

Towards Equality and Diversity

Implementing the Employment and Race Directives

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Equality is an integral part of a civilised society – and of a strong and successful Britain. We want to make our society one in which people are given the best possible opportunity to make a success of their lives, whatever their background. Everybody has a valuable contribution to make. Our challenge is to unlock the talents and potential of all our citizens.

The last Parliament saw significant developments. We pressed forward, for example, with proposals to ensure that people with disabilities have access to work and services. We created the Disability Rights Commission to promote and enforce civil rights for disabled people. We introduced a common age of consent for gay men and heterosexuals. We set in place the minimum wage as a vital step for all low-paid workers, but especially women, narrowing the pay gap by 2 percentage points – the first progress for many years. We brought in the New Deal to help young and long term unemployed, workers over 50, lone parents and disabled people.

We also acted decisively in the wake of the Stephen Lawrence Inquiry. We amended Britain's race equality legislation to make race discrimination unlawful when carrying out public functions. We also placed a duty on public authorities to promote race equality as a natural part of their work. In this second term, we will now build on these measures in order to promote a change in culture.

Changing culture at work

In part, this consultation paper is about modern employment. It is about the rights and responsibilities of both individuals and employers, and the benefits which they derive from good working practices.

The reality is that fairness at work and productivity go hand in hand. Equality is about recognising and getting the right people for the job. It is about effective working relationships and good delegation. And, where things begin to go wrong, it is about resolving issues quickly and fairly for both parties. The best employers already know that they need to use the qualifications and skills of all sections of their workforce. And they recognise – indeed, they can demonstrate – that a diverse workforce can give them a competitive edge in meeting the demands of a broad customer base.

Changing culture takes time. Encouraging more employers to adopt the standards of the best will require good advice and practical support. We shall, for example, be providing down-to-earth guidance through the Small Business Service and services like Equality Direct, made available in a way which is easy to access and understands the demands made of managers.

Tackling discrimination

We also need to have a clear, shared understanding of basic minimum standards. Put simply, unfair discrimination – whether at the point of recruitment, in conditions of employment or through harassment – is wrong. It can have a devastating impact on the lives of individuals. It also imposes huge costs on business and the economy more generally every year. These costs may not always be highly visible – but discrimination inevitably undermines companies' efficiency, productivity and ability to compete. In that situation, everyone loses. It was for all these reasons that European member states took action to establish a common framework for protection against discrimination. This Government played a leading role in negotiations – and we welcome the result.

We plan to implement the European Community Employment and Race Directives during the course of this Parliament. This will involve amending our existing legislation on race and disability, and introducing entirely new legislation to outlaw discrimination on grounds of age, sexual orientation and religion in employment and training. These directives will not be the end of the road on equality. We must be alert to change – and will want to review the impact of new legislation, as well as the effectiveness of the support and guidance we provide, in the light of experience.

Getting it right

For the immediate future, implementing this framework is a significant undertaking and we need to allow time to get it right. And to get it right, we need to hear your views. We believe that it is particularly important for individuals and for employers to understand the combined effect of our proposals.

That is why we are consulting at this early stage on a number of key issues in the same document. But this is not your final chance to influence policy. We will ask for your views again, in due course, about subjects such as age discrimination, in the light of further work. And we will be consulting on draft regulations and guidance too. Throughout the process, we will be working to ensure that the links between this and other legislation are made clear.

I look forward to hearing your views.

Barbara Roche

Minister of State, Cabinet Office

A short guide to the proposals

Why is equality important?

Discrimination usually amounts to exclusion in some form. We believe, quite simply, that it is wrong for people to be singled out for different treatment, merely because of personal characteristics.

We want to ensure that everyone is encouraged to realise their potential.

Discrimination is bad for individuals. But it has a negative impact on productivity and profits, too. It denies employers access to valuable knowledge, experience and skills. It causes stress-related illnesses, poor quality work and long-term absences. And formal complaints tie up the time of staff, their managers and trade union representatives. No-one benefits from this cycle of events – particularly if it ends in employees leaving to find a new job or career.

Practical action on equality and diversity can help to avoid these costs. It also brings wider benefits for business. Good recruitment practices often lead to a more diverse workforce. Diversity, in turn, can help access new markets. It can also help improve a company's image as an employer.

We believe that equality and diversity is good for individuals and good for business alike.

The Race and Employment Directives

The Employment and Race Directives were agreed at the end of last year. We took an active part in their negotiation and welcome them.

The Directives require EU member states to introduce legislation to outlaw unfair discrimination on the grounds of race, sexual orientation, religion or belief, disability and age in the fields of employment and training. The Race Directive also applies to areas such as education and goods and services.

Part 1 of this document summarises the main features of the two Directives. We intend to implement them by:

- ▶ amending the Race Relations Act (RRA) and Disability Discrimination Act (DDA). Most of the changes will be technical in nature. Although the DDA's exemption for small firms will have to be removed, we had already proposed to do this;
- ▶ introducing new legislation to prohibit discrimination in work and training on grounds of sexual orientation, religion and age.

Our aims

We aim to develop effective legislation which will have a real impact in removing unfair discrimination – but without stifling business by imposing unnecessary burdens.

We also want to ensure coherence in new and amending legislation by using the same concepts and wording where practicable. That will remove some of the complexities facing individuals and businesses when allegations of multiple discrimination arise (for example, on grounds of race and religion).

Key points on which we want to hear your views

The most significant aspects of our proposals are summarised below. Further information about the impact of these proposals and options is available in **Part 2** of this document.

Direct Discrimination

We intend to use the definition of direct discrimination already set out in the RRA when preparing new legislation to outlaw discrimination on grounds of sexual orientation, religion and age. The different approach in the DDA will continue, subject to minor adjustment.

Indirect Discrimination

We propose to use the definition of indirect discrimination set out in the Directives when preparing new legislation on sexual orientation, religion and age. Some amendments will also be needed to the RRA definition. We could either make a few technical changes to the existing provision, or replace it completely with the Directives' definition. We are interested in your views on both options. The DDA will continue to require employers to make "reasonable adjustments" in almost all cases where indirect discrimination arises.

Harassment

There are two options when preparing implementing legislation on disability, sexual orientation, religion and age. In order to provide consistency, we could adopt a definition based on the decisions about harassment which have already been made by the Courts under the RRA.

Alternatively, we could use the stricter test set out in the Directive, and accept that the definition for race would be different. We are interested to hear your views on both options.

Promoting equal treatment

We think there are good arguments to move, in the longer term, towards a single Equality Commission. Such a commission could offer support to individuals and business covering discrimination on all aspects of equality.

For the short term, we would like to hear your views on how we can best offer both individuals and business advice, support and guidance on the new grounds of sexual orientation, religion and age.

Occupational requirements

We will introduce a general provision in the RRA and in new legislation on sexual orientation, religion and age allowing employers to justify a difference in treatment (recruiting a young or older person, for example) where there is a “genuine and determining occupational requirement”. We would, however, expect employers to make limited use of this flexibility. (There will be special provisions for religious organisations to enable them to preserve their particular ethos.)

Strand specific issues

There are a number of issues which relate to one particular ‘strand’ of equality legislation: race, sexual orientation, religion, disability and age. These are set out in **Part 3**.

Your answers to some of these questions will help us frame clear and workable legislation. We want to know what you think, for example, about defining “religion” and “sexual orientation”. On age, the Employment Directive allows us to justify some differences in treatment. We want to know when you think this might be appropriate. One important issue, for example, is whether employers should still be able to fix a compulsory retirement age at, say, 65.

Other questions refer to issues which we will need to cover in written guidance for employers and individuals. Responses will help us prepare this in a way which meets your needs.

Costs and benefits

We have researched the costs and benefits of implementing the Employment and Race Directives. We calculate that the average implementation cost of our proposals will be £157 per employer. Benefits for employers could amount to between £102 and £567 million, depending on assumptions.

Annex A gives more detailed information about this analysis, and about costs and benefits for individuals, though not all the benefits can easily be expressed in financial terms.

Guidance for employers and individuals

The purpose of legislation is to set minimum standards. But we want to look at other ways of encouraging many more businesses to adopt the standards of the best. It would help if you could let us know about policies which you believe work particularly well and bring benefits for both individuals and business.

If you have any questions about current equality legislation, **Annex C** of this document gives a list of agencies which can offer advice. Business managers can get practical, joined-up advice from a single source by calling Equality Direct on 0845 600 3444.

How to respond

Consultation closes at the end of March 2002. Please let us have your views before then. There is a response form attached to this document. You can also respond via internet through the DTI website. Further information about how you can have your say is given in **Annex B** to this document.

Next steps and timetable

For race, sexual orientation and religion. Your responses will help us prepare draft regulations on race, sexual orientation and religion. We will consult again on these later in 2002 before putting legislation to Parliament.

Disability. We are ending the exemption of small employers from the DDA in October 2004 and also propose to make the other changes to the DDA required by the Employment Directive at the same time. These will include ending other occupational and employment exemptions and omissions from the DDA mentioned in *Towards Inclusion*.

For age. We will need to make full use of the time available – until 2006 – to prepare and introduce new legislation on age discrimination. Your responses will help us develop more detailed proposals for consultation next year.

Part 1 – Equality, diversity and the Directives

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Chapter 1

The case for equality and diversity

Our policy on discrimination

- 1.1 The Article 13 Employment and Race Directives are about tackling discrimination.
- 1.2 Discrimination usually amounts to *exclusion* in some form. We believe that it is wrong for people to be singled out for different treatment, merely because of personal characteristics. We know all too well that some discriminatory practices – such as harassment – can have a devastating effect on individuals' lives, health and careers. Even when it is subtle and unwitting, discrimination can limit achievement and curb aspiration. We want to ensure that everyone is encouraged to realise their potential – and to challenge prejudice where it becomes apparent in behaviour.

The costs for individuals and business

- 1.3 In the past, equality has often been understood only in terms of improving rights for individuals. But increasingly, we are now aware that promoting equality and tackling discrimination is not just the right thing to do, it also makes good economic sense. The fact is that discrimination is bad for individuals – and it is costly for business.
- 1.4 There can be no doubt that discrimination – on any of the grounds covered by the Directives – will have a negative impact on productivity and profits. Exclusive practices have an effect far beyond a company's immediate workforce. They deny the company access to valuable knowledge, experience and skills. In addition to these opportunity costs, discrimination can, and regularly does, lead to stress-related illnesses, poor-quality work and long-term absences. Inaction by line management when these cases come to light often compounds the problem. And when workers ultimately make a formal complaint, internal grievance procedures or tribunal hearings tie up the time of staff, their managers and trade union representatives. Mediation or resolution

through tribunals involves a wider range of people and costs, including legal fees and compensation. No-one benefits from this cycle of events – particularly if it ends in employees leaving to find a new job or career.

The costs of recruiting a new member of staff are often undervalued. According to the US Department of Labor, it costs one-third of a new recruit's annual salary to replace an employee. That means an organisation can easily spend £7,000 for each new employee recruited at a salary of around £22,000 – the average wage in the UK.

- 1.5** The cost of discrimination is not just confined to the workplace. Public bodies and private companies which do not provide their services fairly to those from all communities are ineffective. They marginalise a significant part of their community or potential customer base, and run the risk of claims being brought under existing sex, race and disability legislation. Members of the public have the right to expect that services are provided to them fairly.

Benefits for individuals – benefits for business

- 1.6** Early and strategic action to tackle these and other forms of discrimination will help to reduce the direct consequences suffered by individuals and the costs for business. But there are wider benefits, too, for both workers and managers, linked to diversity.
- 1.7** By hiring people according to evidence of their abilities, and without being influenced unfairly about matters of lifestyle, for instance, companies can be more confident in getting the best people available for their jobs. Equally, demonstrably fair recruitment practices encourage people to live up to their potential – rather than play it safe.
- 1.8** Over time, fair recruitment practices will often lead to a more diverse workforce and perhaps one which is more closely representative of the community in which a business is based. This, too brings benefits for business. A diverse workforce can be more creative than one which has been recruited in the image of a particular manager. It may be able to establish new clients for the business, and help to reach a wider market.

- 1.9** While people may be a company's greatest asset, its image is increasingly important – whether gained through national publicity or the local grapevine. In a modern, knowledge-based economy, where there is strong competition between companies for skilled workers, the costs of a poor reputation on employment matters and service delivery can be all too obvious. At any point in the economic cycle, good practice on equality can only help to build a stronger business for the long-term.

Some business results

Mayday Group, a company supplying temporary and permanent catering staff were having to turn away business due to a shortage of suitable temps.

The company took a number of steps to attract a wider pool of job applicants, including advertising in the ethnic minority press. But Mayday found that a number of otherwise suitable people, particularly from new immigrant groups, lacked the necessary skills or cultural awareness to be offered particular jobs. Rather than simply turning away people who, with a little help, could become assets to the company Mayday provided training to suitable candidates. Jane Sunley, Mayday's Managing Director said "Applicants from ethnic minorities who, without training would otherwise not have been offered work, added £400,000 to Mayday's turnover". In addition, Mayday feel their actions have led to better management and better morale, with consequent improvements in retention, productivity and quality of service.

Asda, one of Britain's supermarket chains, employs 100,000 people in more than 250 stores and distribution centres across the country. Asda's policy of recruiting staff representative of the local community has many benefits, including: an improved customer service to those whose first language is not English; suggestions about new products to stock; and an increased awareness of religious and cultural events which might impact on sales.

B&Q has achieved a major breakthrough in recognising the value of employing older and disabled people in their stores as business results demonstrate they are well attuned to the needs of their customers. Among other things B&Q has achieved an overall improvement in customer care on the principle that ‘if we get it right for disabled people, then we get it right for most people’ and increased overall employee satisfaction, and therefore better retention, absenteeism, and productivity rates.

What smaller businesses have said

Magnetti Marelli UK Ltd has 800 staff, based in Birmingham. Its Personnel Operations Manager commented that “supervisors with a better understanding of equal opportunities ... have the confidence to handle delicate issues before they escalate out of control”.

South Wales Forgemasters have found that “...this is a fairly labour intensive operation. There is a degree of hands-on knowledge one gains with age and experience that makes the job a little easier – so there is an advantage in having someone a little older to do this particular work”.

Chapter 2

What do the Employment and Race Directives mean for Great Britain?

Introduction

2.1 The Employment and Race Directives were adopted under Article 13 of the EC Treaty by the UK and other European member states in 2000. Together, they provide a common framework of protection against discrimination and harassment.

- (a) *The Race Directive*: Council Directive 2000/43/EC of 29 June 2000. This lays down “the principle of equal treatment between persons irrespective of racial or ethnic origin”. In other words, it prohibits discrimination on the grounds of race and ethnic origin in areas falling within its scope. The Directive has to be implemented by 19 July 2003. A copy can be found at http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0043.html
- (b) *The Employment Directive*: Council Directive 2000/78/EC of 27 November 2000. This lays down a similar, anti-discrimination “principle of equal treatment” in the context of sexual orientation, religion or belief, disability and age. It has to be implemented by 2 December 2003 in relation to sexual orientation and religion or belief, and by 2 December 2006 in relation to disability and age. A copy can be found at http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0078.html

Scope

2.2 The Employment and Race Directives both cover the following areas:

- (a) conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions;

- (b) employment and working conditions, including dismissals and pay;
- (c) vocational guidance and training;
- (d) membership of, and involvement in employers' or workers' organisations or professional bodies (for example, trade unions or bodies like the Law Society or British Medical Association).

2.3 The Race Directive goes further than the Employment Directive. It also covers social protection (including social security and healthcare); education; goods and services available to the public, including housing; and social advantages (which covers things like housing benefit, student maintenance grants and loans, bus passes for senior citizens etc).

2.4 There are a number of important points to note about the scope of the Directives:

- (a) they apply to both the public and private sectors, regardless of the size of the organisation (there is no small firm exemption);
- (b) they apply to “occupations”, which means that some workers in addition to employees and the self-employed are also covered;
- (c) “pay” is likely to include all types of remuneration and fringe benefits such as performance-related pay, group insurance (e.g. private health care insurance provided as part of an employment package) and occupational pensions;
- (d) all *state* benefits (including state pensions) are excluded from the scope of the Employment Directive. The Directive also allows member states to provide that fixing ages for occupational pension schemes and, in this context, the use of age criteria in actuarial calculations should not be regarded as age discrimination;
- (e) “access to employment” covers employment agencies – and bodies which award licences or qualifications needed to carry out a particular job (e.g. the Public Carriage Office which licenses taxi drivers in London);

- (f) “vocational training” has a wide meaning. It covers not only in-house training provided by an employer, but also courses or studies which provide training for jobs or professions – including most university degrees and many other further and higher education courses (for example, teacher training courses);
- (g) member states can exclude service in the armed forces from the scope of the legislation implementing the disability and age provisions of the Employment Directive. We intend to rely on this exemption.

Summary of the main, general provisions of the Directives and implementation proposals (in outline)

- 2.5** The remainder of this chapter summarises the main, general provisions of the Directives. Part 2 discusses some of the more significant issues raised by these provisions and gives detailed implementation proposals on which we are asking for views at this stage. Other implementation proposals are described in outline in paragraphs 2.12 to 2.20 below. These will be covered in more detail when we consult on draft regulations and guidance.

Direct and indirect discrimination

- 2.6** The Directives prohibit both direct and indirect discrimination on the grounds of racial or ethnic origin, sexual orientation, religion or belief, disability or age. While the definition of direct discrimination is very similar to that contained in the Race Relations Act 1976 (RRA), the definition of indirect discrimination is somewhat different. Our detailed implementation proposals are set out in chapters 4 and 5.

Prohibition on harassment

- 2.7** Harassment is deemed to be a form of direct discrimination. The definition laid down by the Directives says that harassment occurs where there is unwanted conduct which violates a person’s dignity *and* creates a hostile environment. Member states are free to provide for a more straightforward definition if they wish, as long as this does not reduce the level of existing protection. Our detailed implementation proposals are set out in chapter 6.

Bodies for the promotion of equal treatment

- 2.8** The Race Directive requires member states to designate a body or bodies to promote race equality and to assist individuals to pursue complaints. In Great Britain, the Commission for Racial Equality already exists. There is no corresponding requirement in the Employment Directive. Our detailed implementation proposals on promotion of equal treatment are set out in chapter 7.

Exception for genuine occupational requirements

- 2.9** Member states may allow differences of treatment in limited circumstances where race, sexual orientation, religion or belief, disability or age is a “genuine and determining occupational requirement”. Our detailed implementation proposals are set out in chapter 9.
- 2.10** There is also a specific provision in the Employment Directive designed to enable Churches and other religious or belief organisations to preserve their particular ethos. Our detailed implementation proposals are set out in Part 3, paragraphs 13.10 to 13.23.

Positive action

- 2.11** Member states are permitted – but not required – to maintain or adopt specific measures to prevent or compensate for disadvantages linked to the grounds of discrimination covered by the Directives. But the Directives do not allow ‘positive discrimination’, such as fixed recruitment quotas based on race or religion. Our detailed implementation proposals are set out in chapter 10.

Defence of rights: seeking redress

- 2.12** The Directives say that member states must allow individuals who suffer unlawful discrimination to bring proceedings to enforce the rights conferred by the Directives, even after the end of the relationship in which the discrimination occurred. Member states must also provide for organisations such as trade unions or special interest groups either to be able to support complainants or to bring cases on applicants’ behalf.

2.13 Our outline implementation proposals are as follows:

- (a) We propose that the established mechanism for resolving discrimination disputes through conciliation, Employment Tribunals and the Courts should be extended to cover complaints of discrimination on grounds of sexual orientation, religion and age.
- (b) Deadlines for bringing cases on these new grounds will be comparable, in broad terms, to those already used for complaints under the RRA and Disability Discrimination Act 1995 (DDA).
- (c) We propose to amend the RRA and DDA so as to allow individuals to seek redress in certain situations falling within the scope of the Directives after the relationship between complainant and respondent has ended, for example where an employer refuses to provide a reference for a former employee who has brought a discrimination claim based on either Directive. Similar provision will be made in the new legislation on sexual orientation, religion and belief and age.
- (d) Under current arrangements, trade unions or voluntary organisations may support the complainant in discrimination cases under the RRA and DDA. We propose that this should continue to be the case for complaints of discrimination based on any of the grounds covered by the Directives.

Sanctions

2.14 Where discrimination contrary to either Directive is proved to have taken place in any case, the complainant must be given a remedy, including compensation where appropriate, which must be “effective, proportionate and dissuasive”.

2.15 Where Tribunals and Courts find that unlawful race or disability discrimination has occurred, they already have power under the RRA and DDA to order the respondent to pay compensation to the victim where appropriate. They may also make other types of orders in certain circumstances (for example, declarations and recommendations). In our view, these remedies are sufficiently “effective, proportionate and dissuasive”. Our implementation proposal, in outline, is to confer similar powers on Tribunals and

Courts in cases where discrimination is proved under the new legislation on religion and belief, age and sexual orientation.

Shift of burden of proof

- 2.16** The Directives contain provisions about the burden of proof in discrimination cases. Where, at the hearing of a case before a Court or Tribunal, the claimant produces clear evidence indicating that discrimination has taken place, it will then be for the employer or other respondent to establish that their actions were not discriminatory.
- 2.17** Those provisions are closely based on another EU Directive (97/80/EC) about the burden of proof in cases based on sex. We have recently implemented that Directive by amending the Sex Discrimination Act 1975¹ (SDA). Our implementation proposal, in outline, is to include provisions to similar effect in the RRA and DDA, and in the new legislation on sexual orientation, religion and belief, and age.

Victimisation

- 2.18** The Directives prohibit the victimisation of people who have brought discrimination complaints or have appeared as witnesses in discrimination proceedings. Victimisation may take the form of dismissal or other forms of adverse treatment.
- 2.19** The RRA and DDA already give explicit protection from victimisation. Our implementation proposal, in outline, is to include similar provisions in the new legislation on sexual orientation, religion and age.

Public security

- 2.20** The Employment Directive contains a provision allowing member states to adopt measures which “are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”. This should allow member states to have measures which, for example, prevent people where necessary from working in jobs where they may pose a risk to the

¹ See the new sections 63A and 66A of that Act, as inserted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2001/2660).

health and safety of fellow employees or members of the public. Our implementation proposal, in outline, is to include appropriate provisions based on Article 2(5) in the legislation implementing the Directive.

New legislation

- 2.21** Figure 1 below summarises the difference in scope of the Directives, the various implementation deadlines which they contain, and whether new legislation will be needed in Great Britain to implement the Directives. (Separate legislation will apply in Northern Ireland.)
- 2.22** In brief:
- (a) The RRA is already in place. Its principal provisions are compatible with the Race Directive. Some amendments do need to be made to the Act in order to transpose the Directive, but these are relatively minor and technical.
 - (b) The DDA is also already broadly consistent with the Employment Directive. Some amendments will be required, but the most significant of these co-incide with those recommendations of the Disability Rights Task Force which the Government has already decided to implement.
 - (c) New legislation will be needed to outlaw discrimination in employment and training on the grounds of sexual orientation, religion or belief, and age.

Figure 1: Comparison of existing legislation and European requirements

	Employment		Goods and services ²		Deadline
	European Directives	Existing Legislation	European Directives	Existing Legislation	European Directives
Race	✓	✓	✓	✓	July 2003
Sexual orientation	✓	X	X	X	Dec 2003
Religion & belief	✓	X	X	X	Dec 2003
Disability	✓	✓	X	✓	Dec 2006
Age	✓	X	X	X	Dec 2006

² In this table, "employment" and "goods and services" are shorthand for wider concepts. See paragraphs 2.2 – 2.3 for details.

Chapter 3

Our approach to implementing the Directives

Main principles

- 3.1** Our approach to implementing the Directives is guided by three main principles:
- (a) To develop practical, workable and effective legislation which fully meets the standards required by the Directive and will have a real impact in removing unfair discrimination and improving people's lives – but without stifling business with unnecessary burdens.
 - (b) To seek greater coherence where possible between strands (e.g. race, religion, age, etc) so that rights and obligations are easier for individuals and employers to understand. Wherever sensible and practical, we aim to ensure that requirements in new and existing legislation contain the same or similar concepts and wording. We will implement groups of legislation together where practicable.
 - (c) To ensure that sufficient time is given to employers, employees and other interested parties to consider our proposals for implementing the Directives; to respond to consultation at each stage; and to prepare for their implementation.

Legislation

- 3.2** The process of implementing the Directives is made even more complex by their differences in scope, timing and impact explained in Figure 1. With this in mind, we intend to prepare separate items of legislation for each of the strands and to use regulations under Section 2(2) of the European Communities Act 1972 to implement the Directives, where practicable. This will help us to manage the process of implementation in a way which allows sufficient time for

consultation and preparation, but without missing important deadlines.

Next steps

3.3 After publishing this paper, we will:

- (a) respond to questions by making additional briefing available via the internet or through our freephone consultation lines. We want the consultation process to be dynamic. We will continue to take soundings with representative groups after the formal deadline has passed, so that implementing legislation is well-informed.
- (b) prepare more detailed proposals on sexual orientation, religion and age as the basis for further consultation. We will consult, in addition, on guidance on each subject.
- (c) allow employers at least three months before legislation comes into force to consider the guidance and make any changes needed to their policies and working practices. We plan to make use of the additional time available (until 2006) to implement the Employment Directive's provisions on age.

Timetable

3.4 Legislation on race, sexual orientation and religion will be implemented first, in the second half of 2003. Our proposed timetable is as follows:

29 March 2002	Consultation ends
Second half of 2002	Consultation on draft regulations (3 months)
First half of 2003	Lay regulations before Parliament
	Consultation on draft guidance (3 months)
	Publication of guidance

3.5 For the other strands:

- (a) **Disability.** We are ending the exemption of small employers from the DDA in October 2004 and also propose to make the other changes to the DDA required by the Employment Directive at the same time. These will include ending other occupational and employment exemptions and omissions from the DDA mentioned in *Towards Inclusion*.
- (b) **Age discrimination.** Along with other European member states, we argued that a longer period (until 2006) should be available to implement the age provisions of the Employment Directive. We plan to prepare legislation and publish guidance well before December 2006 to ensure that employers have good time to prepare.

3.6 An amendment to the EU Equal Treatment Directive (which covers **sex discrimination**) is likely to be agreed amongst European member states by the end of the year. We expect that the deadline for its implementation will fall into the early part of 2005. If practicable, we shall look to implement any necessary changes to the SDA at the same time as introducing new legislation on age.

Part 2 – General issues for consultation

In part 2, we set out some general issues on which we would welcome your views. Please do take the time to read through the proposals in chapters 4 to 10 and let us know what you think, using the enclosed questionnaire.

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Chapter 4

Direct discrimination

The Directives

- 4.1** Both Directives state that direct discrimination occurs where “one person is treated less favourably than another is, has been or would be treated in a comparable situation” on any of the grounds of discrimination covered by the Directives. In other words it means a difference of treatment simply because of a person’s race, sexual orientation, religion or belief, disability, or age, rather than (for example) a person’s competence to do a particular job.
- 4.2** The Employment Directive also contains a recital (no. 17) which makes clear that the Directive does not require a person to be recruited, promoted, kept in employment, or given training “where he or she is not competent, capable or available to perform the essential functions of the post concerned or to undergo the relevant training” (except where – in the case of a person with a disability – he or she can be made capable, competent or available by means of a reasonable adjustment: see Part 3, paragraphs 14.7 to 14.10 below).
- 4.3** Except in relation to age, differences of treatment based directly on one of the grounds covered by the Directives can be justified only in limited circumstances – in particular, where it is a “genuine and determining occupational requirement” that a job be done by a person of a particular racial group, religion etc. (See chapter 9 below.)
- 4.4** There is a more general provision allowing differences of treatment directly on the basis of age to be justified in certain circumstances. This is described in Part 3, paragraphs 15.5 to 15.7, of this document.

Existing legislation

- 4.5** The RRA contains a definition very similar to the one in the Directives. So, for example, employers commit direct discrimination under the RRA where on racial grounds they treat an employee less favourably than they would treat another employee in comparable circumstances. The approach of the DDA is rather different. This is described in Part 3, paragraph 14.6, of this document.

Our proposal

- 4.6** We do not propose to make any amendment to the definition of direct discrimination in the RRA. And we intend to apply the RRA definition in the new legislation on sexual orientation, religion or belief, and age.
- 4.7** The definition of discrimination in the DDA will require only minor alterations to make it clear that direct discrimination in the narrow sense used by the Employment Directive cannot be justified. (See Part 3, paragraph 14.6)

Do you agree with this approach?

Chapter 5

Indirect discrimination

The Directives

5.1 Both Directives state that indirect discrimination occurs where an apparently neutral “provision, criterion or practice” would put persons of a given group (e.g. members of a racial or religious group) at a particular disadvantage compared with other persons, unless the provision, criterion or practice can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

5.2 This is supplemented by a recital in each directive which says:

“The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.”

Existing legislation

5.3 Under the RRA, indirect discrimination occurs where a **requirement or condition** is applied which:

- (a) a **considerably smaller proportion** of persons of a particular racial group are able to comply with when compared with persons not of that group;
- (b) cannot be justified by the employer (or other person applying the requirement or condition) irrespective of racial grounds; and
- (c) is to the detriment of the complainant.

5.4 Once again, the DDA uses a different approach. This is described in Part 3, paragraph 14.8 of this document.

Our proposal

- 5.5 Option 1.** To incorporate the formulation used in the Directives’ definition (or something very similar) in new legislation on age, sexual orientation and religion, and in legislation to amend the RRA. We might also use this definition in the DDA in the limited circumstances explained in Part 3, paragraph 14.13. It could also be adopted in the SDA, provided that this is in line with the Equal Treatment Amendment Directive which is currently being negotiated in Brussels.
- 5.6** A single definition of indirect discrimination should remove some of the complexities facing individuals and business when allegations of multiple discrimination arise: for example on grounds of race and religion. Having a single definition might also help save training and other costs for business.
- 5.7 Option 2.** The definition used in the Directives would still be adopted in new legislation to cover sexual orientation, religion, age and, in certain limited areas, disability. But the existing RRA definition would be left intact, subject to the following minor adjustments:
- (a) “requirement or condition” would be expanded to cover “provision, criterion or practice” (the wording used in the Directive); and
 - (b) it would be made clear that a complainant could seek to establish whether “a considerably smaller proportion” of his or her racial group was able to comply with the provision, criterion or practice in comparison with other groups, by means which do not rely on an analysis of statistical evidence.
- 5.8** This option would have the benefit of minimising the changes to the RRA, but the revised definition would then be inconsistent with the one used in the new legislation on sexual orientation, religion and age. In our view, it would not be practicable to apply the RRA definition, as so amended, to the new legislation on sexual orientation, religion and age – or in the DDA.

- 5.9** Either option 1 or option 2 would mean that informal practices, as well as formal requirements and conditions, would fall within the definition of indirect discrimination. Moreover, comparative disadvantage to particular groups could be proved by evidence which did not depend on compilation of statistics. We therefore believe that both options would enhance the protection available to individuals, but option 1 is likely to have longer-term benefits to businesses and individuals.
- 5.10 The choice is, therefore, between a consistent definition across all the grounds of discrimination (option 1), or one which would minimise changes to current law (option 2). Which do you prefer?**

Chapter 6

Harassment

The Directives

- 6.1** Both the Race and Employment Directives specify that harassment is to be treated as a form of direct discrimination when unwanted conduct based on a ground of discrimination covered by either Directive takes place:

“with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

- 6.2** The Directives go on to say that, in this context, “the concept of harassment may be defined in accordance with the national laws and practice of the member states”.

Existing legislation

- 6.3** The RRA and SDA do not specifically refer to harassment, but it is clear from case law that racial or sexual harassment is a type of detriment capable of amounting to less favourable treatment prohibited by the Acts. Employment Tribunals normally define harassment as unwanted conduct of a racial or sexual nature or other conduct based on race or sex affecting the dignity of men and women at work.
- 6.4** Similarly, the DDA does not expressly mention harassment, but it does prohibit discrimination against persons with disabilities “by subjecting them to detriment”.

Our proposals

- 6.5** We have identified two options for implementation:
- 6.6 Option 1.** In relation to sexual orientation, religion, disability and age, harassment could be defined by using the formulation set out in Article 2(3) of the Employment Directive. This would mean that, in order to establish that harassment had occurred, a complainant would have to show that:

- (a) he or she had been the victim of unwanted conduct based on one of the grounds of discrimination concerned;
- (b) the conduct had been intended to violate his or her dignity, or that it actually did have that effect; **and**
- (c) the conduct had been intended to create an intimidating, hostile, degrading, humiliating or offensive environment for him or her, or that it actually did have that effect.

In harassment cases under the RRA, a complainant need prove only items (a) and (b). The Directives' definition is therefore stricter.

- 6.7** It is not open to us to incorporate that definition in the RRA because Article 6(2) of the Race Directive says that the level of protection against discrimination must not be reduced. Under option 1, we would therefore not intend to make any specific amendment to the RRA in relation to harassment. Tribunals would continue to apply their existing approach when determining whether harassment had occurred.
- 6.8** Option 1 would have the advantage of minimising changes to the RRA. Existing, familiar case law on racial harassment could continue to be applied. Legislation on the new grounds of discrimination would incorporate the clear Employment Directive definition, although this is a stricter test than that applied under the RRA.
- 6.9** **Option 2.** This would involve applying a consistent definition of harassment across all the grounds of discrimination covered by the Directives. We would do this by enshrining the existing case law definition (see above) in the RRA. We have in mind that the effect of the new provision would be that harassment (as so defined) constituted discrimination. We would incorporate very similar provisions in the new legislation on sexual orientation, religion and age. We would also explicitly outlaw harassment in the DDA in a way which took account of its different approach to tackling discrimination.
- 6.10** We are also thinking of making it clear in the RRA, DDA and the new legislation that, when deciding whether conduct amounts to harassment, Tribunals should consider whether a reasonable person would have regarded the conduct concerned as violating the dignity of the complainant.

- 6.11** An advantage of the Option 2 definition is that it should make it easier to deal with cases involving allegations of harassment on multiple grounds (e.g. where an employee suffered harassment because he was both black and gay). And in overall terms, the test for deciding when harassment has occurred would be more straightforward than under Option 1.
- 6.12** The Equal Treatment Amendment Directive is currently being negotiated in Brussels. This is likely to include a specific definition of harassment which we will need to reflect in the SDA. Depending on the final outcome of the negotiations, it may be possible to use the option 2 definition in the SDA.
- 6.13** **Do you favour option 1 or option 2? Please say why.**
- 6.14** **If you prefer option 2, would you support the idea that Tribunals should assess whether “a reasonable person” would have regarded the conduct in question as harassment?**

Chapter 7

Promoting equal treatment

The Directives

- 7.1** The Race Directive requires member states to designate a body or bodies to “promote” race equality, and to assist individuals to pursue complaints. The Employment Directive does not have a corresponding requirement.

Existing legislation

- 7.2** Great Britain has already established the Commission for Racial Equality, as well as the Disability Rights Commission and the Equal Opportunities Commission (responsible for gender issues and equal pay for men and women).

Our proposal

- 7.3** We believe that, in the longer term, there are arguments in favour of a single, statutory commission offering integrated advice, guidance and support on equality matters. That would be in the interests of businesses and individuals, particularly those who are the subject of multiple discrimination. It would also help to ensure a coherent approach to equality issues across the board.
- 7.4** We are, however, clear that a major change of this nature cannot be achieved effectively in the short term. In particular, the Disability Rights Commission is a young organisation, established as recently as April 2000. It needs time to establish its services to support the continuing implementation of the DDA. We also want to learn from the experience in Northern Ireland where a single commission was established in the same year.
- 7.5** We therefore propose to develop transitional arrangements that will enable us to move towards a single commission in the longer term. Meanwhile, chapter 8 sets out how advice, guidance and support might be provided on the new grounds of discrimination.

Chapter 8

Advice, guidance and support

The Directives

- 8.1** Both Directives require member states to take care that details of implementing legislation should be brought to the attention of those with an interest.
- 8.2** As mentioned in chapter 7 above, the Race Directive requires member states to designate a body to promote race equality, to give advice and to assist individuals in pursuing complaints. But there is no corresponding requirement in the Employment Directive.

Existing legislation

- 8.3** The Commission for Racial Equality and the Disability Rights Commission already have powers to issue guidance, and to provide advice to individuals, businesses and others, in relation to the provisions of the RRA and DDA respectively.

Our proposal

- 8.4** Although not required by the Employment Directive, we consider it important that individuals should have access to practical advice and support if they believe that they have been the subject of unlawful discrimination on the grounds of sexual orientation, religion or belief, or age.
- 8.5** We therefore think that written guidance should be available so that individuals, employers and others are aware of their rights and responsibilities under the legislation dealing with these new grounds. We propose that guidance should be prepared or commissioned by the Government, and that drafts will be the subject of consultation before a final version is published at least three months before new legislation comes into force.

- 8.6 Which organisations, in your view, should be involved in helping to prepare practical guidance for the use of both business and individuals?**
- 8.7** In our view, individuals should also be able to obtain advice about ways of resolving difficult situations at work or, if there is a clear case of discrimination, how to make a formal complaint. This kind of advice is already available from: ACAS regional telephone centres; Citizens Advice Bureaux and trade unions; and the Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission under the current equality legislation. Business can also get impartial advice from the Equality Direct telephone advice service.
- 8.8 What arrangements should be made available to provide support in these areas on the new grounds of age, religion and sexual orientation?**

Chapter 9

Occupational requirements

The Directives

- 9.1** When transposing the Race and Employment Directives, member states have an option to provide that differences in treatment based on a characteristic related to a particular racial or ethnic origin, sexual orientation, religion or belief, disability or age can be justified where having that characteristic is “a genuine and determining occupational requirement”, but only where “the objective is legitimate and the requirement is proportionate.”

Existing legislation

- 9.2** Section 5 of the RRA specifies circumstances where it may be a genuine occupational qualification for a job to be carried out by someone of a particular racial group. These include reasons of authenticity, in a dramatic performance or other entertainment for example, or for authenticity as an artist’s or photographer’s model. Also section 4(3) exempts employment in a private household from the provisions of the Act.
- 9.3** The DDA already ensures that employers and others can seek to justify employing someone because they have a particular disability.

Our proposal

- 9.4** We do not propose to include a list of permissible occupational requirements as part of new legislation on sexual orientation, religion or belief and age. We think that this approach would be too inflexible. It would be very difficult to specify every possible circumstance when a genuine occupational requirement may arise.
- 9.5** Instead, we propose that there should be a provision of general application, allowing employers to recruit staff on the basis of a “genuine occupational requirement” in the rare situation where they could show that it was an essentially defining feature of the job for the employee to be of a particular sexual orientation, religion or belief, or age. It will then be a matter for Employment Tribunals and

the Courts to judge whether the criteria set out in the legislation have been met in particular cases. We propose to give written guidance listing some examples of the circumstances in which employers could rely on this limited exception. **Do you agree?**

- 9.6** For the same reasons we propose to delete section 4(3) and 5 of the RRA. In their place, we will provide that membership of a particular racial or ethnic group could be a genuine occupational requirement where it is an essentially defining feature of a job. **Do you agree?**
- 9.7** We do not propose to make any amendment to existing provisions of the DDA.

Chapter 10

Positive action

The Directives

- 10.1** The Employment and Race Directives permit the UK to maintain or adopt positive action measures to “prevent or compensate for disadvantages” linked to racial or ethnic origin, sexual orientation, religion or belief, disability and age.

Existing legislation

- 10.2** The RRA already permits certain types of positive action relating to race. Employers may:
- (a) encourage job applications from particular racial or ethnic groups which are currently under-represented in the workforce (for example, by saying in advertisements that members of such groups are particularly welcome to apply);
 - (b) offer training programmes to develop the potential of particular groups of employees which are under-represented in particular types of work in a company.
- 10.3** It is for employers to show that initiatives of this type are justified. However, the RRA does not allow positive discrimination: for example, where a company *only* recruits new staff who are of a particular racial or ethnic group because persons of that origin are under-represented in its workforce.
- 10.4** The DDA works quite differently, permitting positive action in favour of disabled people generally. It is not unlawful to treat a person differently on the grounds that they do not have a disability.

Our proposal

- 10.5** In preparing the new legislation on sexual orientation, religion and age, we propose to enable employers – if they wish – to take positive action on grounds comparable to those set out in the RRA. Positive discrimination will not be permitted. We do not propose to amend the existing provisions of the RRA or DDA.

Do you agree?

Part 3 – Strand-specific issues

In part 3, we set out some specific issues on which we would welcome your views. Please to take the time to read through the proposals in chapters 11 to 15 and let us know what you think using the enclosed questionnaire.

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Chapter 11

Race: some specific issues

- 11.1** As part of our determination to achieve race equality in this country, we are working to develop the right legislative framework and the Race Directive is an important part of this. The Race Relations (Amendment) Act 2000 was the first significant change to Great Britain's race legislation in 25 years. The Directive takes this a step further. It will establish a common standard of legal protection from race discrimination across Europe, impacting upon employment and training, as well as education, access to goods and services including housing, social protection and social advantages.
- 11.2** Here in Great Britain, our long-standing legislation in this area already complies with much of what is covered by the Race Directive. The Race Relations Act 1976 (RRA) already makes it unlawful to discriminate on grounds of race in relation to employment, training and education, the provision of goods, facilities and services, the provision of housing and certain other specified activities. The Race Relations (Amendment) Act 2000 strengthened the RRA by making race discrimination unlawful in the carrying out of public authority functions, and by placing a duty on public authorities to promote race equality. We will be implementing the Race Directive within the broad terms of the RRA.
- 11.3** Amendments to the RRA resulting from the Directive are unlikely to impact heavily on companies as the business case for diversity is now widely recognised. The RRA has been in force for 25 years and employers are well used to its principles. The real cost to business arises when it does not address discrimination issues and consequently faces legal action that could be avoided by embracing the business case for diversity and putting in place good practice.
- 11.4** Many of the issues covered by the Race Directive are also included in the Employment Directive. These cross-cutting issues are set out in detail in Part 2 of this consultation paper. There are other race-specific issues that will require amendment to the RRA in order to comply with the provisions of the Race Directive. These are set out below. Please do take some time to read through the

proposals in this chapter and let us know what you think on the enclosed questionnaire.

Seamen recruited abroad

- 11.5** Section 9 of the RRA provides that race discrimination is not an issue where seamen are recruited onto British ships at overseas ports. In the light of the Directive, we consider that this provision is no longer appropriate. Do you agree?

Training for those not ordinarily resident in the UK

- 11.6** Section 6 of the RRA provides an exception from the provisions of the Act in circumstances where employment is intended to provide training in skills which are intended to be exercised outside Great Britain. Section 7(4) contains a similar provision, in respect of contract workers. Section 36 provides that, where access to facilities for training is provided to someone not ordinarily resident in Great Britain, an act of discrimination is not unlawful when that person does not intend to subsequently remain in Great Britain. In the light of the Directive we consider that these provisions are no longer appropriate. Do you agree?

Charities as employers

- 11.7** When acting as employers, charities are exempt from the provisions of the RRA. This is to allow charities that support people from particular racial and ethnic groups to recruit workers from those groups if the nature of the work requires it. Under the Directive, charities will be subject to the same rules of recruitment as any other employer. It is not our aim, however, to restrict the work of charities in any way and they will, in appropriate circumstances, be able to rely on the provision of genuine occupational requirements (see Part 2, chapter 9 in this document) if there is a need to appoint individuals from a particular racial or ethnic group. Do you agree?

Charities as providers of goods, facilities and services

- 11.8** When providing goods, facilities and services, charities are not currently subject to the provisions of the RRA. We propose to remedy this. However, we propose to retain an exception for

charities and other bodies whose activities are directed at compensating for disadvantage linked to racial or ethnic origin, so that they will not be precluded from carrying out this essential element of their work. Do you agree?

Partnerships of fewer than six people

- 11.9** Section 10 of the RRA provides that partnerships of fewer than six persons are currently exempt from its provisions. In the light of the Directive, we consider that this provision is no longer appropriate. Do you agree?

Disposal and management of small dwellings

- 11.10** Section 22 of the RRA provides that discrimination is not unlawful when it occurs in the disposal of small dwellings. In light of the Directive we propose to remove this exception, other than in circumstances where the disposal and management of the small dwelling is in relation to a letting of an essentially private nature, when someone rents a room in a private home and shares facilities with the householder. Do you agree?

Chapter 12

Sexual orientation: some specific issues

Introduction

- 12.1** A person's sexual orientation generally has no bearing whatsoever on their ability or suitability to do their job. The Employment Directive is an important step forward in protecting employees from unfair treatment on the basis of their sexual orientation. We shall introduce new legislation to implement the Directive's provisions in this area by 2003.
- 12.2** We shall prepare draft implementing regulations as the basis for further, detailed consultation next year. At this stage, there are two specific issues on which it would be helpful to receive your views. Please do take some time to read through the proposals in this chapter and let us know what you think on the enclosed questionnaire.

Harassment

- 12.3** Our work during negotiations on the Directive last year and early discussions with representative groups have left us in no doubt that harassment is a particularly important issue for lesbians and gay men. A recent survey by the TUC suggests that as many as 44% of gay men and lesbians have experienced some form of discrimination in the workplace, and that a large proportion of this would count as harassment. That is unacceptable. Since we need to define harassment for each strand of legislation, this issue is covered in Part 2, chapter 6 of this document. We would welcome comments about the options presented there; and whether the approaches suggested would cover the range of behaviour which gay men and lesbians, in particular, believe to be unfair discrimination.

Definition

- 12.4** The purpose of the Directive is to “lay down a general framework for combating discrimination on the grounds of ... sexual orientation as regards employment and occupation”. When transposing the directive, one option would be to refer in general terms to “sexual orientation”, without qualification. It would, however, take some time for cases to be considered at Employment Tribunals and in the Courts to clarify the scope of new protection.
- 12.5** The alternative is to outlaw discrimination, more specifically, on grounds of heterosexual, homosexual or bisexual orientation. (This definition does not deal with discrimination on the grounds of gender re-assignment. This is already covered by existing legislation)³ This definition, in our view, meets the requirements of the Directive. It would also offer individuals and employers more clarity, by establishing that everyone – whether gay, lesbian, straight or bisexual – would be protected from discrimination in employment, occupation and training. Do you agree with this approach?
- 12.6** A concern voiced by some during negotiations on the text of the Directive last year was that – in addition to outlawing discrimination against people on the basis of their heterosexual, homosexual or bisexual orientation – it could also be used to protect those who have unlawful sex, in particular paedophiles. We do not believe that this is the intention of the Directive. Moreover, Article 2(5) allows member states to “take measures ... which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

Pay, pensions and other benefits

- 12.7** The scope of the Employment Directive includes “employment and working conditions ... and pay”. The term “pay” is likely to include all types of remuneration, including fringe benefits -such as group private health insurance, and occupational pensions. The Directive may therefore make it unlawful to discriminate directly or indirectly in relation to benefits under occupational pension schemes – for

³ See the Equal Treatment Directive and section 2A of the Sex Discrimination Act 1975.

staff working in both the public and private sectors. However, the Directive does not cover state pensions or social security schemes.

- 12.8** In the context of occupational pensions, this could have an impact where benefits are payable to a partner on the death of the pension holder. Where rules of the scheme (for example) restrict benefits to opposite sex partners (whether or not married to the pension holder), this is likely to amount to direct discrimination and, therefore, will be incompatible with the Directive. However, where the rules of the scheme restrict benefits to surviving spouses, this is allowable under the Directive. This is because the Directive is expressed to be “without prejudice to national laws on marital status and the benefits dependent thereon” (see Employment Directive, recital 22).

Chapter 13

Religion: some specific issues

Our aims in implementing the Directive

- 13.1** The Employment Directive requires member states to introduce new legislation prohibiting direct and indirect discrimination and harassment on the ground of religion or belief in the areas of employment, self-employment, occupation and vocational training – although there is a special exemption designed to allow churches and other religious or belief organisations to preserve their ethos.
- 13.2** When implementing the Directive, we therefore intend:
- (a) to ensure that discrimination in the work place on the grounds of religion or belief will no longer be acceptable; and
 - (b) to ensure that churches – and other public and private organisations whose ethos is based on religion or belief – can continue to recruit staff of the same religion or belief where that is necessary to enable the preservation of that ethos.
- 13.3** We would welcome views and comments on a number of areas as we consider how best to draw up the new legislation. Please do take some time to read through the proposals in this chapter and let us know what you think on the enclosed questionnaire.

Definition of “religion or belief”

- 13.4** The Employment Directive contains no definition of “religion or belief”, and it is therefore for us to specify any appropriate definition in implementing legislation. Given the wide variety of different faiths and beliefs in this country, we have reached the view that we should not attempt to define “religion or belief”, and that it would be better to leave it to the Courts to resolve definitional issues as they arise.
- 13.5** However, we do intend to make it clear that the term “belief” does not apply to political belief – which is not covered by the Directive.

In our view, “belief” extends only to religious beliefs and profound philosophical convictions similar to religious belief which deserve society’s respect.

- 13.6** Our proposal is therefore that the new legislation should prohibit discrimination on the grounds of “religion or belief” in the areas covered by the Directive, but without giving any further definition of the term, except to say that belief should be taken to refer to a religious or similar belief, and not political belief. Do you agree with our approach?

Practical issues for all employers

- 13.7** The legislation will make it unlawful for employers to discriminate directly or indirectly when dealing with issues such as requests for leave for religious observance, or in laying down rules on dress, uniform etc. Once the legislation is prepared, we will be consulting on draft guidance to give practical assistance on these issues.
- 13.8** The legislation will not require employers automatically to grant all requests for leave for religious observance. But they must avoid both direct discrimination (for example, by refusing individual requests for leave simply because of the employee’s religion or belief) and indirect discrimination, i.e. applying rules on leave which particularly disadvantage some groups in comparison with others and which cannot be objectively justified.
- 13.9** We have also considered issues such as diet, dress and religious observance. The Directive does not require employers to put specific arrangements in place on any of these fronts. However, employers will need to avoid having rules which discriminate directly or indirectly against staff on the ground of religion or belief. We propose to provide detailed guidance on these issues to help employers. Do you have views on what advice we should offer on these issues in that guidance?

Provisions for organisations with an ethos based on religion or belief

- 13.10** The Directive contains two provisions allowing us to permit differences of treatment based on a person’s religion or belief which would otherwise be treated as unlawful discrimination. Both apply where there is a genuine occupational requirement

that the job concerned should be held by a person adhering to a particular religion or belief.

- 13.11** The first – Article 4(1) – is a provision which applies generally (see chapter 9). It has effect – regardless of the nature of the organisation concerned – whenever it is “a genuine and determining occupational requirement” that a job be carried out by a person belonging to a particular religion, or holding a particular set of religious or other beliefs. So, for example, it would be a genuine and determining occupational requirement that the post of Church of England chaplain in the armed forces should be held by an Anglican Minister (as opposed to a Methodist).
- 13.12** The second – Article 4(2) – applies only to “churches and other public or private organisations whose ethos is based on religion or belief”. It will allow such organisations to recruit staff on the basis of their religion or belief where this is “a genuine, legitimate and justified occupational requirement having regard to the organisation’s ethos”. So, for example, a religious organisation may be able to demonstrate that it is a genuine requirement that all staff – not just senior staff or people with a proselytising function – should belong to the religion concerned, so as to ensure the preservation of the organisation’s particular ethos. Alternatively, depending on the circumstances, the exemption might apply only to a number of key posts. However, this exemption does not allow religious or belief organisations to discriminate on other grounds.
- 13.13** Article 4(2) also makes it clear that organisations with an ethos based on religion or belief can continue to expect their staff to “act in good faith and with loyalty to [that] ethos”. So, for example, where an employee of a religious organisation conducted him- or herself in a manner that was inconsistent with the organisation’s ethos, disciplinary action against the employee might be appropriate where it was clear that the conduct would undermine the ethos.
- 13.14** We therefore propose to include in the new legislation a provision based on the wording of Article 4(2) to allow organisations which have an ethos based on religion or belief to pursue employment policies necessary to ensure the preservation of that ethos. But we do not propose to define which particular organisations will be covered by this exemption. Nor do we intend to specify the particular posts which are essential in underpinning an organisation’s ethos.

13.15 Given the broad range and variety of religious and belief organisations in this country, we believe it is unhelpful to be unduly specific about which organisations and posts should be covered. Smaller organisations in particular may welcome this approach. It will therefore be up to each organisation to consider whether they qualify as a “religious or belief organisation” and which of their posts need to be held by believers in order to preserve their ethos, particularly where ancillary or support staff are involved.

13.16 However, organisations who want to rely on these provisions would have to be in a position (where necessary) to satisfy Employment Tribunals that:

- (a) they do qualify as a religious or belief organisation under Article 4(2), and
- (b) their particular recruitment or other staffing policies could be justified.

The burden of proof would be on the organisation (see Part 1, paragraphs 2.16 to 2.17 of this document).

13.17 Once the new legislation is in place, we propose to consult on and issue guidance to assist religious or belief organisations, their staff and others – including Courts and Tribunals – in dealing with these issues.

13.18 You are invited to comment on the proposals outlined above. Are there particular issues here we should cover in the guidance?

Employment in religious schools

13.19 We know that many people will be interested in the position of employment in schools. The new legislation implementing the Directives will apply to them.

13.20 We are, however, committed to maintaining the position of state-maintained schools as set out in sections 58 to 60 of the Schools Standards and Framework Act 1998 (“SSFA”), which applied in England and Wales. These include provisions enabling governing bodies of schools with a religious character to employ teachers who have a commitment to the particular faith or denomination concerned.

- 13.21** In Scotland, education is the responsibility of Scottish Ministers. Section 21 of the Education (Scotland) Act 1980 provides that a teacher being appointed by the education authority to the staff of a denominational school must be approved by representatives of the relevant church or denominational body.
- 13.22** In our view, there will be no need to amend sections 58 to 60 of the SSFA. Scottish Ministers take the same view in relation to section 21 of the Education (Scotland) Act 1980.
- 13.23** Those sections, coupled with the proposed provision described in paragraph 13.15 above based on Article 4(2) of the Directive, will allow the governing body of a religious school – and in Scotland, the education authority responsible for a denominational school, with the approval of the church or denominational body concerned – to pursue employment policies needed to preserve the particular religious character of the school.

Chapter 14

Disability: some specific issues

- 14.1** We already protect disabled people against discrimination in employment and training through the Disability Discrimination Act (DDA). However, we have always recognised that the DDA does need to be improved. That is why we proposed important changes to it in March 2001 in *Towards Inclusion*, our response to recommendations from the Disability Rights Task Force.
- 14.2** These proposals anticipated the most significant changes that will be necessary under the Employment Directive. In particular, we proposed to end in October 2004 the current exemption from the DDA's employment provisions for employers with fewer than 15 employees. Other occupational exemptions or omissions that we plan to end include barristers and their pupils, partners in business partnerships, police officers and fire-fighters and employees on board ships and aeroplanes. It is important that disabled people's access to civil rights applies across a comprehensive range of employment and occupations.
- 14.3** In addition, we proposed changes in *Towards Inclusion* which are not reflected in the Directive. The main ones are a duty on the public sector to promote equality of opportunity for disabled people and a widening of the scope of the DDA to cover most functions of public authorities not already covered by the DDA's provisions on access to goods and services.
- 14.4** This chapter focuses on some further changes that we will be making to the DDA. Please do take some time to read through the proposals in this chapter and let us know what you think on the enclosed questionnaire.

How will the Directive affect the DDA?

- 14.5** The DDA generally protects disabled people against direct and indirect discrimination, but does so in a different way from the more familiar approach in the Sex Discrimination and Race Relations Acts. It takes account of the particular nature of disability as something

which is unique to each individual in their own circumstances. The DDA is very much in line with the Directive but will need some relatively small changes beyond those outlined above.

Direct discrimination

- 14.6** The DDA provides that unlawful discrimination will occur where a disabled person is unjustifiably treated less favourably than others for a reason related to the disability. In theory this means that an employer, for instance, could try to justify direct discrimination in the narrow sense meant by the directive – essentially treatment for reasons of prejudice⁴. Prejudicial treatment would arise where an employer did not employ someone *simply* because they were disabled, irrespective of their ability to do the job. We do not expect Employment Tribunals or Courts would accept that such treatment could be justified. But, to avoid doubt, we will be ensuring that, in line with the Directive, direct discrimination is excluded from the DDA's justification approach in the field of employment and training. Employers will still be able to justify not employing people who cannot do the job even with a reasonable adjustment.

Reasonable adjustments and indirect discrimination

- 14.7** The employment provisions (Part II) of the DDA also say that a reasonable adjustment should be made where an employer's arrangements or premises substantially disadvantage a particular disabled person compared with non-disabled people. Adjustments, which would take account of the disabled person's particular employment circumstances, might mean changing hours of work, meeting in an accessible office or using Braille, for example.
- 14.8** The DDA duty to make reasonable adjustments tackles indirect discrimination against disabled individuals. Indirect discrimination might happen where an employer has policies or practices which, although they apply equally to all employees (whether or not disabled), in fact put members of staff with a particular type of disability at a substantial disadvantage when compared with those who do not have that disability. For example, an employer might have a policy of only employing people who can use a PC keyboard. This might disadvantage some blind people. An adjustment to overcome the disadvantage in this case might be to

⁴ Part 2, chapters 4–5, of this document explains more about the terms direct and indirect discrimination.

provide voice-operated software for the employee concerned or, if PC work was a minor part of the job, to allocate the relevant work to someone else.

14.9 The Directive requires member states to introduce a specific duty on employers to make what it calls “reasonable accommodations” for disabled people. This is similar to the reasonable adjustments duty which applies to employers under the DDA. We therefore have no plans to change the DDA’s general approach to adjustments in the field of employment.

14.10 The Directive also provides that member states can deal with indirect discrimination by taking a reasonable adjustments approach along the lines already adopted by Part II of the DDA rather than by taking the objective justification approach explained in chapter 5 of this document. In most instances we propose to continue simply with the familiar reasonable adjustments approach in the field of employment and training. We feel that this offers effective protection for disabled individuals. However, the DDA excludes some areas covered by the Directive from the duty to make adjustments. Our proposals for covering these areas are explained below (from paragraph 14.13 onwards).

Employment services, vocational training and guidance.

14.11 Vocational training and guidance and employment services (e.g. services provided by employment agencies) are among the activities falling within the scope of the Directive. The DDA currently contains provisions prohibiting discrimination in relation to services of this type, but these will need some amendment to ensure that they reflect the Directive’s requirements. Those provisions are found in:

- (a) Part III of the DDA (concerning access to goods and services) which currently covers employment services and some vocational training services; and
- (b) Part IV (concerning education) which deals with vocational training provided as part of further or higher education courses.

14.12 Our proposed amendments would mean that providers of vocational training or guidance or employment services:

- (a) will be unable to justify direct discrimination of the type described in paragraph 14.6; and

- (b) will have to make a reasonable adjustment if their premises, or arrangements for the provision of their services, substantially disadvantage a person with a particular type of disability when compared with others.

This is the same approach as that for the employment provisions (Part II) of the DDA.

Particular provisions

- 14.13** The DDA currently excludes a small number of pay-related issues from the duty to make adjustments. It follows that disabled people would not generally be protected against indirect discrimination in these excluded areas – which are performance pay, occupational pension and group insurance schemes (e.g. permanent health schemes such as BUPA). There is already significant protection against discrimination in each area in the DDA, but we will be tightening it to ensure that disabled people are fully protected against indirect discrimination. We do not think that the changes would be significant for employers or the pensions or insurance industry. In many cases there may be little practical difference to the way the DDA works now.
- 14.14** We propose to cover performance pay, occupational pensions and group insurance in one of two ways. The Directive allows us to adopt the reasonable adjustment approach described above. Or we could instead make sure that, where the rules of any of these types of scheme substantially disadvantaged persons with particular types of disability, those rules would have to be objectively justified. It may be that the reasonable adjustment approach we are retaining for the DDA generally is not suitable to the way in which these schemes actually work in practice, so we are consulting on both approaches. In addition, we need to consult on how the two approaches to indirect discrimination might apply to qualifying bodies (see paragraph 14.23).

Issues on which we want to hear your views

- 14.15** There are fairly technical matters which we will be discussing further with the particular industries, employer bodies, trade unions and disability organisations. In addition, there are some issues on which we would like your views as part of this consultation. Please take some time to look at the questions below and let us know what you think on the enclosed questionnaire.

Performance pay schemes

- 14.16** Some disabled people might face substantial disadvantage at work affecting their performance. In turn this could affect their performance pay. However, in many cases there is likely to be a reasonable adjustment which might help improve their performance. If there is not, then the person might be disadvantaged by the terms of the scheme itself. They might simply get less money because they cannot perform to the same standard as others (although the employer might wish to continue employing them).
- 14.17** In your view, where there is no reasonable adjustment which could improve a disabled person's performance, and where a disabled person is then substantially disadvantaged by the operation of the scheme itself, should an employer be required to:
- (a) change the scheme for the individual – perhaps paying them more for less work; or
 - (b) objectively justify the discriminatory aspect of the scheme (by showing that it has a legitimate aim and that the means of achieving the aim are appropriate and necessary)?
- 14.18** Do you have views on the way either approach might affect particular types of performance pay scheme?

Occupational pension and group insurance schemes

- 14.19** Employers have a role in deciding the terms on which such schemes should be provided to their employees. Managers and trustees of pension schemes and insurance companies also play an important role in allowing entry to the schemes and administering them fairly. Clearly it will be important to ensure that the duties under the DDA apply to the responsible party.
- 14.20** The DDA will need amending where its requirements relating to these schemes do not meet those in the Directive concerning discrimination – even if in some cases the change may have no effect in practice. In particular, the DDA currently allows employers, and managers and trustees of pension schemes, to prevent a disabled person from having access to particular benefits of a scheme if the cost of providing them would be substantially greater

than for a non-disabled person. It also allows them to charge the full contributions even if the disabled person does not receive the full benefits.

- 14.21** In your view, where a disabled person would be substantially disadvantaged by the provision, rules or operation of such schemes, should employers, managers and trustees of occupational pension schemes and relevant insurance companies be required:
- (a) to make adjustments to a scheme for the individual; or
 - (b) to objectively justify the discriminatory aspect of the scheme (by showing that it has a legitimate aim and that the means of achieving that aim are appropriate and necessary)?
- 14.22** Do you have any views on the way in which either of these approaches would affect particular occupational pension or group insurance schemes?

Qualifying bodies

- 14.23** These are bodies which can give authorisations or qualifications needed to help people get access to a particular profession or trade. They include bodies which issue licences to engage in an occupation or business, or bodies awarding qualifications specific to a particular profession, such as the Pensions Management Institute. We will be ensuring that all qualifying bodies are covered by the DDA employment provisions, except to the extent that they are already covered by the provisions of the DDA applying to further and higher education institutions.
- 14.24** In your view, should qualifying bodies – whether covered by the employment or education provisions of the DDA:
- (a) be able to maintain academic and other particular standards if they can objectively justify them; and
 - (b) be required to adjust other aspects of the relevant work of qualifying bodies – such as the means of course delivery and assessment like course materials, seating in exams or time limits – if it is reasonable to do so? (Any qualifying bodies which are FE and HE institutions would already have to do this under the education provisions of the DDA.)

14.25 Do you have any views on the way in which these approaches would affect particular qualifying bodies?

Chapter 15

Age: some specific issues

- 15.1** We intend to legislate to tackle age discrimination at work and in training. We cannot afford the substantial cost of discriminatory age practices to individuals or to the wealth of the nation.
- 15.2** This first consultation paper on age concentrates on identifying and inviting views upon the key issues. Because of the complexity of age discrimination issues, we intend to introduce age legislation on a longer timetable than equivalent legislation on sexual orientation and religion or belief. For the same reason we will undertake a second age consultation exercise in the second half of 2002. The second consultation will build on this one by consulting on a set of firm proposals for action with a view to implementing the age provisions of the Employment Directive before the end of 2006.

What is age discrimination in the workplace?

- 15.3** Age discrimination in the workplace exists when decisions are made on matters related to training or employment that are based on a person's age rather than her/his skills and ability to do the job. It leads to assumptions about younger and older workers that create and perpetuate inappropriate recruitment, selection, training, promotion and retirement practices. In tandem with developing legislation, we plan to increase promotional activities to change attitudes on age in the workplace and to challenge the unthinking prejudice that blights lives and is so costly to our economy.
- 15.4** We need to be clear about what we are trying to achieve with legislation. We want to identify and prohibit what is unfair practice based on discriminatory attitudes or inaccurate assumptions, so as to remove the barriers which people of all ages face if they want to work. But we recognise that there may be differences of treatment or exceptions on the grounds of age that are justified. We do not want to outlaw initiatives which improve the opportunities for people to enter or return to work or training, through New Deal initiatives for example. Nor do we want to ban employment practices which can be clearly and objectively justified.

- 15.5** Article 6 of the Directive provides the flexibility needed to permit and justify a difference of treatment based on age. It contains an illustrative list of the types of differences of treatment that may be justified, including:
- (a) special conditions on access to employment and vocational training for particular categories of people in order to promote their vocational integration or to ensure their protection;
 - (b) minimum conditions of age, experience or seniority for particular advantages;
 - (c) a maximum recruitment age based on the training requirements of the post.
- 15.6** However, any differences of treatment on the grounds of age (including those referred to above) will only be deemed as “non-discriminatory” if they are objectively and reasonably justified.
- 15.7** A key goal of this consultation is to identify which types of treatment are acceptable and which are not. It is important for us to hear what you think. We need to gain the views of as many people as possible – from businesses, employees (both in work and prospective), and all relevant organisations, so that we can develop effective and proportionate proposals for legislation to combat age discrimination.

Issues on which we want to hear your views

- 15.8** Please do take some time to read through the proposals in this chapter and let us know what you think on the enclosed questionnaire.

Direct and indirect age discrimination

- 15.9** As discussed in chapters 4 and 5 of this document, discrimination can be either direct or indirect. We believe that a proper understanding of concrete individual experiences can assist us frame laws and guidance to tackle age discrimination effectively.

- 15.10** Have you suffered age discrimination at work? Or have you witnessed anybody else suffering age discrimination at work? If so, we would like to hear about it – the form it took, what makes you believe it was age discrimination, the effect it had and what you think might help prevent such discrimination happening again.

Recruitment, selection and promotion

- 15.11** Refusing to employ or promote someone on the grounds of their age will be outlawed except where there are justifiable reasons for the refusal⁵. Can it ever be justified, for example, for an employer to specify a minimum or a maximum age of recruitment for a job? If so, in what circumstances? And for what kind of jobs might such exceptions be justified? For instance, are there occasions when, for good reason, an individual of a given age should not be recruited on the grounds of training costs?
- 15.12** Recruitment schemes which focus wholly or mainly on one age group to the exclusion of others could be perceived as indirectly or directly discriminatory on grounds of age. Do you consider such schemes to be justifiable? If so, in what circumstances would you regard them as being justifiable? For example, what are your views on graduate recruitment schemes?
- 15.13** Refusing to consider somebody for promotion solely because of his or her age would be prohibited unless the new legislation allows for this to be justified. Do you think it should do so? If so, in what circumstances? Please let us know with your reasons.

Training

- 15.14** Preventing someone from taking part in training simply because of his or her age will be outlawed under the proposed legislation. There is scope under the Directive to make exceptions to this general rule. An exception might, for example, include any situation in which the cost of training would be unreasonable when set against the amount of time that person would spend working for the organisation. Would you support such an exception? For instance, would you prevent an employee from attending a training event because they were due to retire shortly? Can you think of any circumstances where exceptions should be made?

⁵ The Employment Directive allows for service in the armed forces to be specifically excluded from legislation implementing the age provisions. We intend to rely on this exemption.

Occupational requirements

- 15.15** The Directive provides for narrowly defined exceptions to be made where it is a requirement for a post to be occupied by someone of a particular age. One example might be a requirement for child actors to play the parts of children in, say, a performance of “Oliver”. Can you suggest other examples of work or training where age could be legitimately considered a genuine job requirement?

Pay & non-pay benefits⁶

- 15.16** Legislation outlawing age discrimination at work would disallow pay or non-pay benefits based wholly or partly on chronological age. Again, there could be justifiable exceptions. It is possible that benefits related solely to length of service (for example, an extra 5 days holiday once you have been working for the company for 10 years) might be regarded as indirectly discriminatory. Do you know of any pay or non-pay practices that might be considered discriminatory for either younger or older workers? If so, are there sound reasons to justify continuing these practices?
- 15.17** Annual incremental pay might be regarded as a justified exception to reflect experience and reward loyalty to an employer. Do you agree?

Redundancy

- 15.18** At present, many employers offer attractive voluntary redundancy packages based on age or length of service. Can this more favourable treatment be justified? If so, in what circumstances?

Retirement

- 15.19** At present, employers can fix their employees’ retirement age. This is normally in the range of 60-65. Legislation on unfair dismissal (the Employment Rights Act 1996) does not apply when an employee is asked to retire upon reaching normal retirement age. In contrast, some countries with existing laws against age discrimination at work have banned entirely the use of compulsory retirement ages. Other countries have made retirement age an exception.

⁶ The new legislation will not affect the operation of occupational pension schemes. Article 6(2) of the Employment Directive makes it clear that fixing ages of admission for such schemes and, in this context, the use of age criteria in actuarial calculations should not be regarded as age discrimination.

- (a) Do you think employers should be able to require people to retire at a certain age?
- (b) If so, do you think there should be any legal limits placed on their right to do so?
- (c) What concerns, if any, do you have about current retirement practices?
- (d) In your opinion, what would be the advantages and disadvantages if there were no fixed retirement age?

Conclusion

15.20 We have aimed to identify on several key issues in relation to age discrimination at work and in training. It is important that we hear your views on these issues. If you are aware of other circumstances or situations where age legislation could have an effect in employment of vocational training, please let us know.

Part 4 – Annexes

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Annex A:

Regulatory impact assessment

Options

- A1** In general terms, the options are either (a) to do nothing or (b) to amend GB legislation in order to comply with the Employment and Race Directives. Option (a) would involve non-compliance with an EU Directive. It carries significant political and legal risks, and is not compatible with the Government's policy. This impact assessment is, therefore, based on option (b).

Equity and fairness

- A2** Complying with the Directives will ensure greater fairness for individuals by improving the labour market conditions in favour of those who are traditionally at a disadvantage. Specifically, these are people with a minority ethnic background, people with disabilities, older workers and young people entering the labour market for the first time, members of faith groups, gay men, lesbians and bisexuals. This is generally captured in the impact assessment as a benefit, in terms of better employability, wages and progression prospects for the groups of individuals most affected by additional legislation.

Labour market efficiency

- A3** The proposals aim at increasing participation in the labour market. They aim at groups such as younger or older individuals and disabled people whose employment rates are below the average. Increasing the pool of the economically active will improve the matching of people with jobs and increase the country's productivity and competitiveness.

Costs and benefits

- A4** We have prepared separate statements to identify the potential costs and benefits under option (b) for race, sexual orientation, religion and age. These are available from the DTI website at

www.dti.gov.uk/er/equality. A broad description of these costs and benefits is given below. As part of the consultation exercise, we would welcome comments about the costs and benefits or the assumptions and methodology used in this initial analysis.

Race

- A5** Great Britain already has extensive legislation against race discrimination. The implementation of the Directive will benefit people working within GB and British citizens working or living elsewhere in the EU.
- A6** The impact on business is expected to be minimal as companies are already familiar with working within an anti-race discrimination framework. The changes that will be made to the Race Relations Act will mainly be technical.
- A7** Any possible increase in the number of cases brought as a result of the changes to GB law is likely to arise from the increased awareness of the measures available to tackle race discrimination. However, the possible cost to business will probably arise from the need for some employers to adjust recruitment and staff management practices. The potential increase in the number of complaints and Court and Tribunal hearings also implies additional administrative costs for government.

Sexual orientation

- A8** The main benefits of eliminating discrimination on this ground are:
- (a) for individuals: better employability, training and promotion prospects for individuals. These are estimated to be between £13 and £38 million; and
 - (b) for businesses: the recruitment and retention of a larger pool of skilled and competent workers. These are estimated to be between £5 and £52 million.
- A9** The main costs to business arise from the need to adjust recruitment and staff management practices, from complaints and from an increase in companies' training expenses. There may also be some costs implied by the need to extend privileges and concessions available to unmarried heterosexual couples to same sex couples (e.g. travel concessions). Any extension of pension rights to same sex couples required by the Directive would enhance security for some individuals and their partners but have

further cost implications for those pension schemes affected (estimated to be £38 million).

Religion or belief

A10 The main benefits of a more diverse workforce are:

- (a) for individuals: improved employability, training and promotion prospects. These are estimated to be between £32 and £113 million.
- (b) for businesses: recruitment and retention of a larger pool of skilled and competent workers. These are estimated to be between £13 and £103 million.

A11 The main costs to business arise from the need for some employers to adjust recruitment and staff management practices; and the prospect of Employment Tribunals cases for a number of employers. (The scale of this effect is expected to be similar to that of race legislation). There will also be additional expenditure on training which will have a direct impact on productivity. The potential increase in complaints and Tribunals also implies additional administrative costs for government.

Disability

A12 There is already extensive legislation in place in Great Britain covering this ground and so the Directive would bring few substantial new benefits. However, extending protection against discrimination on grounds of disability to EC countries where there is currently little or none would present a considerable benefit to British citizens working, training or seeking work and training within other member states. The Government has already put forward proposals – in *Towards Inclusion* – to give effect to the most significant changes required by the Directive. These would bring nearly 7 million more jobs within the scope of the Disability Discrimination Act (DDA). Around 600,000 of these jobs are already occupied by disabled people.

A13 The costs to business stem from the limited changes which would need to be made to the DDA. The main costs to business would flow from the extension of the DDA employment provisions to cover small employers. A proposal to do this was included in *Towards Inclusion* which had its own RIA⁷. There are small costs to

⁷ Copies of *Towards Inclusion* can be ordered by calling 0845 60 222 60, quoting DR02.

business from necessary changes which were not included in that document – such as changing the DDA approach to occupational pensions and group insurance. There are potential benefits to business from simplification of DDA provisions as well as from improved employee retention and diversity policies.

A14 The DDA currently allows employers, and managers and trustees of pension schemes, to prevent a disabled person from having access to particular benefits of a scheme if the cost of providing them would be substantially greater than for a non-disabled person. It also allows them to charge the full contributions even if the disabled person does not receive the full benefits. Research has not identified any complaints having been made under the DDA's occupational pension provisions.

A15 Under the changes proposed to the DDA, scheme rules which treated people differently solely on the basis that they are disabled would have to be changed as this would be direct discrimination. However, we are not aware that schemes do this – instead their decisions on individuals are based on assessments using actuarial or other statistical evidence which might relate to their disability. Under either approach to indirect discrimination outlined in the disability chapter in paragraphs 14.19 – 14.22, employers, and managers and trustees of pension schemes, could still argue that particular benefits can be limited or denied to particular individuals if the cost of providing them would give rise to a disproportionate burden.

A16 It does not seem likely that any schemes which currently charge disabled people for benefits they do not receive would be able to defend doing so. However, we are not aware that this is a widespread practice or, if it is, that any partially reduced charges would be more than a minimal cost to schemes.

Age discrimination

A17 Early conclusions from the evaluation of the impact of the non-statutory Code of Practice on Age, together with related research on business case studies, suggest that there are potential benefits to be gained from a more age-diverse workforce.

- (a) Individuals could benefit from better employment, training and promotion prospects. These benefits are estimated at between £42 and £90 million.

- (b) Case studies suggest that benefits for business include reduced costs owing to more effective recruitment practices, improved productivity owing to enhanced training, reduced turnover of staff and the retention of staff skills and knowledge. These are estimated to be between £84 and £412 million.

More generally, there are potentially significant efficiency improvements for the British labour market, if the legislation results in an increase in the effective supply of labour.

- A18** The Directive includes a number of exceptions where discrimination on grounds of age is justified and this will help determine the degree of impact. The Government will need to clarify these exceptions for employers, and enhance understanding of the implications.
- A19** The main costs to business arise from the need for some employers to change recruitment, staff management and training practices, and for some employers the prospect of new Employment Tribunals. The potential increase in complaints and Tribunals also implies additional administrative costs for government.

General benefits

- A20** In addition to the costs and benefits highlighted above, there are overall benefits to society in facilitating a more diverse workforce. These include:
 - (a) greater fairness. Legislation on sexual orientation, religion and age will offer new protection against discrimination in employment and training, in a similar way to existing GB legislation;
 - (b) promoting greater social inclusion, through wider employment and training opportunities, which is necessary for a diverse and tolerant society;
 - (c) increased labour market participation by all groups and therefore increased efficiency of the labour market.
- A21** It is difficult to attach a monetary value to these, but they do have implications for the competitiveness and prosperity of businesses and the economy more generally. A more inclusive society ensures that more people are able to use their talents and fulfil their potential in work. It provides a stable environment in which businesses can prosper.

Costs and benefits for business

A22 We have assumed, as is the usual practice, that where an employer successfully defends a complaint to a Tribunal or Court, there will be compliance costs. These costs have been included in our assessment of the costs to business and Government given above. However, where a claim is lost, the employer has obviously not complied, so the costs are not included.

A23 The costs to business, as summarised in paragraph A4, are based on this assumption. The total compliance costs for each element of the Directive are presented in the following table, together with those benefits which can be expressed in financial terms. More details are set out in annexes which are available from the DTI website at www.dti.gov.uk/er/equality

	One-off cost (£ million)	Annual recurring cost (£ million)	Benefits (£ million)
Race	0.0	0.5	
Sexual orientation	23.0	4.5 ⁸	5 – 52
Religion/belief ⁹	45.0	44.0 – 80.0	13 – 103
Disability	Minimal ¹⁰	Minimal	
Age	152.0	138.0	84 – 412
Combined	220.0	187.0 – 223.0	102 – 567

Total costs

A24 The one-off cost of all the elements is estimated to be £220 million. This takes into account the fact that joint introduction of elements where this occurs will reduce the total costs of familiarisation with the legislation. These “diminishing marginal costs” are considerable. They are explained in the detailed impact assessment. Recurring costs total between £187 and £223 million when all the elements come into force from December 2006 onwards.

Explaining differences in the costs

A25 The age strand is expected to give rise to the largest component in the total compliance cost. This is because we are assuming that the full extent of costs related to recruitment and staff

⁸ £31 million if pensions included.

⁹ Some of the costs under religion as well as under sexual orientation have not been quantified.

¹⁰ This is because the significant changes to the DDA appeared in the Regulatory Impact Assessment for *Towards Inclusion* published on 5 March 2001. The cost of removing the exemption for small firms was estimated to be £4.7 million.

management will be incurred, reflecting the wide scope of possible complaints and the consequent scrutiny of management decisions.

- A26** The cost associated with the religion element is much lower because there may be overlap with existing race legislation to the extent that it may not be possible to distinguish in some instances between racial discrimination and religious discrimination.
- A27** The cost associated with legislation on sexual orientation is relatively small (though it should be higher than that stated above since costs of cases and Tribunals have not been included, due to insufficient data).

Costs for a typical business

- A28** There are about 25 million employees in Great Britain. The average cost of implementing our proposals is therefore around £9 per employee. Some of these implementation costs – those related to reading guidance for example – do not depend on the number of employees within the business. In total there are 1.4 million employers in Great Britain. The average cost per employer is £157.
- A29** Training costs are another important factor. These depend on the size of the employer. Per employee, they are estimated to be £150 per day training. In total, recurring costs average at £134 to £159 per employer once all the strands have been introduced.

Impact on small business

- A30** Consultation with small businesses has been carried out. The exercise has attempted to assess the extent and nature of costs that small businesses are likely to incur, including the degree of compliance and the perceived risk of litigation.
- A31** Some of the implementation costs do not depend on the size of the firm. The owner manager of a firm with 20 employees will have to read the guidance, just as the personnel manager of a large firm will.
- A32** Apart from this, the likely impact on businesses is generally proportional to the number of employees who are covered by new or amended legislation, but with some exceptions.
- (a) To the extent that smaller businesses are more likely to recruit and promote on an informal basis, they may need

to make greater changes in order to meet the Directives. This applies to all five strands: race, sexual orientation, religion, disability and age.

- (b) Costs arising from complaints and Tribunal cases may impose a greater burden on smaller businesses as they will have less resource to deal with these complaints. This applies to all five strands.
- (c) Adjustment costs under religion or belief, such as accommodating for dietary requirements, will impose a greater burden on smaller businesses as the cost per worker of such provisions will be greater.

Informal consultation

A33 The DTI, Home Office, Department for Work and Pensions and former DFEE have carried out informal consultation with a wide range of organisations, including those listed below. These meetings have helped inform this consultation document and we are grateful to them for taking the time to contribute.

Age Concern
 Armed Forces Lesbian and Gay Association
 Board of Deputies of British Jews
 British Chambers Of Commerce
 Catholic Education Service
 Christian Brethren
 Christian Institute
 General Synod, Church of England
 Commission for Racial Equality
 Confederation of British Industry
 Consortium of Lesbian, Gay and Bisexual Voluntary
 and Community Organisations
 Disability Rights Commission
 Employers Forum on Age
 Engineering Employers Federation
 Equal Opportunities Commission
 Evangelical Alliance
 Inter-Faith Network
 Institute of Management
 Lesbian and Gay Employment Rights (LAGER)
 Lesbian and Gay Christian Movement
 Muslim Council of Great Britain

National Assembly for Wales
National Secular Society
Recruitment and Employment Confederation
Scottish Enterprise
Scottish Executive
Scotland Office
Small Business Service
Society of Chief Personnel Officers
Stonewall
Third Age Employment Network
Trades Union Congress

Summary and recommendations

- A34** The tables below show the costs and benefits in detail. There is considerable scope for net benefits in the total package. This is supported by the fact that many of the benefits could not be expressed in financial terms. This includes issues of fairness and improved self esteem as well as improved efficiency of the labour market.

Enforcement, sanctions, monitoring and review

- A35** We anticipate that enforcement and sanctions will be along the lines of those in the current legislation on gender, race and disability. Costs have been based on this assumption.

Summary tables

Sexual orientation

	Benefits	Costs
Employers		
Awareness (one-off)		£ 23 million
Recruitment	£ 2.34 million	£ 1.5 million
Pensions (private employers)		£ 38 million
Training		
Promotion	£ 3 – 50 million	£ 3 million
Enforcement		
Employees		
Promotion	£ 13 – 38 million	
Pensions (private employers)	£ 38 million	
Exchequer/NIF		
Recruitment		
Promotion	£ 3 – 8 million	

Religion and belief

	Benefits	Costs
Employers		
Awareness (one-off)		£ 45 million
Recruitment	£ 1 million	£ 4.2 million
Training	£ 10 – 100 million	£ 27 – 63 million
Promotion	£ 2 million	£ 6.5 million
Enforcement		£ 6 million
Employees		
Recruitment	£ 29 – 86 million	
Promotion	£ 1 – 2 million	
Training	£ 2 – 25 million	
Exchequer/NIF/pension fund		
Recruitment	£ 6 – 17 million	
Promotion	£ 0.2 – 0.4 million	
Training	£ 0.4 – 5.0 million	
Enforcement		£ 2 million

Age

	Benefits	Costs
Employers		
Awareness (one-off)		£ 152 million
Recruitment	£ 20 – 60 million	£ 23 million
Training	£ 54 – 307 million	£ 20 million
Promotion	£ 10 – 45 million	£ 75 million
Enforcement		£ 20 million
Employees		
Training	£ 5 – 53 million	
Promotion	£ 37 million	
Exchequer/NIF		
Recruitment	£ 70 million	
Training and promotion	£ 8 – 18 million	
Enforcement		£ 5 million

Annex B:

About this consultation

Scope of consultation

- B1** This paper invites views about new and amending legislation which will apply to England, Scotland and Wales. We welcome responses from organisations based in Great Britain; anyone resident or working in Great Britain; from business overseas employing staff in Great Britain; or anyone else who thinks they may be affected by new legislation. Responsibility for implementing the employment and race directives in Northern Ireland rests with the Office of the First Minister and Deputy First Minister.

Questions about the consultation

- B2** We would be happy to answer your questions about issues raised in this paper or about the process of consultation itself. Please call one of the following freephone numbers:

General issues	0800 028 8078
Race	0800 528 0039
Sexual orientation	0800 028 8076
Religion	0800 028 8074
Disability	0800 587 2314
Age	0800 028 8066
Minicom (all issues) for people with hearing impairments	020 7712 2492

Access to information and alternative formats

- B3** We are committed to open consultation. A complete copy of this document, an on-line questionnaire and a shorter summary version are available in English and Welsh on the Department of Trade and Industry's website: www.dti.gov.uk/er/equality. The website includes links to versions in Arabic, Hindi, Chinese and Gujarati. It also holds a copy of the version prepared for people with learning disabilities. All of these, together with documents in Braille, large print and on tape are available on request (see below).

Consultation deadline

- B4** This consultation exercises closes at the end of March 2002. Please let us have your responses before then.

How to respond

- B5** A questionnaire is enclosed as part of this pack. Please do take time to complete it if you can. It should be returned to the address shown on the form. Alternatively, you might find it easier to complete the form by downloading a copy from the DTI website – www.dti.gov.uk/er/equality – and returning it by Email to equality.diversity@dfes.gsi.gov.uk If you have a visual impairment and wish to respond orally, please telephone 0800 0288078.

How to order further copies of this document

- B6** In addition to internet access, further copies of this document can be obtained from publications order lines as follows:

Format	Contact	Reference code
Full consultation document (English)	Prolog	URN01/1466
Full consultation document (Welsh)	Prolog	URN01/1469
Summary document (English)	Prolog	URN01/1471
Summary document (Welsh)	Prolog	URN01/1472
Braille	Prolog	URN01/1468
Version for people with a learning difficulty	Prolog	URN01/1473
Audio cassette	Prolog	URN01/CAS15
Large print	DTI	URN01/1470
Full document on floppy disk	DTI	URN01/1474

To order from Prolog:

Phone: 0845 60 222 60
 Fax: 0845 60 333 60
 Email: dfes@prolog.uk.com

To order from DTI:

Phone: 0800 0288078
 Fax: 020 7215 0168
 Email: simon.conroy@dti.gsi.gov.uk

Government's code of practice on consultation

- B7** This exercise follows the Government's Code of Practice on consultation.

Commenting about the consultation process

- B8** If you have views about the way in which we have carried out this consultation process, or suggestions for future exercises, please write to: Andrew Dobbie, Regulatory Impact Unit, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET.

Annex C:

Current sources of advice

If you need advice about tackling discrimination or promoting diversity – whether as a manager or an individual – you can already find help from one or more of the following sources.

Service	Description	Contact Details
ACAS	Advisory, Conciliation and Arbitration Service (ACAS) are the employment relations experts, helping people work together effectively. ACAS can provide impartial information and help, preventing and resolving problems between employers and their workforces, settling complaints about employees' rights, and encouraging people to work together effectively.	England 0121 456 5856 Scotland 0141 204 2677 Wales 029 2076 1126 www.acas.org.uk
Citizens Advice Bureau	The Citizens Advice Bureau service offers free, confidential, impartial and independent advice on problems which are central to people's lives. These include debt and consumer issues, benefits, housing, legal matters, employment, and immigration. Advisers can help fill out forms, write letters, negotiate with creditors and represent clients at Court or Tribunal.	England and Wales 020 7833 2181 www.nacab.org.uk Scotland 0131 667 0156 www.cas.org.uk
Commission for Racial Equality	The Commission for Racial Equality is a publicly funded, non-governmental body set up under the Race Relations Act 1976 to tackle racial discrimination and promote racial equality.	England 020 7828 7022 Scotland 0131 240 2600 Wales 029 2038 8977 www.cre.gov.uk
Disability Rights Commission	The Disability Rights Commission (DRC) is an independent body set up by the Government to help secure civil rights for disabled people.	08457 622 633 www.drc.org.uk

Equal Opportunities Commission	The Equal Opportunities Commission (EOC) is an agency working to eliminate sex discrimination in 21st Century Britain.	England 0161 833 9244 Scotland 0141 248 5833 Wales 029 2034 3552 www.eoc.org.uk
Equality Direct	This service is designed to give business managers easy access to authoritative and joined-up advice on a wide range of equality issues.	0845 600 3444 www.equalitydirect.org.uk
RREAS	The Race Relations Employment Advisory Service (RREAS) is part of the Advisory, Conciliation and Arbitration Service (ACAS). The service provides free and confidential strategic advice to employers and others so that they can develop and implement policies and practices for racial equality among the workforce. It is a national service with a team of advisers based throughout the country to ensure local expertise is available to all their clients.	0121 452 5447 0121 452 5448 0121 452 5449
Small Business Service	The Small Business Service (SBS) is a Government agency which champions the interests of small businesses.	0845 600 9006 www.businesslink.org