

‘MODERNISING DISCRIMINATION LAW’: PROPOSALS FOR A SINGLE EQUALITY ACT FOR GREAT BRITAIN

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ABSTRACT

This article analyses the Discrimination Law Review, issued in June 2007, which proposes the introduction of a Single Equality Act for Great Britain. It argues that these proposals will lead to some valuable reforms especially through the harmonisation of legal definitions in areas such as disability discrimination and indirect discrimination. Yet, at the same time, the Discrimination Law Review has missed an opportunity to address some of the central problems that hinder the effectiveness of discrimination law. The analysis focuses on specific examples: the ‘comparator’ problem in equal pay and multiple discrimination cases; individual remedies; public sector duties; procurement; and positive action. The article concludes that although the proposals for a Single Equality Act will lead to greater protection for individuals they are unlikely to be an effective response to the problems of structural discrimination and social exclusion.

INTRODUCTION

The Discrimination Law Review (DLR), issued on June 2007, is the Government’s consultation before the introduction of a Single Equality Bill. British discrimination law has expanded rapidly since the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA): its sources now include human rights and EU norms; its scope has expanded beyond employment discrimination to include public sector duties, as well as more extensive coverage of provision of goods and services; and its prohibited grounds now include disability, sexual orientation, religion & belief and age. This ad hoc development has resulted in a complex, and often chaotic, body of statutory provisions and case law. The Equality Act 2006 rationalised the institutional structure of discrimination law by establishing a single equality commission (the Commission for Equality and Human Rights), whilst the Cabinet Office’s Equality Review provided the evidence of the extent of the problem of social exclusion (Equalities Review, 2007). The DLR continues this reform process by proposing the introduction of a Single Equality Act which will remove much of

the chaos of domestic discrimination law. A framework equality law emerging from Great Britain at this time may also have influence internationally and throughout the European Union.

A full summary of the DLR's proposals are set out in the consultation document. Critical commentary on the DLR could take an external criteria (e.g. securing individual dignity or distributive justice) as the benchmark against which to judge success or failure. I want to avoid this method and, instead, develop an internal critique. This means accepting the DLR's own account that discrimination law has two central aims: first, protecting individuals from discrimination; and second, tackling disadvantage (section 1). I argue that despite weaknesses in the DLR's strategy for law reform, especially in relation to remedies and enforcement, its proposals will enhance individual protection against discrimination (section 2). The DLR proposals are insufficient, however, to address the asymmetries of power that cause political, social and economic exclusion (section 3). This fundamental flaw means that it is unlikely to achieve its second goal of 'tackling disadvantage'.

1. REFORMING DISCRIMINATION LAW – 'SIMPLICITY, EFFICIENCY AND MODERNISATION'

The DLR states that the two central goals for discrimination law that it identifies – to 'protect individuals from discrimination' and 'tackle disadvantage' – 'reflect basic values of our society' (DLR, pp. 60–62). The DLR also adopts three law reform objectives: 'simplifying the law' (DLR, p. 12); 'more effective law' (DLR, p. 13) and 'modernising the law' (DLR, p. 15). 'Modernisation' is justified because society is now 'very different' and consequently discrimination law needs to 'keep pace with and reflect the changes in our society' (DLR, p. 124). 'Simplification' means maintaining existing levels of protection; preference for a common approach; practical definitions which reflect individuals everyday lives; common sense; and ensuring compliance with EU law.

The DLR is less clear regarding which values underlie the 'effectiveness' of discrimination law. At first sight, there seems to be an explicit rejection of a purpose clause or a constitutional paradigm for the Single Equality Act. This is odd because the institutional structure of a single equality commission (the CEHR) which merges constitutional and statutory approaches is endorsed by the DLR (p. 63, para. 11). Moreover, despite the firm rejection of the constitutional model on p. 62 at para. 10, the DLR goes on to acknowledge in the next paragraph that the HRA is a source of equality norms: 'Legislation must be interpreted in the light of

these rights. [...] The application of human rights in an equality context has been demonstrated in a number of cases dealing with disability, sexual orientation, gender reassignment and religion or belief and in some cases has led to new discrimination law being brought forward.' Therefore, at the same time as explicitly rejecting constitutional equality models, the DLR implicitly accepts the symbiotic relationship between constitutional and statutory discrimination law. This relationship is an inevitable outcome of the different sources that produce the 'multilayered' nature of discrimination law (N. Bamforth, M. Malik and C. O'Cinneide, forthcoming 2007).

The DLR could have emphasised the importance of these 'constitutional' sources of discrimination law, as the prism through which all domestic discrimination law needs to be understood, without the wholesale abandonment of the British statutory model or even the adoption of a purpose clause. Of course, a Single Equality Act will not be able to resolve all the complexities arising from the overlap of constitutional and statutory sources. An additional complexity is the potential for conflicts between equality norms which are part of the fundamental rights structure of the EU (through the influence of the ECHR and the EU Charter of Fundamental Rights Chapter III) and the detailed provisions of EU discrimination law directives. More explicit acknowledgement of these sources may, however, provide a guide as to why it is important to protect individuals from discrimination. For example, the DLR proposes that transsexual people should be protected from indirect discrimination (DLR, para. 1.33) which arises when organisations do not change their records to show the individual's new name or gender. Protecting transsexuals in these cases is important because forcing them to reveal their personal history would be a breach of 'dignity' and of their right to privacy. In this case, discrimination law reform can be said to be 'effective' because it ensures compliance with the right to privacy which is protected by Article 8 of the ECHR. This example also illustrates another feature of discrimination law which the DLR has failed to address explicitly. The original legal technique for the regulation of discrimination was the statutory tort of unlawful discrimination (created by the SDA and RRA). This technique grafted an important collective value (non-discrimination on the grounds of sex and race) on to the existing private law structure. Yet although private law and individual rights were chosen as the preferred paradigm, there was also recognition in the White Papers that preceded the SDA and RRA that discrimination law serves important collective interests. Subsequent developments, especially through European developments, have meant that this 'public function' of discrimination law has become more explicit. Most importantly, UK discrimination law has to accommodate the

provisions of the ECHR, e.g. the equality provision in Art 14 or the right to privacy in Art 8. This has created a body of constitutional discrimination law which is now incorporated into domestic law through the Human Rights Act. These developments have led to what is sometimes described as the ‘constitutionalising’ of discrimination law. One example of this trend is the decision of the Court of Appeal in *Copsey v. WWB Devon Clays* [2005] IRLR 811. In *Copsey*, an employee argued that a contractual term of her employment contract which required her to work on Sundays was in breach of her freedom of religion under ECHR Art 9. The case would now be decided under the Employment Equality (Religion and Belief) Regulations 2003 which prohibit religious discrimination in employment and training. In *Copsey*, Justice Mummery applied the jurisprudence of the European Court of Human Rights on freedom of religion (ECHR Article 9) to the woman’s private contract of employment. *Copsey*, and Mummery J’s analysis which combines public and private law analysis, illustrate the way in which constitutional and human rights norms are increasingly being ‘translated’ into private law reasoning (Hugh Collins, 2007). Although the DLR does not want to explicitly adopt a constitutional model, there are already developments within British discrimination law which can be described as ‘hybrid’ combinations of private and public law.

A more explicit acknowledgement of the importance of ECHR and EU sources would also ensure that the DLR moves beyond the minimalist standard that it sets for itself that ‘we want to make sure that British discrimination law meets the requirements of European law’ (DLR, p. 13). British discrimination law definitions of sexual harassment have recently been held to be incompatible with the Equal Treatment Directive in *R (EOC) v. Secretary of State for Trade and Industry (Equal Opportunities Commission v. Secretary of State for Trade and Industry)* [2007] IRLR 327 HC. In this case, the EOC successfully challenged the implementation of the Equal Treatment Directive 2002/73 into British law, arguing that the Employment Equality (Sex Discrimination) Regulations 2005 did not properly implement the Directive in relation to provisions on sexual harassment and pregnancy discrimination. The High Court accepted the central claim of the EOC that the new s.4A(1) introduced into the SDA 1975 Act the words ‘on the ground of her sex’ which impermissibly imported causation into the definition: i.e. the Equal Treatment Directive provided a more generous (associative) definition than that introduced by the SDA 75 which had introduced a more restrictive causative factor into the definition of sexual harassment.

As *ex parte EOC* illustrates, there are risks in the ‘translation’ of EU law definitions into British discrimination law without a full

recognition that EU discrimination law often requires a higher standard of protection. This is likely to be a particular problem, as I argue below, for the DLR's proposals to harmonise the definitions of indirect discrimination. More generally, the DLR's minimalist and grudging approach to compliance with ECHR and EU law creates the risk of uncertainty and unnecessary litigation.

It may also seem surprising that the DLR does not raise any questions regarding the independence of the CEHR in the light of recent constitutional reform proposals to introduce greater scrutiny of public appointments and public power by Parliament (*The Governance of Britain*, July 2007, HC Cmnd. 7170). At present, the CEHR functions as a human rights and minority protection agency, but it is subject to political control over its appointments and budget (see Equality Act 2006, Schedule 1). The CEHR could be transformed into a more independent institutional structure by making it accountable to Parliament through the Parliamentary Select Committee structure and the supervision of the Joint Committee on Human Rights (JCHR). This would have the further advantage of providing a forum in which domestic discrimination law is analysed within the paradigm of existing international and European human rights obligations, e.g. ILO standards, equality provisions such as ECHR Art 14 and other human rights such as freedom of speech. The JCHR could also evaluate the operation of the Single Equality Act and provide an annual review of discrimination law. Rather than a 'once in a lifetime' review, this would institutionalise discrimination law reform as an ongoing process.

2. 'PROTECTING INDIVIDUALS FROM DISCRIMINATION'

Harmonising legal definitions

A number of the DLR proposals are likely to fulfil its goals of 'simplification, effectiveness and modernisation'. Constructive criticism needs to acknowledge these successes and suggest improvements to the law reform process.

Disability is an area where a Single Equality Act will make important contributions. In this area, discrimination law is not always aligned to the needs of those with disabilities: for example, because of the complexity of the legal rules or because legal definitions do not match the social problems experienced by individuals. The DLR proposals for harmonising the meaning of disability discrimination, as well as clarifying the issue of when and at what level the duty to make reasonable adjustments is triggered, are important. They need to be the basis of a wide ranging consultation

with stakeholders (DLR, pp. 41–43). More disappointing, however, is the DLR's treatment of the legal definition of 'disability'. The Disability Discrimination Act 1995 includes a 'capacities' test which lists a number of factors (e.g. speech, hearing, eyesight) relevant to impairment. The 'capacities test' has been difficult to implement and those with mental incapacities have often found it impossible to overcome this legal hurdle. Therefore, the DLR proposal to remove the 'capacities' test is to be welcomed. However, they could have gone further by asking for views from all stakeholders on whether 'disability' should be defined as anyone who has (or has had) a long term impairment. This definition has the support of the users of disability discrimination law (Disability Rights Commission, 2007).

The DLR's proposal to harmonise definitions of indirect discrimination to EU standards (of 'provision, criterion or practice' and 'particular disadvantage') across all the protected grounds will ensure simplification and efficiency. This reform is complemented by proposals to harmonise the test for 'objective justification' in indirect discrimination cases. Unfortunately, the new test does not adopt the precise words in the EU directive which states 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. Instead, the DLR 'translates' this test into a domestic formula that states 'a proportionate means of achieving a legitimate aim' (DLR, pp. 37–41). There is already a complex body of case law on 'justification' in constitutional discrimination law. Having different tests for 'objective justification' in EU and domestic discrimination law adds additional and unnecessary complexity. Moreover, although 'proportionate' is likely to capture most relevant factors, this strategy is likely to create a potential conflict between EU and domestic definitions of 'objective justification'. This is a risky strategy at a time when the European Commission has sent the UK formal requests requiring full implementation of the Race Equality Directive (RED), and specifically cites differences in the domestic and RED definition of indirect discrimination as the basis for potential infringement proceedings (see 'EC Infringement Proceedings' (2007) 168 EOR, 5).

One problem with the DLR approach to 'harmonisation' is that important issues of principle are sometimes buried in discussions that are presented as merely 'technical' law reform. In the section on 'simplifying exceptions', for example, there is a list of exceptions that the DLR wants to retain. Whilst the DLR proposals on harmonising exemptions is welcome, it is unfortunate that there is no discussion which critically evaluates whether the full range of exemptions are still necessary or how exemptions have been experienced by protected groups. For example, a wide ranging exception

was introduced in the Employment Equality (Sexual Orientation) Regulations 2003, Regulation 7(3), which allows ‘organised religion’ to discriminate against gays and lesbians in employment and training. This exception has been held to be compatible with EU discrimination law, (see *R (on the application of Amicus v. Secretary of State for Trade and Industry* [2004] WL 741919 (QBD)). Nevertheless, there is an argument that the existing Reg. 7(3) exception is drafted too widely and should be narrowed by introducing an explicit requirement of ‘proportionality’, as required for all derogations in EU discrimination law. It would have been more appropriate for a consultative document such as the DLR to remain more open to the need to reconsider these types of derogations and exceptions. This is particularly important in the context of the exception for ‘organised religion’ because Stonewall, a representative body for gays and lesbians, has stated that the Employment Equality (Sexual Orientation) Regulations 2003 Reg. 7(3) has ‘been flagrantly abused by some organisations who have used it to hound gay employees in a way which was certainly not envisaged when it was introduced’ (Stonewall, 2007). An additional advantage of creating a mechanism which allows the Joint Committee on Human Rights to review the Single Equality Act, as suggested above, would be that it could also consider evidence of the way in which derogations and exceptions are being experienced by individuals.

The comparator problem

The ‘comparative’ nature of discrimination law has been the subject of considerable criticism (Richard H. Fallon and Paul C. Weiler (1985); Christopher McCrudden, (1982)). In some areas, such as pregnancy discrimination, it has been abandoned altogether (Sandra Fredman, (1994)). These criticisms support the argument that comparison is too individualistic and does not take sufficient account of the social context. On this analysis, the argument goes, the focus on individuals is an insufficient response to the way in which discrimination is a structural problem. In addition, the criticism of the individualistic nature of anti-discrimination law – and its concept of direct discrimination – also draws on the idea that individuals cannot be extracted from the social context and groups within which they find themselves. A comparative, and symmetrical, concept of discrimination can in some cases perpetuate the exact harms – of hierarchy and stigma – that discrimination law and policy seek to address.

The DLR affirms its commitment to the ‘British’ model (DLR, p. 62, para. 10) and the ‘comparative’ nature of discrimination law

(DLR, para. 1.16). Yet, at the same time, the DLR implicitly recognises the limits of the comparative approach by remaining flexible in some contexts. For example, it proposes the removal of the comparator requirement in cases of discriminatory victimisation. Given that a significant number of discrimination cases are also employment cases, the differential definitions of victimisation are a further source of complexity and confusion, and this change should promote harmonisation (DLR, pp. 43–44), paras 1.60–1.62).

Equal pay

It is unfortunate that the DLR's flexible approach towards the need for a 'comparator' does not extend to equal pay law. The entrenched nature of labour market segregation, as well as the associated and related problems of lack of training and marginal working, are 'structural' problems rather than one off acts of discrimination by employers. In this context, the individual litigation model cannot address what are collective, and deeply entrenched, causes of pay inequity. The focus on individual litigation is reinforced by the conceptual structure of the Equal Pay Act which atomises pay structures: by requiring a narrow range of comparisons; by ignoring the inter-related nature of pay structures within industries; and by drawing arbitrary distinctions between the public and private sector.

It is, however, possible to make improvements to the present system through incremental law reform and by adopting a more pragmatic and purposive attitude towards 'comparison'. The nature of women's work means that they are concentrated in segregated forms of employment where the search for a male comparator is futile. In this context, challenging pay discrimination requires comparisons across establishments, sectors and industries (Damian Grimshaw and Jill Ruberry, 2007). There are two particular issues that Grimshaw and Ruberry identify which are of particular relevance in the context of discrimination law: first, the social construction of value; and secondly, payment systems. The legal regulation of sex discrimination – through sex discrimination and equal pay legislation – seeks to overcome and replace stereotypes about women. At the same time equal pay legislation which targets job markets and pay systems is a response to the structural (individual and collective) problems of job segregation and pay inequity. It is evident, that the structural problems identified by Grimshaw and Ruberry that lead to the undervaluation of women's work in theory, are becoming translated into the reality of a persistent 'gender pay gap' and undervaluation of women's work in practice. The Equal Opportunities Commission (EOC) Gender Index confirms that women continue to earn less than men in paid work. Despite thirty years of sex

discrimination laws at the EU and domestic level, women who work full time earn 17% less than men; women who work part time earn 38% less per hour than men; and women graduates still earn less than men who have the same qualifications (EOC, 2007(a); EOC, 2004). The EOC summarises the main reasons for these unequal outcomes as occupational segregation, the penalty that women face when they become mothers and the difficulties that they have in combining paid work as employees and unpaid work as care givers. Occupational segregation occurs when certain forms of employment have been, and continue to be, 'no go' areas for women; or when certain processes within the same category of work are divided into 'men's work' and 'women's work' (Sandra Fredman, 1997). This combination of factors means that women have been locked into a vicious cycle of low pay and job segregation. This cycle produced and sustained other factors which contributed to women's low pay, and socio-economic disadvantage: trade unions did not prioritise organisation in those industries that were dominated by women; and education and training which allowed mobility across segregated job markets was not available for women, who were also hampered by stereotypes about what constituted appropriate 'female' subjects and professions (Sandra Fredman, (1997), at chapters 3 and 4). The result of this structural job segregation were entrenched in the past, and they continue in the present as women are concentrated in forms of work, which are also often non-unionised and in smaller firms.

As a study of occupational segregation in 2004 revealed that 'for every 10% greater the proportion of men in the workforce, the greater the increase of wages by 1.3%, *even after other factors are taken into account.*' (EOC, 2004, at p. 2). Research also confirms that the 'gender wage gap' is primarily explained by the lesser value (measured as remuneration for human capital) which is attributed to women's jobs. Occupational segregation is a particularly important issue in the context of evaluating sex discrimination law, especially the legal regulation of pay discrimination, because of the importance of the use of 'comparators' in a determination of whether there has been unlawful sex discrimination in the areas of pay and terms and conditions of employment. (S. Horrell, 1990; P. Sloane, 'The Gender Wage Differential', 1994; Aileen McColgan, 1997).

Given the causes of women's pay inequity, a key challenge for discrimination law reform in this area is to ensure a more flexible use of 'comparison' to allow existing equal pay law to tackle the factors (e.g. job segregation) that cause the undervaluation of women's work. The DLR concludes that the use of a 'hypothetical comparator' in equal pay cases would not yield any benefits in practice, and it cites the inability of claimants to provide tribunals with

evidence of the pay and conditions of a hypothetical comparator as a particular problem (DLR, paras 3.25–3.29). The word ‘hypothetical’ in this context is misleading and obscures the fact that what is required is a more flexible and purposive approach to comparison in equal pay cases. There are a number of ways in which, despite the lack of an actual comparator, a woman could provide evidence of discrimination of her employer’s pay practice (sometimes called the ‘hypothetical comparator’) from which discrimination can then be inferred. Moreover, women in the public sector may be able to point to a man in the private sector (e.g. *Allonby v. Accrington & Rossendale College, Case C-256/01 ECJ*) who is not an ‘actual comparator’ but who is doing equivalent work.

The DLR proposes codifying existing case law to make equal pay law more ‘simple’ and ‘effective’ (DLR, para. 3.21). However, this will merely ‘codify’ the key problem which arises from the case law itself; what is needed instead is substantive law reform including a more flexible approach to comparisons in equal pay cases and the political will to hold employers responsible for ensuring equal pay for their women employees. The DLR has also followed the Women and Women’s Work Commission, 2007 and does not recommend the adoption of mandatory equal pay reviews for the private sector. Recent EOC research has confirmed that despite four decades of equal pay legislation, women’s ‘part-time pay gap’ will take a further 25 years to close and the ‘full-time pay gap’ will take 20 years (EOC, 2007(a)). The DLR proposals on equal pay contain neither the legal reforms, nor the political will, to change this undervaluation of women’s work.

Addressing multiple discrimination

Multiple discrimination is another area where the DLR has missed an opportunity to tackle discrimination and disadvantage by taking a more flexible approach to comparators. Multiple discrimination may result from an ‘overlap’ where an individual falls into more than one protected ground, e.g. race and sex. It also raises the possibility that an individual who is at the ‘intersection’ of a number of different protected grounds, e.g. race and sex, may experience discrimination in ways that cannot be captured by choosing between the existing grounds. Harmonising discrimination law to the new grounds of disability, religion, sexual orientation and age will inevitably increase the risk of these overlaps and intersections. The DLR has adopted a ‘single axis’ approach to discrimination which will leave unresolved the problems that arise from multiple discrimination. The DLR concludes that ‘We do not have any evidence that in practice people are losing or failing to bring cases

because they involve more than one protected ground' (DLR, para. 123). A more constructive analysis would have been to focus on the problems faced by individuals once they have commenced proceedings. It would then have become clear that there are difficulties in the British approach which requires that each prohibited ground is considered independently and separately, see *Bahl v. The Law Society* [2003] IRLR 799 (CA).

The case of *Burton and Rhule v. De Vere Hotels* [1997] 1 I.C.R. 1, (EAT) illustrates how the use of race as a sole category can sometimes obscure the influence of gender as a factor in discrimination. In *Burton*, two young black waitresses were employed to serve at tables at the respondents hotel at a dinner where the comedian Bernard Manning was the main speaker. During the course of the evening, Manning made jokes about the sexuality of black men and women including statements, inter alia, that black women were good at certain sexual acts. Guests at the dinner also made sexist and racist comments. The women in *Burton* filed a claim for damages, and won, by arguing that this conduct constituted racial harassment under the Race Relations Act 1976. During the legal proceedings in the tribunal and the EAT it was recognised that they could have also brought a claim for sexual harassment under the Sex Discrimination Act 1975. However, this choice of either racial harassment and/or sexual harassment (i.e. an additive approach to discrimination) fails to capture the way in which *Burton* is an example of intersectional discrimination. In this case, both race and sex were used by Manning and the men at the dinner simultaneously and in ways that cannot be separated. The language used by the discriminators reproduced not just general stereotypes about all women, it was also distinctive in its use of stereotypes about the sexuality of black women. This is an example of stereotypes about women's sexuality that are based on gender and race: both grounds are operating simultaneously to produce the problem of discriminatory harassment. The use of either race and/or sex fails to capture the distinctive way in which harassment has functioned to cause harm to ethnic minority women in this context. The use of race as the relevant category is overinclusive: i.e. the way in which the harassment has specifically used language that targets the victims as 'women' is obscured and subsumed within the category race. This is a problem of multiple discrimination because the category 'gender' or 'race' is being used to express the whole of the problem without any acknowledgement that these categories need to be refined to express the 'qualitative change' that occurs when they co-exist.

The DLR could have considered a number of responses to the problem of multiple discrimination without abandoning the British comparative model or adopting the solution of 'new analogous

grounds' developed by the Canadian Supreme Court (see *Law v. Canada* [1999] 1 S. C. R. 497; *Corbiere v. Canada* [1999] 2 S. C. R. 203). Most importantly, the DLR could have proposed allowing multiple comparisons through a clause stating that 'a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited ground' (Justice, 2006). The DLR could also have proposed removing the additional statutory requirement for a comparator to be similarly situated (RRA s. 3(4) and SDA s. 5(3)). In this way, comparison would remain relevant to establish 'less favourable treatment' but the victim of multiple discrimination would be saved the additional burden of establishing precisely the same factual characteristics as the comparator. A more imaginative use of remedies can also assist victims. Where there is evidence of multiple discrimination, this could trigger the award of extra damages: to represent the greater harm suffered by this particular victim of discrimination, to act as a deterrent or as a punitive measure against a perpetrator who has chosen an especially vulnerable person. Specially designed positive action measures can also assist individuals who fall into a number of protected grounds, particularly where there is evidence that multiple discrimination has resulted in structural disadvantage (EOC, 2007(b)). The DLR proposals fail to introduce any of these measures to address the problem of multiple discrimination.

Remedies, enforcement and access to justice

An effective system of remedies, enforcement and access to justice is a pre-condition to realising the DLR's goal of protecting individuals from unlawful discrimination. Although individuals who are victims of discrimination have the right to bring an action, the fact that they are often members of disadvantaged social groups will frequently mean that they lack the social, political and economic power to effectively manage legal proceedings. This powerlessness is reflected in a number of ways: the pressure on employees to settle claims through arbitration even if it is not in their best interests; and the failure of employers to pay awards of damages. These problems are exacerbated by the forum, rules of procedure, evidence and costs in discrimination law cases: e.g. lack of legal aid for legal representation in cases which, despite the original intention to ensure that tribunals were a 'user friendly forum', often raise complex issues of evidence and procedure. There has also been a tendency to rely on monetary compensation as the main remedy in discrimination law which ignores the structural nature of the problem. Monetary compensation is not a sufficiently proactive remedy to target discrimination

as a systematic practice which can cause harm to a whole social group. British discrimination law has also not fully used the technique of mandatory injunction which would have a number of advantages in discrimination cases: e.g. allowing the judge to balance the needs of those in the social group and wider community other than the individual litigants; and shifting the focus away from fault on to future consequences (Sandra Fredman, 2002, chapter 6). Some of these problems could be addressed through the introduction of US style class actions which would allow a whole group to benefit from a decision. It has, however, been argued that these would make it more difficult to bring cases. Even if class actions were thought to be unsuitable, a more imaginative use of remedies and case management may be able to take into account the collective and 'group' aspects of individual cases in discrimination law.

In non-employment related cases, the DLR recommends promoting early dispute resolution through ADR; and improving accessibility, efficiency and effectiveness of procedures in discrimination law cases (DLR, para. 7.2). In employment related cases, the DLR adopts the analysis of the DTI consultation paper (DTI, 2007) which also shows a strong preference for ADR: e.g. encouraging good practice in resolving disputes for those who do not resort to tribunals; a new telephone and internet advice service; and simplification and improvements in procedure and case management in tribunals (DLR, para. 7.11). It is true that disputes should be resolved early where possible and that ADR has an important role in discrimination law. However, it is also true that voluntary ADR is not always a perfect or adequate substitute for a system of individual legal remedies. The DLR promotes ADR with little concern that individuals who are from disadvantaged social groups will often lack the power to negotiate fair settlements, and this may consequently result in the 'subversion' of their rights 'through conciliation' (see Hugh Collins, 1992). Discrimination cases are often complex; and litigants from disadvantaged social groups lack the personal skills and financial resources to manage litigation without legal representation or additional support from agencies or trade unions. The DLR contains no concrete proposals for improving legal aid and the quality of legal representation where individuals choose not to use ADR. Although the DLR includes some suggestions for improving procedures and case management, it contains no systematic reforms for transforming or improving the nature of remedies in discrimination law. There are no clear proposals, for example, to increase and extend the use of re-instatement, re-engagement and recommendations in appropriate cases, thereby ensuring that domestic discrimination law complies with the EU

requirement that legal sanctions should be ‘effective, persuasive and dissuasive’ (see Bob Hepple, Mary Coussey, Tyfyal Choudhry, 2000, Recommendations 50–53).

3. ‘TACKLING DISADVANTAGE’

The DLR identifies a second goal of ‘tackling disadvantage’ for discrimination law. This is referred to throughout the consultation document in ways that go beyond mere ‘rhetoric’: e.g. ‘We need to consider what is causing this absence of certain groups from those areas of society, and whether we need to do more to address persistent disadvantage’ [...] ‘But we believe that discrimination law also has an important role to play in tackling the disadvantage experienced by people from some groups’ [...] (DLR, p. 14). The ‘positive duty to promote equality’ and ‘balancing measures’ (positive action) are presented as the key to make the law effective. The DLR is emphatic that discrimination law has a central role in this context: ‘The law underpins our approach to equality, providing a framework against which everyone can assess whether an approach is the right one. The law is the key to achieving a society in which all people can fulfil their potential, not held back by unnecessary barriers to equality of opportunity’ (DLR, p. 60).

Transforming the public sphere

The DLR embraces the use of ‘fourth generation’ positive duties to address the problems of structural discrimination. It concludes that these are ‘uniquely placed to make a difference to the life chances of people from disadvantaged groups’ (para. 5.25). At present, the positive duty covers ‘race’ (Race Relations Amendment Act 2000) as well as ‘gender’ and ‘disability’ (Equality Act 2006). As part of its strategy of harmonisation and modernisation, the DLR proposes a single public sector duty which would extend to all the prohibited grounds. The DLR’s focus on goals and outcomes (DLR, para. 5.26) rather than procedural compliance is to be welcomed (Sandra Fredman and Sarah Spencer, 2006). However, there is a risk that the DLR proposals will lead to regression and lower standards of protection. This is because the proposed single public sector duty would narrow the scope of the duty to specific priorities and objectives (DLR, para. 5.33) rather than applying across all the functions of the public authority. In relation to enforcement, the DLR unrealistically envisages that the CEHR will be able to play a key role in ensuring compliance with the public sector duty (DLR,

paras 5.78–5.83). The previous experience under the CRE suggests that this will be insufficient to ensure that public authorities comply with the public sector equality duties. The CRE, in its final assessment before it is transformed into the CEHR, has noted that large number of departments of the civil service have not complied with the existing race equality duty (Alan Travis, ‘15 Whitehall Departments named and shamed for race equality failures’, *The Guardian*, 18 September 2007). The DLR envisages some additional support for enforcement by suggesting that inspectorates should monitor progress of public authorities in complying with the public duty as part of their routine performance assessment (DLR, para. 5.89). However, the DLR has stopped short of adopting the recommendations of the Equalities Review that a single public sector duty should require public sector inspectorates to promote equality in their inspections; and that persistent equality gaps should be the subject of special investigations by the relevant inspectorates (DLR, para. 5.89).

The DLR assumes a degree of willingness on the part of public authorities, and the wider public, to implement the duties. This requires conditions in civil society that cannot be created through legal regulation alone. Nevertheless, these pre-conditions can be encouraged by clear and transparent legal structures that facilitate participation by disadvantaged groups, and the wider public, who are then able to hold public authorities to account. The DLR proposal of replacing specific duties with ‘non-enforceable duties’, as well as removing the requirements for public authorities to make available evidence and progress towards published goals (DLR, para. 5.42–5.46), is unlikely to encourage these wider changes in civil society.

Regulating the private sphere

The DLR focus on equality in the public sector sometimes obscures the fact that transforming private sector employment is an essential pre-requisite to ‘tackling disadvantage’: 80% of the workforce are, after all, employed outside the public sector (Office for National Statistics, 2005). The DLR states that the private sector and the CBI accepts the ‘business case’ for diversity (DLR, paras 6.3–6.11). There is clearly wide support within private business for voluntary equality standards (e.g. accreditation schemes). This ‘light touch’ regulation is, however, a wholly inadequate response to the vast scale of the problem of structural inequality (Equalities Review, 2007). Indeed, the DLR’s proposals acknowledge the need to move beyond these ‘light touch’ equality tool kits. The DLR identifies

two important levers for changing organisational policy and behaviour in the private sphere: public procurement and positive action is (now referred to as ‘balancing measures’).

Procurement

The DLR suggests that organisations like the CBI support greater use of public procurement as long as the guidelines are clear and there are the appropriate skills to deliver results (DLR, para. 5.99). Within the British context, this represents a dramatic shift from the 1980s when the Local Government Act 1988, section 18 was introduced as a response to requests from the CBI and employers to restrict local authority powers to impose contract compliance policies. This shift is also part of an increasing recognition that modern governments can use their ‘purchasing power’ as one way of pursuing legitimate social goals such as equality and non-discrimination (Christopher McCrudden, 2007).

The DLR could have built on this emerging consensus by strengthening the legal framework; but instead, it fails to make any significant recommendations which would require or encourage public procurement to promote equality. Of course, the DLR’s focus on greater clarity about the goals of public procurement through guidance notes, training and good practice, as suggested by the CBI, is necessary and important (DLR, paras 5.96–5.98). However, it is difficult to see why this requirement for clarity does not also extend to making crystal clear that public authorities can and should actively use public procurement to promote their equality duties (an idea which is rejected by the DLR, para. 5.93). The DLR does not propose the introduction of a specific clause which would confirm beyond doubt that the public sector duty entitles public bodies to use public procurement to promote their equality goals (Equalities Review, 2007, at p. 119). Nor does the DLR recommend the introduction of a statutory power which would allow the Secretary of State to designate that specified public authorities are required to use public procurement to promote equality where there is large scale outsourcing of their functions. The DLR also does not propose any changes to the Code of Practice on Workforce Matters In Public Sector Service (Cabinet Office, 2005) by adding substantive provisions on equality of opportunity (para. 7); specifying equality issues in the monitoring arrangements (paras 11) or by strengthening the role recognised trade unions in enforcing equality standards (para. 13). The DLR seems to have fulfilled its objective that its proposals on public procurement should ‘work well for business’ and ‘minimise burdens on the private sector and public authorities’ (DLR, para. 5.100). To this end, the DLR has failed to create an effective legal framework,

or significant incentives, for a more extensive use of public sector procurement to promote equality.

It is a general feature of the DLR that it rarely uses comparisons with other jurisdictions as the basis for reform of British discrimination law. It is, perhaps, understandable that the DLR does not want to stray too far away from the existing British model. Although comparative material is sometimes invaluable, solutions need to remain sensitive to the social and political formations out of which prejudice and discrimination emerge. Moreover, law reform should not unproblematically transplant legal concepts and rules from other jurisdictions without recognising the limits of the existing doctrine of British statutes and case law. Nevertheless, comparative analysis can sometimes be invaluable to reveal how discrimination law can be made more effective. The DLR's analysis on procurement is one area where comparisons would have revealed that US and Canadian approaches provide a more detailed framework for procurement and contract compliance. The Canadian legislative framework, for example, introduces a systematic process for gathering information, as well as consultation between employers, trade unions and employees, as the basis for introducing contract compliance. The Canadian Employment Equity Act 1995 has a different focus to the British model because of its use of administrative bodies and its emphasis on negotiated settlements with employers. Nevertheless, the Canadian approach provides an interesting example of how legal regulation can create the optimal conditions for encouraging the use of procurement to advance the goals of discrimination law. The Canadian Human Rights Commission has a role in enforcement which includes powers to direct employers to remedy any non-compliance (see Part II of the Act). Employers can request that the Commission set up an Employment Equity Review Tribunal if it believes that the direction is unfounded; or the Commission can request the convening of a special tribunal if it believes that direction has not been implemented (s.28). This tribunal is an independent quasi judicial body with the power to order, confirm, vary or rescind the Commission's direction, and to make any order it considers appropriate (s.30). Decisions of the tribunal can be the subject of judicial review in federal courts (s.30). Moreover, the decisions of tribunals can be translated into orders of the Federal Court in the context of enforcement (s.31).

In terms of the content of the duty on the employer, the Canadian contract compliance regime puts into place requirements on employers in a number of stages. First, the employer is required to understand the issues in their context: by conducting a workforce survey to ascertain the proportion and position of women, aboriginal, disabled and 'visible minority' workers; by undertaking a

‘workforce analysis’ to determine the degree of under-representation, if any, of the groups within the workforce; and also by undertaking an ‘employment system’s review’ to determine what, if any, barriers ‘prohibit the full participation of designated group members within the employer’s workforce’ (sections 5 and 9). Second, the employer is required to develop a response to the problems identified. This requires developing an ‘employment equity’ plan which includes: positive policies and practices to accelerate the integration of designated group members in employers’ workforces; elimination of employment barriers pinpointed during the employment systems review; a timetable for implementation; short term numerical goals; and longer term goals (section 10). Third, the employer is required to monitor the implementation of the plan, reviewing and revising it as necessary (e.g. sections 12 and 13). There is also a record and reporting system. Section 17, for example, requires ‘record keeping’ and producing an employment equity report; and section 19 makes clear that these reports should be made available for public inspection. The Canadian contract compliance regime is likely to cover a wide range of employers: it covers contractors with more than a hundred employees; and it applies in relation to contracts worth at least \$200,000. Although the Canadian system of contract compliance puts into place a detailed regime with significant powers of enforcement, there is also a mechanism to balance the needs of employers with the goals of discrimination law and equality. So, for example, there is a provision that the Commission may not give a direction, and no tribunal may make an order that would cause undue hardship on an employer, require an employer to hire or promote unqualified persons, or impose a quota on an employer (meaning a requirement to hire or promote a fixed and arbitrary number of persons during a given period, s. 33). Another noteworthy feature of the Canadian contract compliance regime is that it creates a duty on employers to consult with employees by putting into place equity plans (section 15 of the Canadian Employment Equity Act) in a way that is similar to the increasing requirements for social dialogue in EU public procurement law. Although the Canadian system is distinct because it depends on the greater use of enforcement through arbitration, it would have provided the DLR with a useful example of how a legislative scheme can encourage the greater use of procurement to realise the goals of discrimination law.

Balancing measures and positive action

In relation to balancing measures, the DLR vision is to create a more flexible ‘legal space’ for private organisations who are ‘seeking to make progress towards their goals of tackling under-representation

and disadvantage to be able to use a wider range of voluntary balancing measures' (DLR, para. 4.47). There is an underlying assumption of consensus between all parties about 'tackling under-representation and disadvantage'. Whilst clear guidance by the CEHR is useful, the DLR has failed to take this opportunity to create the optimal conditions for the effective use of positive action in the private sector. What is lacking is an over-arching vision of how behavioural and organisational change will take place. The DLR assumes that once the private sector understands what constitutes permissible positive action there will automatically be willing compliance. However, even if an organisation is committed to diversity, the DLR proposes no coherent framework within which the organisation can identify its precise 'internal problem' as a first step towards designing and adopting balancing measures. One vision for the private sector would be to mirror the approach taken in the public sector with its focus on participation, evidence gathering and designing solutions 'within the organisation'. The DLR rejects private sector duties to promote equality (DLR, para. 6.13) and the Northern Ireland model of a statutory requirement for some employers to monitor their workforce (DLR, para. 6.11). Instead, the DLR suggests that existing reporting requirements under the Companies Act 2006 could be extended to include information about the company's employees and social issues (DLR, para. 6.12). This light touch 'equality check tool' provides some evidential basis for employers who are already committed to the goals of non-discrimination and diversity. This system does not, however, contain any incentives for individuals and organisations for whom 'equality' and 'diversity' are not a priority.

The DLR could have strengthened its proposals by supporting periodic reviews of employment practices, which are agreed and conducted in consultation with employees and representative trade unions (B. Hepple, M. Cousse, T. Choudhry, 2000, Recommendation 28). The DLR's reluctance to introduce a strongly enforceable private sector duty or follow the Northern Ireland model of reporting and enforcement (DLR, para. 6.11) is, perhaps, understandable because of the larger scale of the private sector in Britain. The precise details of how periodic reviews should be enforced could have been left as an issue for consultation; and a 'lighter touch' regulatory scheme may well be more appropriate for the British context. The main point, however, is that the DLR should build on the wide support for 'diversity' that it claims exists in the private sector. To this end, the DLR should have explicitly consulted on developing a framework for employers, employees and trade unions to work together to (i) gather base line evidence of employment practices; and then to act on this information by (ii) jointly drawing up an employment equity

plan which could include ‘balancing measures’. This process is more likely to result in the optimal use of balancing measures than the option (which the DLR rejects) of giving the CEHR a role in approving positive action plans (see DLR, para. 4.51). Employment equity plans agreed between employers, employees and their representatives could also usefully accommodate the needs of parents and carers (e.g. through the right to request flexible working in the Work and Families Act 2006), without introducing a right to non-discrimination on the grounds of parenting or caring responsibilities which the DLR rejects as unnecessary legal regulation ‘cutting across the balance of existing provisions’ (DLR, para. 8.20).

CONCLUSION

The DLR proposals for a Single Equality Act will go some way towards achieving its first goal of protecting individuals from discrimination. The DLR’s second goal of ‘tackling disadvantage’ is likely to prove more elusive. This is not because of complexity or inefficiency or because there are new ‘modern’ conditions requiring a re-configuration of discrimination law in the twenty first century. Rather, the ability of discrimination law to tackle disadvantage depends on more ‘old fashioned’ legal and political choices: determining whether, and how far, law can intervene to correct asymmetries of power; and using collective political action on behalf of individuals who are excluded. Moreover, many of the essential pre-conditions for tackling disadvantage (e.g. wider legislative and social policy initiatives that address the political, social and economic causes of structural disadvantage; and strengthening collective action and civil society) lie outside the sphere of discrimination law. Paradoxically, then, the ability of discrimination law to ‘tackle disadvantage’ requires a more modest agenda for ‘law’ than is envisaged by the DLR. A Single Equality Act may ensure that in some respects British discrimination law becomes ‘simple, effective and modern’. However, the failure of the Discrimination Law Review to provide anything beyond ‘light touch regulation’ to address the problems of discrimination and disadvantage also confirms the conclusion in the celebrated novel *The Leopard* – that ‘everything must change, so that everything stays the same’.

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