



Government
Equalities Office

Putting equality at the heart of government

**UK Consultation on the
European Commission
Proposal for an Equal
Treatment Directive**

**Government
Summary of
Responses**

January 2010

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Introduction

In July 2008 the European Commission (EC) proposed a draft Directive to prohibit discrimination on the grounds of religion or belief, disability, age and sexual orientation outside of the areas of employment and vocational training. The EC also provided an impact assessment of the draft Directive which accompanied the proposal.

The Commission committed itself to examining the case for extending the legal framework based on Article 13 (of the Treaty establishing the European Community) in 2004 when it published a Green Paper entitled 'Equality and non-discrimination in an enlarged European Union'¹, and continued to confirm commitments in 2005 with the framework strategy on non-discrimination and equal opportunities for all. The European Year of Equal Opportunities for All was held in 2007 and in 2008 the legislative work programme continued.²

The UK Government supports the aims of the Directive to extend protection on the above grounds and believes that the Directive can contribute to a fairer and therefore stronger Europe through consistent minimum protection across all Member States.

The UK already has domestic legislation prohibiting discrimination on the grounds of disability, religion or belief and sexual orientation in the provision of goods, facilities and services, education, the exercise of public functions and the disposal and management of premises. The Equality Bill, published on 27 April 2009, will outlaw age discrimination against those aged 18 or over by those providing goods, facilities and services and exercising public functions in the future. The introduction of similar protection is still under consideration in Northern Ireland.

However, there are ways in which the UK's legislation differs from the proposed Directive, including the following:

- The UK has not legislated explicitly to prohibit harassment on the grounds of sexual orientation and religion or belief in the fields which are proposed in the Directive.
- The draft Directive would prohibit discrimination on the grounds of age in the provision of goods and services for those aged under 18.
- Anti-discrimination legislation in Great Britain does not require manufacturers or designers of goods to make adjustments in anticipation of differing access needs whereas there has been some suggestion that this would be captured in the Directive.

¹ COM (2004) 379.

² COM (2007) 640.

The UK Government will be seeking to agree a Directive that is clear and certain in legal terms, respects the division of competence between Europe and Member States and is sufficiently flexible to allow Member States to have appropriate exceptions. The UK Government will consider detailed issues of transposition times when the detail of the Directive is clear.

The UK Government issued a consultation paper to consult in particular on the impact of the draft Directive in those areas where its proposals are, or might be, at variance with the current and proposed law, and on the impact of the proposals on individuals, businesses and others.

The consultation paper included specific questions on Article 2 – Concept of discrimination; Article 3 – Scope; Article 4 – Equal treatment of persons with disabilities; and Article 15 – Implementation. Respondents were also invited to respond on any other aspects of the draft Directive that they felt relevant.

The UK Government further used the 12-week consultation period to invite stakeholders to discuss the proposals in more detail with leading officials from the Government Equalities Office. Officials also attended public events run by stakeholders to discuss the proposals when invited.

The latest set of Presidency drafting suggestions can be found in Annex A. While drafting suggestions are normally confidential, in the interests of transparency, the Swedish Presidency has made this a public document. It is therefore possible to see how the text has developed since the original proposal published in July 2008. It should be noted, however, that these are only proposals and will change during further negotiations.

The breadth of the draft Directive meant that the 12-week public consultation generated responses from a wide variety of individuals and from organisations in the public, private and third sector. Altogether the UK Government received over 2,000 responses which are summarised in the following sections of this document.

As is standard in government summaries of responses to public consultations on EU legislation that are still being negotiated, we have not set out in this document the conclusions that we have reached as a result of the consultation. To do so runs the risk of compromising our negotiations in Europe.

Summary of Responses

A large majority of organisations that responded to the consultation welcomed the principle of introducing further anti-discrimination legislation in Member States.

We received over 2,000 responses to the consultation exercise. Of these over 1,900 were from individuals with religious views, expressing concern about harassment provisions and implications for freedom of speech. The remaining responses were from organisations representing equality groups, trade unions, religious organisations and businesses.

Age

I Finance and insurance – industry responses

The vast majority of financial services firms and insurers that responded to this consultation welcomed the Commission's efforts to 'ensure that consumers are not discriminated against in the provision of goods and services' (Association of British Insurers (ABI)). Respondents were concerned that the Directive would apply to access to insurance and/or financial goods and services and discrimination on the grounds of age and disability.

The majority of respondents saw premiums based on the assessment of risk as fair and commented that age and disability are just two amongst a range of factors that form a vital part of risk assessment in the finance and insurance sector.

The British Insurance Brokers' Association (BIBA), for example, thought it was legitimate to give discounts on insurance when consumers are less of a risk, even if the risk is related to age. They commented that an 18-year-old is three times more likely to claim on their motor insurance than a 50-year-old and that the average claim for an 18-year-old is £4,400 compared with £1,459 for a driver aged between 30 and 59 years.

The British Vehicle Rental and Leasing Association (BVRLA) considered it crucial on road safety grounds to be allowed to continue to treat both younger (18–24 as defined by the BVRLA) and older drivers (75 and over as defined by the BVRLA) differently on the basis of their age as statistical evidence shows that younger and older drivers pose a high road risk. Companies do not generally rent vehicles to those aged under 21 and do not rent certain types of vehicles, due to their size or category, to those aged between 21 and 25: 'younger drivers not only have less experience but tend to lack the level of maturity necessary to ensure the highest level of driving standards is met'. They later continued '... death rates for 18–24-year-old drivers typically remain more than double that of older drivers' (BVRLA, statistic from OECD 2006). They said that, 'declining cognitive abilities and slower reaction speeds mean that older drivers can have particular difficulty navigating complex driving situations...'.

Financial services respondents said that not allowing age and disability to continue to be determining factors of risk in the industry would harm both consumers and businesses. Age and disability were, they commented, legitimately taken into account when giving advice on products such as investments, equity release, and pension accumulation. Prudential pointed to the risk of a chilling effect, with the Directive leading to 'the removal of

provision and development of products aimed at meeting the needs of particular age groups’.

Almost all respondents on this topic argued that premiums could rise across the board to pay for the increased risks if age and disability could not be used to the disadvantage of lower risk consumers. Premiums and prices could also rise due to firms having to apply increasingly detailed pricing criteria, for example using single year age points rather than age bands. Many respondents also said that possibly changing how risk was assessed during a downturn could increase burdens on businesses. Some respondents saw the proposed Directive as Europe inappropriately telling Member States how to assess risk, while pointing to an international reputation for excellence in this area in the UK. Some respondents said that assessing risk using age protected consumers from borrowing funds which they would not be able to afford to repay and a cycle of probable debt.

Organisations representing the financial and insurance sector did not believe that there was a market failure for older or younger people in the UK and therefore that harmful discrimination which required legislation was not occurring. Prudential, for example, and many other respondents felt that *‘the Directive should only address those areas where there is clear evidence of consumer detriment’*. The Investment and Life Assurance Group (ILAG) stressed that the industry was supporting and promoting fair practices itself and that the Financial Services Authority (FSA) programme, Treating Customers Fairly, had recently been adopted by the industry.

Some respondents believed the potential negative impact of the legislation to be such that insurance should be exempted from the Directive altogether.

Some respondents not advocating an outright exemption welcomed the principle of Article 2.7 in the Directive as it sets out to permit proportionate differences in treatment where the use of age or disability is a key factor in the assessment of risk in financial services. Financial and insurance sector respondents favoured the French Presidency text proposal for Article 2.7 which stated that proportionate differences in treatment *‘... shall not be considered as discrimination for the purpose of the Directive’* on grounds of clarity.

Prudential called for a clear Directive and text that enabled projections of future changes to mortality and morbidity to be used. They suggested that the Directive should permit relevant actuarial principles to be used in addition to actuarial and statistical data to achieve this. There were also

calls for the Directive to specifically mention legitimate reasons for setting specific age limits, for example for pension products.

Callcredit Limited, a consumer credit reference agency, expressed concern that the use of the word 'proportionate' would require a different approach to credit referencing which would be difficult to establish and would no longer allow commercial confidentiality about their data and how they used it. Callcredit felt that Article 2.7 should be framed in such a way that it provided flexibility to credit reference agencies and showed that it is how the credit assessment is formed that is of importance, rather than its content.

2 Finance and insurance sector – equality groups

Some respondents including the Equality and Human Rights Commission (EHRC), the Equality Commission for Northern Ireland, the Older People's Advocate for Northern Ireland, the Equality and Diversity Forum (EDF), the Discrimination Law Association (DLA), the Royal National Institute of Blind People (RNIB), the Royal National Institute for Deaf People (RNID), Sense, Leonard Cheshire Disability and The Guide Dogs for the Blind Association did not support the exception in the proposed Directive for financial and insurance services in its current form. They were concerned that the exception as drafted would allow discrimination to continue and said that stereotypes were widely used in financial services.

'Current discriminatory practices in banking and insurance that disadvantage young people, older people and disabled people continue with little change. Such practices are based on often un-tested stereotypes.' (DLA)

'There are many examples of discriminatory practices on the basis of older age in the UK financial services market.'
(The Equality Commission for Northern Ireland)

'A deaf man was refused to hire a car in Dublin because the car hire company said the insurance would not cover him due to his impairment. However there is no higher risk of accidents when one is deaf.' (Joint response from RNIB, RNID, Sense, Leonard Cheshire Disability and The Guide Dogs for the Blind Association)

Many organisations, including Age Concern and Help the Aged, argued that harmful discrimination on the grounds of age in insurance and financial services was occurring. An example they gave was:

'Many insurers operate upper age limits for motor and travel insurance, leading to older people being rejected out of hand for insurance cover. Age thresholds, such as 75 or 80, often lead to unreasonable and disproportionate increases in premiums which do not appear to reflect a sudden increase on risk.'

They agreed there should be specific exemptions for differences in premiums for different age groups, only when backed by actuarial evidence, but opposed allowing the 'provision of insurance for certain age groups only'.

The Age Concern and Help the Aged response suggested replacing the word 'key' in Article 2.7 with 'determining' to allow for clearer judgements. They saw the phrase 'actuarial principles' as too vague and allowing companies to 'make decisions on the basis of non-verifiable commercial strategy'. EDF also favoured 'determining' over 'key' as a 'determining factor must be one which is overwhelming in its impact, whereas a key factor, while important, can be one of a number of different factors being considered'.

Some respondents thought that differences in treatment on grounds of age and disability should be allowed only if the provider published up-to-date actuarial or statistical data relevant to each risk area, the approach taken in the Gender Goods and Services Directive.

3 Healthcare

The draft Directive would prohibit discrimination on the grounds of age in the provision of goods and services, including healthcare in so far as it is within Community competence. This generally echoes the Government's commitment to outlaw age discrimination in services and public functions, including healthcare, in the Equality Bill, which is currently before Parliament.

Equality stakeholders, particularly those with an interest in age, strongly favoured the Directive applying to healthcare, providing examples of where they believed discrimination is currently taking place. Whether healthcare should be within the scope of the Directive is considered on page 43.

Help the Aged and Age Concern said that older people experienced healthcare treatment based on age and not clinical need, and that there was strong evidence of this in services for cancer, stroke and cardiology.

Age Concern and Help the Aged claimed that age discrimination in health and social care manifests itself in three ways:

- a) Explicit age-based policies: examples were given of two key age-based barriers remaining at the age of 65 – these relate to mental health services and funding and assessment processes for social care.**
- b) Front-line decisions and behaviours: an example was given of clinicians acting as gatekeepers to treatment and failing in their assessments of older people.**
- c) Organisational decisions: they claim that services that primarily benefit older people are often given low prioritisation of funding – as an example, end-of-life care services.**

Further details of the responses on the application of the proposed Directive in relation to healthcare can be found on pages 43–45.

4 Under-18s

The UK Government's policy on applying a ban on age discrimination when providing services and exercising public functions to under-18s and to the provision of education in schools was set out in the UK consultation document on the EU Directive. In summary, the UK Government does not believe that extending age discrimination legislation to children is the best way to promote their well-being and help young people thrive. Age is a good indicator of a young person's level of development and need for protection. It significantly influences how we should engage with them, the services they require and the levels of personal responsibility and freedoms they should be afforded – something that is not generally true for adults. Services for children are nearly always tailored in an age-appropriate way and the basic principle of age discrimination legislation, that people should not be treated differently on the basis of their age, is rarely appropriate.

The consultation document did not specifically invite views about the application of age discrimination provisions to people aged under 18 because the Government had recently consulted on the subject in the 2007 Discrimination Law Review. On reviewing the evidence presented then, most examples of poor treatment put forward came from negative attitudes towards children, a general low opinion and mistrust of young people and a lack of age-appropriate services for children.

The Government's view is that these matters are best dealt with outside the scope of age discrimination law.

We invited organisations to submit evidence or views on any part of the Directive, and some organisations covered the subject in their responses.

11 MILLION, the Northern Ireland Commissioner for Children and Young People, the Equality and Human Rights Commission, the Children's Rights Alliance for England (CRAE/Young Equals) and the Scottish Council for Voluntary Organisations were among several organisations that wanted age discrimination protection in the provision of goods and services to apply to under-18s and within schools and therefore be within the scope of the Directive.

These organisations disagreed that age discrimination legislation is rarely appropriate for the treatment of children. Some organisations representing children thought that the Government's policy may not be compatible with international and European obligations on the rights of children. They did not agree that excluding under-18s from a ban on age discrimination in services was necessary to protect age-appropriate and age-targeted services for children. They said it was an established principle in anti-discrimination legislation that people can be treated differently, pointing to disability discrimination law which requires reasonable adjustments to be made. 11 MILLION said:

'Disability anti-discrimination legislation, for example, does not deny the different needs and capabilities of people with disabilities; rather, it operates to ensure that disabled individuals do not receive less favourable treatment on account of their disability. A parallel argument may be made with regard to children – age discrimination legislation would not deny different treatment for children based on their varying needs and capabilities, but would outlaw unjustified discrimination or less favourable treatment based on age.'

The Government, however, takes the view that it is inappropriate to refer to disability law in this context as the disability provisions work only in one direction – they outlaw less favourable treatment of disabled people and require reasonable adjustments to be made to meet their specific needs. They do not give any rights to non-disabled people and non-disabled people therefore cannot claim that they are being treated less favourably than a disabled comparator.

11 MILLION and Children in Scotland commented that the Government accepted that age discrimination legislation could cater for different age-based treatment in relation to older people:

'It [the proposed age discrimination prohibition] will not affect the differential provision of products or services for older people where this is justified – for example, free bus passes ... we want to make sure we only outlaw unjustified discrimination without unintentionally stopping things that are beneficial to particular age groups.'

GEO (2008) *Framework for a Fairer Future – the Equality Bill*, as quoted in 11 MILLION's response.

11 MILLION, CRAE/Young Equals and other organisations representing children saw the 'objective justification' test included in the Directive³ as a reasonable way of dealing with any need for differences in treatment, and therefore argued that an exception in the Directive for those aged under 18 was unnecessary. They did not see the need to treat children in a way appropriate to their age as a reason to seek to exclude under-18s from the age discrimination elements of the Directive.

The majority of these organisations thought it could send a negative message across Europe if the Directive was agreed with the specific exclusion of those aged under 18 from age discrimination protection. For example, the Scottish Council for Voluntary Organisations commented:

'While there may be some other mechanisms for redress for young people who experience discrimination in the UK, we are concerned that rejecting a universal application in the EU Directive will limit the potential to enhance protection for young people in other EU countries that may not have the same opportunities/mechanisms to combat discrimination in the provision of goods, facilities and services, education and provision of public functions.'

Several of these organisations submitted or referred to evidence about children and young people's experiences to support their view that there should be legislation to ban discrimination against children and young people because of their age. Examples included mental health services for 16- and 17-year-olds; difficulties accessing public transport; poor treatment in restaurants (young people being refused service until they can prove that they can pay); and difficulties accessing leisure facilities and legal services.

³ That differences in treatment will not constitute discrimination if they are justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

They mentioned:

- shop windows displaying signs that read ‘no children allowed’;
- ‘mosquito’ devices installed outside shops to deter children and young people from congregating in certain areas;
- the absence of a minimum wage for 16- and 17-year-olds; and
- curfew orders.

As an example of less favourable treatment of older children in healthcare⁴, CRAE/Young Equals pointed to a quote included in a 2007 report commissioned to stimulate debate about young people with mental health difficulties who have to be admitted to adult facilities:⁵

‘The children’s ward wouldn’t accept her because she was over the age of 16, the adult ward wouldn’t accept her because she was under 18 and so we had a hell of a game trying to find a ward for her. In the end she ended up going on a geriatric ward for the night.’

On young people’s access to justice, CRAE/Young Equals said that children often do not contact social services or the police even when they have been subjected to serious assault. In support, they commented that a literature review of research that had been carried out between 1990 and 2003⁶ showed that police often did not listen to children or speak to them directly when they called for help.

CRAE/Young Equals drew on the following sources in commenting on access to public services:

- research carried out by children and young people themselves, published in 2001,⁷ which they believe showed children being unfairly restricted in their access and membership to council-run sports facilities; and

⁴ 11 MILLION, the Children’s Commissioner for England (January 2007) *Pushed into the Shadows – young people’s experience of adult mental health facilities*. London: Office of the Children’s Commissioner.

⁵ Note: Section 31(3) of the Mental Health Act 2007, which comes into force in England in April 2010, now places a duty on hospital managers to ensure that patients aged under 18 are treated in an environment that is suitable having regard to their age (subject to their needs).

⁶ Gorin, S. (May 2004) *Understanding what Children Say: Children’s experiences of domestic violence, parental substance misuse and parental health problems*. York: Joseph Rowntree Foundation.

⁷ Investing in children (2001) *Leisure research report, Respect*.

- a report by the Chartered Institute of Library and Information Professionals (CILIP), published in 2002, which explored the future of libraries for children and young people and considered how accessibility could be improved for them.⁸

They concluded that there was widespread evidence of children being unfairly refused entry to public services such as libraries, leisure centres, museums and art galleries.

The DLA thought that excluding under-18s from the age discrimination provisions of the Directive would cut across a broad aim of the Directive, that of making EC law clear and consistent across all grounds. They also thought it would create a new gap and introduce a new hierarchy of rights across Europe.

Generally speaking, the comments on this issue were from children's advocates who wanted the Directive to provide protection to under-18s from unfair or less favourable treatment on grounds of age in relation to the provision of goods and services. However, there were some calls for the exclusion of under-18s from respondents that were generally concerned with how the application of age discrimination legislation would apply to those aged under 18.

5 Accommodation and group holidays

The British Holiday & Home Parks Association (BH&HPA) and some other organisations were concerned that the Directive might prevent age restrictions for holiday homes or accommodation, for example on under-18s or groups of 16–25-year-olds.

On over-18s holidays, respondents argued that this was a significant industry, alternatives were readily available for under-18s and the practice was a legitimate business aim rather than harmful discrimination.

'If the EU bans adult-only holidays, it creates enormous competitive disadvantage for Europe's tourism industry; customers will simply take their adult-only holidays outside the EU borders.' (BH&HPA)

Respondents also saw preventing stag and hen parties from renting caravans or holiday homes as a legitimate business practice, as the *'overwhelming majority of holiday parks cater to the family market and as such seek to protect*

⁸ CILIP (2002) *Start with the child – a radical new vision exploring the future of libraries for children and young people*. London: CILIP.

these families and their children from the exuberance of large groups of people who, experience demonstrates, choose to book a holiday together, often to celebrate through the consumption of quantities of alcohol.'

These respondents supported under-18s being excluded from the age discrimination provisions of the Directive.

6 Retirement homes, mobile home parks and social housing

Some housing respondents were concerned that the Directive would prevent age restrictions in the allocation of retirement homes and residential mobile home parks. These usually had minimum age limits (50 or 55 for mobile home parks and 65 for retirement villages), which were often the reason they existed. Respondents thought it would be both patronising and harmful to deny older people the choice to live in such communities, which were also well placed to provide specialist services and daytime social contact. Respondents were also concerned that it would no longer be possible to maintain age limits on people to whom these properties could be sold.

'Consider the park home owner who bought a home on a park with the benefit of legitimate age rule in 2009. The home owner could, five years later, with a ban having been imposed that would negate the rule, find themselves in a completely different housing environment.'
(BH&HPA)

The Residential Landlords Association argued that there were legitimate business reasons for not renting premises to certain age groups. These included the legality of tenancy agreements with under-18s, safety of young children and maintaining the character of student accommodation.

Social housing providers also thought age limits should be possible. The National Housing Federation said:

'The Directive should allow differential treatment in order to meet the legitimate aim of providing specialist housing for older people to remain independent in their home, preventing the need for more intensive support and care provision for longer and ensuring older people do not become socially isolated, and providing specialist support for younger people in a safe environment.'

Organisations that provide age-specific housing, from both the private and social sector, saw these measures as proportionate and beneficial and thought they should not have to be objectively justified on a case-by-case basis.

Harassment

1 Individual responses against harassment provisions

The overwhelming majority – 95% – of all of the responses received as part of this consultation were from individuals. All these individual responses expressed concern that extending free-standing protection against harassment on the grounds of religion or belief and sexual orientation would result in a restriction of their ability to proselytise their faith in a manner that they saw fit. Responses were also concerned that an extension of harassment provisions might mean that they would no longer be able to refuse a service to someone if they deemed that person to be at odds with their Christian faith:

'If a Catholic event takes place at a venue that offers double, twin and single-bedded rooms, the teaching of the Church would require that double-bedded room were only available to married couples.'

This represents a common misunderstanding of the extension of discrimination legislation, because it is already against the law in the UK to directly discriminate against someone because of their religion or belief, sexual orientation, disability, gender (which includes gender reassignment) or race in the provision of goods and services. This means, for example, that it is already against UK law for the owner of a bed and breakfast business to refuse to provide a room to a gay couple. This was another concern expressed in many of the individual responses.

2 Organisation responses against harassment provisions

Some religious organisations expressed a significant degree of concern over the proposal to extend the harassment provisions on the grounds of sexual orientation and religion or belief. The overwhelming majority of these responses were from Christian organisations that, in common with the letter-writing campaign, were concerned that any extension of harassment provisions on the above-mentioned grounds could have severe implications for freedom of speech and restrict their ability to proselytise their faith.

Many respondents from this sector felt that the text, as drafted, gave cause for concern due to its vagueness in drafting:

'The peril of the harassment provision lies in its inherent vagueness. The language proscribing an 'intimidating, hostile degrading or offensive environment' invites abuse.' (Christian Concern for Our Nation (CCFON))

The fear that was commonly reported was that harassment legislation on these grounds could result in frivolous claims:

'Various pressure groups are likely to use the provisions of the Directive to curtail the expression of views they disagree with by the simple expedient of declaring themselves to be offended. Homosexual groups campaigning for same-sex marriage may declare themselves offended by the presentation of the Catholic Church's moral teachings on homosexual acts; Catholics may declare themselves offended by a 'Gay Pride' (quotations their own) march.' (Catholic Bishops' Conferences of England, Wales and Scotland)

A further concern set out was that the harassment provisions in the Directive could hamper the ability of religious organisations to provide services in a manner that they see fit:

'Certain faith communities wish to run educational or welfare facilities for their members with the result that members of such communities would be given preference in the allocation of space and resource. We therefore welcome the concessions afforded by current UK legislation in this regard, and regard as of the utmost importance the maintenance of a position in the EU Directive.' (The Board of Deputies of British Jews)

'What the Church is seeking from this Directive is simply the right to maintain its own teaching and activities with integrity, according to its own ethos.' (Catholic Bishops' Conferences of England, Wales and Scotland)

'The current combination of provisions contained in domestic equality legislation ... already achieve a carefully worked-out balance that ensures that schools meet the needs of all their pupils while allowing faith schools to teach in a manner that is consistent with their religious ethos. It is essential that nothing in the Directive should undermine that position.' (The Archbishops' Council)

Religious organisations stated that they wished to avoid instances where they would be forced to take religious artefacts down from walls in places where they provide a service, discontinue the practice of leaving bibles in public places or discontinue distributing leaflets in common areas or to people's homes for fear of a member of the public saying that they had been harassed. Moreover, these organisations made it very clear in their responses that any restrictions in how they proselytise their faith would be

an infringement of their human rights and that the ability to talk at liberty about one's faith must be protected at all costs:

'The rights of freedom of religion and freedom of expression under Articles 9 and 10 of the European Convention on Human Rights are of fundamental importance in a democratic society – and doubly so in one which prides itself on tolerance and diversity.' (Catholic Bishops' Conferences of England, Wales and Scotland)

'The right to freedom of expression and freedom of speech are vital to the preservation of our democracy. If promulgated, the Directive undermines such values while creating intolerance. Since the Directive allows individuals to easily allege offence, the ominous threat of legal action chills expression of legitimate viewpoints related to, but different than, another's lifestyle or belief.' (CCFON)

Another commonly cited concern was that such important decisions were being made at a Europe-wide level:

'Each Member State ought to be competent to issue its own equality legislation, and the churches in the UK have for several years been conducting a robust dialogue around UK equalities legislation ... the EU should leave Member States to determine their own discriminations laws instead of intervening in this highly contentious and sensitive area.' (Salvation Army)

'The EU cannot use blanket legislation to deal with all 27 EU states, many of whom have widely differing religious and social cultures.' (Spring Road Evangelical Church and Mayflower Christian Bookshop Charitable Trust)

'The draft Directive deals with extremely controversial issues, raising fundamental concerns about religious freedom and balance of competing rights. The nature of the subject matter makes an EU-wide Directive the wrong mechanism for legislating in this area.' (The Christian Institute)

It wasn't only religious organisations that didn't wish to see harassment provisions extended for fear of freedom-of-speech restrictions. The National Secular Society also raised concerns about the proposal to extend harassment on the grounds of religion or belief and sexual orientation. They felt that existing protection in public order offences and the Racial and Religious Hatred Act 2006 are sufficient in protecting any behaviour that

is serious enough to count as harassment, and stated that *'it is absolutely essential that the right to free expression be protected, including the right to question and criticise beliefs'*.

3 Organisation responses supportive of harassment provisions

There were, however, some organisations strongly in favour of the extension of the harassment provisions on the grounds of religion or belief and sexual orientation, and did not agree with the Government's assertion that sufficient protection already existed in the UK due to existing legislation:

'The consultation paper's arguments against prohibition of harassment on the grounds of sexual orientation and religion or belief are perplexing. Were direct and indirect provisions adequate to address the problem, it is hard to see why harassment provisions are necessary for other grounds.' (National AIDS Trust)

'Protection from harassment has been specifically developed because indirect and direct discrimination have been found inadequate to meet the needs of people who are insulted or abused because of their race or sex.' (EDF)

Some organisations, including EDF, the DLA and the Scottish Disability Equality Forum (SDEF), argued that the harassment provisions are necessary to cover what they consider to be a gap in protection in current discrimination legislation. Specifically, the concern was the fact that protection against direct discrimination requires the complainant to have a comparator. A hypothetical example was submitted that sought to demonstrate where the proposed harassment provisions would provide additional protection⁹ and the Government was asked to consider a number of scenarios that demonstrated the need for additional protection:

'A Muslim man or a gay man goes in to a bar to watch a football match and overhears Islamophobic or homophobic remarks by customers about some of the footballers which leads him to complain. This falls within the harassment definition, but the definition does not extend to religion or belief, or sexual orientation. If he then complains to the bar manager about the remarks made by the customers and then nothing is done by the bar manager, he has no remedy. He

⁹ More examples are provided in the next section of this document under question 1 (see page 31).

cannot claim religion or belief or sexual orientation discrimination unless it could be shown that the bar manager would have treated a complaint by a straight person or a non-Muslim person more favourably. But if the bar manager is dismissive about all complaints, perhaps saying that he does not want to become involved, there is no discrimination. This is why a remedy for harassment is needed.' (EDF)

Not only did organisations such as the EHRC, the Communication Workers Union (CWU), Stonewall, EDF and the Scottish Disability Equality Forum submit examples of where these additional harassment provisions would help to close a gap in UK protection, but they also felt it was absolutely necessary to include them in the Directive in order to strengthen much-needed protection for gay men and lesbian women across Europe.

Some organisations strongly felt that the UK should support an ambitious Directive. Two arguments were presented to support this. The first was that there should be no hierarchy of rights (either in the Directive or the Equality Bill), and in their view omitting to provide harassment protection related to sexual orientation and religion or belief in itself constituted an act of discrimination.

'We do not believe that there is any justifiable reason as to why lesbian, gay and bisexual people should enjoy lesser protections against harassment. Likewise we have seen growth of religious harassment, especially in members of the Muslim community.'
(UNISON)

The second argument was that the UK should be seeking to strengthen equality legislation as far as possible, in order to provide the strongest possible protection for UK gay and lesbian citizens travelling or living abroad in Europe:

'The potential for protection for UK citizens from sexual orientation harassment in 27 EU states, with different legal systems and varying levels of equality protection, supports retention of the current proposed position.' (Stonewall)

Some organisations set out their view that the provisions on harassment in the Directive are more narrowly drawn than UK provisions, and that the implications for freedom of speech (of including harassment provisions in the Directive) were overstated. The current UK provisions read that harassment is conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for that person – the **disjunctive** approach. The Directive takes the **conjunctive** approach by defining harassment as being conduct that has the purpose or effect of violating a person's dignity **and** creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. Organisations felt that this would be an important compromise, diminishing the possibility of spurious claims from the hypersensitive and protecting freedom of speech while introducing protection from harassment. Additionally, the EHRC pointed out in their response, in order to reassure those concerned about spurious claims, the findings of a TUC survey of religion or belief and sexual orientation employment tribunals:

'Although there has been considerable controversy recently, in the context of the sexual orientation goods, facilities and services Regulations over the potential of harassment provisions to precipitate litigation on 'subjective' views of an offensive environment, there is not a single case in which this was an issue before the tribunals.' (TUC, Sexual orientation and religion or belief cases, June 2007 – as quoted in the EHRC's response)

Housing

I Organisations supportive of housing in the Directive

Mind, the EHRC, UNISON, Age Concern, Help the Aged and the TUC were just a few of the organisations that were strongly supportive of housing being included in the Directive. They did not agree that there was a risk of competence creep, as:

'The Directive makes it clear that it only applies to prohibiting discrimination in the access to good and services and that Member States retain the ability to determine the arrangements for providing public services.' (Mind)

Many organisations also raised the issue that, as housing had been included in the previous race Directive and implemented without cause for concern, it was difficult to see why this Directive should be any different. Moreover, organisations representing the interests of minority groups felt that it was essential that housing be included in the Directive. This was because they felt that the harassment and housing provisions together would provide additional protection to people that had anecdotally reported experiences of harassment or discrimination in housing:

'It all started when my mum had a nervous breakdown. People used to tease my mum ... I thought they were good neighbours, but then they found out my personal business ... We've had our door spat on, rubbish left outside our door. I'm so worried about my son growing up in that hostile atmosphere.' (Mind)

'Zena and Ayiesha had a great flat in a friendly north London housing estate. When a new family moved in next door their lives suddenly changed. It started with the kids shouting 'Dirty lezzas' when they walked past. 'Zena is dyke scum' was scrawled onto their front door, and faeces were smeared through their letterbox. Their housing officer seemed incapable of dealing with the problem and they became frightened of being home alone.' (Runnymede Trust)

'As a result of age-based differences in Housing Benefit, private sector landlords are less likely to offer properties to tenants under the age of 25. Advertisements for accommodation sometimes stipulate 'over-25s only' or exclude students, who are more likely to be young people.' (EHRC)

'We have encountered much discrimination ... about my disabled son, lots of people will ask if he is destructive, starts fires etc, all based on ignorance.' (Carers UK)

Such organisations felt that the Directive would be an ideal way to tackle such discrimination as they believed that it would provide a remedy against private and social housing providers if they fail to provide access to housing free from harassment or discrimination on the above grounds.

2 Organisations against housing in the Directive

In turn, respondents representing the property sector were very concerned about housing being included in the Directive and that decisions regarding housing should be made at a European level:

'We do fear that the Directive, by specifically citing housing, is seeking to broaden the EU's jurisdiction into areas where subsidiarity should dictate it has none.' (British Property Federation)

3 Anticipatory adjustments

The proposal of adjustments 'provided by anticipation' caused much debate among the respondents, especially with regard to access to housing. The Directive text stated at Article 4.1:

'The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments.'

Many respondents warmly welcomed it as they felt it could help to remedy what they believed to be a lack of suitable housing in the UK for disabled people and their carers:

'An inability to find housing or being forced to live in unsuitable housing has a considerable impact on carers; for example, they may have to do more physical lifting of the disabled person as a result of a lack of adjustments.' (Carers UK)

'We have numerous individuals who have been waiting on housing lists for over five years in order to be offered accommodation that meets their needs.' (Scottish Disability Equality Forum)

'Of those who require adopted housing in England, 25% are living in unsuitable accommodation.' (Communities and Local Government (2007) *Housing in England*. Joint response submitted by RNIB, RNID, Sense, Leonard Cheshire Disability and the Guide Dogs for the Blind Association)

'There is a growing problem in the rental sector where older people are being forced to leave their housing due to a lack of adaptations.' (Help the Aged and Age Concern)

Those that responded supporting anticipatory adjustments for housing in the Directive largely agreed that the tests in Article 4 (that measures should not impose a disproportionate burden, nor require fundamental alteration) meant that anticipatory adjustments should not be unduly burdensome on owners of property.

There were an equal number of respondents representing landlords, social housing providers, holiday homes, retirement villages and businesses that expressed grave concern over adjustments being provided by anticipation. They expressed concerns in relation to the potential cost of the proposal, the vast range of adjustments that could possibly be made and the lack of guidance as to what is 'reasonable.' CBI summarised:

'Members could envisage employers having to make a choice, between creating an environment suitable for blind customers and one with wheelchair accessibility ... there is a multitude of disabilities that duty holders might have to consider. CBI members felt that the commission had not sufficiently considered how Member States would inform and help employers to understand and comply in this area but that they have also underestimated the scale of the task. The priority must be to inform businesses of the extent of their legal responsibilities and how they can use their available recourses in the most inclusive and effective way.'

Organisations representing landlords and letting agents continued in a similar vein:

'How can you anticipate needs in a block of 100 flats in terms of the common areas? And who will pay the costs if they are not recoverable through the service charges?' (Association of Residential Managing Agents)

'There are hundreds, if not thousands, of disabilities which are extremely impractical to anticipate. While the common portrayal is often someone in a wheelchair or the likes, disability can cover blindness, deafness, mental illness etc ... having to make adaptations to a property that may never be used by a person with disabilities specific to the adaptations seems so profligate. Moreover, a person without a disability may not want the adaptations. For example, electrical sockets half-way up the wall may be welcomed by the elderly but be an absolute nuisance for a young family with inquisitive kids.' (British Property Federation)

Many organisations that responded on behalf of the property sector were clear that they were not against the aims of the Directive per se. They cited wilful compliance to national regulations such as Part M of the Building Regulations and the Lifetime Homes initiative, but strongly felt that an anti-discrimination Directive was not the best place for further regulations and that such decisions should be made at the local, not European, level:

'Accessibility in existing premises should be responsive to the needs of individual residents and not 'anticipatory'. Making pre-emptive adjustments would require a vast amount of retrofitting to existing stock, which is an expensive, complicated process and may be contrary to the wishes of existing tenants.' (National Housing Federation)

'Those best able to judge what is appropriate to a new development or indeed existing stock are those at a local level.' (British Property Federation)

There was also concern among respondents from the property sector that providing adjustments by anticipation and without consultation with the disabled person was patronising and could be counter-productive in the long run if the adjustment made in anticipation was the wrong one:

'A change which is specifically requested might be refused because the landlord has already made some kind of provision, even though it is unsuitable, or alternatively one has the significant expense and trouble of redoing things that have already been provided.' (Residential Landlords Association)

Manufactured Goods

There was a similar level of debate on the responses regarding anticipating reasonable adjustment in manufactured goods. Leonard Cheshire Disability, EDF, the EHRC, the Equality Commission for Northern Ireland and the DLA were just some of the organisations that supported the inclusion of manufactured goods in the Directive.

Evidence submitted in support of the proposal included the following examples:

- A lack of DVDs with subtitles: deaf people are able to access the service in DVD stores and rent DVDs, but are disadvantaged by the manufacturer of the DVDs if they chose not to manufacture the DVD with subtitles. There is currently no remedy for this as there is no duty on manufacturers to consider adjustments at the point of design.
- Inaccessible instructions: instructions that come with manufactured goods are often too small for people with limited visibility, or are not easy to understand if a person has learning difficulties.
- Accessible websites: it is possible to manufacture all computers to be able to read written material; this would enable more people with limited visibility to be able to access information via the internet.
- ATM machines: there is a lack of machines with Braille keypads or at a height accessible to a wheelchair user.
- Ticket purchase machines: with the increased use of 'fast ticket' machines at stations, wheelchair users and blind or partially sighted people are disadvantaged as these machines are rarely at an accessible height or rarely have a VoiceOver option for instructions.
- White goods: washing machines, microwaves and dishwashers are increasingly becoming more inaccessible for blind or partially sighted people as LCD screens are becoming more common; these lack contrast, making the settings very difficult to see.

Disability Action argued that the increasingly ageing population warrants the inclusion of manufactured goods in the Directive, and that people with sensory, mobility, learning and communication disabilities are particularly disadvantaged by the '*continuing inaccessibility of goods and services*'.

The argument of increasing need for inclusive design due to the ageing population was also made by the joint response from RNIB, RNID, Sense, Leonard Cheshire Disability and the Guide Dogs for the Blind Association, which stated that:

'Forecasts indicate that older people will be in the majority in 2025. An increasingly ageing population will mean increasing numbers of disabled people ... inclusive design is an issue that must be addressed by the European Union in order to ensure an inclusive society for all in the future.'

This joint response also went on to argue that not only will inclusive design become increasingly important, but that it also made good business sense:

'The estimated annual spending power of disabled people in the UK is around 80 billion (family resources survey 2006.) Accessible design should be seen as an opportunity for industry to access some of this relatively untapped consumer market.'

'Many responses in support of including manufacturing goods in the Directive acknowledged the difficulty in producing goods accessible to all, but did not see this as a reason to prevent legislation from ensuring that goods should be 'as accessible as possible' and that this measure would 'make a significant impact on enabling persons with disabilities to truly participate in society.' (Disability Law Service)

However, there were many respondents that had grave concerns about the proposal to provide anticipatory adjustments in the manufacturing and design of products. CBI was just one organisation to argue that not only would the cost be too huge a burden to bear for manufacturers, but that it would also do disproportionate damage to UK competitiveness.

They argued:

'Disabled people are not a homogeneous group: the range and severity of disabilities for a company to consider is too large and complex to be considered a proportionate requirement. Making reasonable adjustments that would render a manufactured item suitable and accessible for a range of impairments would require specialist knowledge that would undoubtedly be in short supply and too costly for most manufacturing firms. Having to incorporate such consideration into both the design and manufacture process will increase costs and seriously impede the competitiveness of EU companies in the global economy.'

Transport Sector

The joint response from RNIB, RNID, Sense, Leonard Cheshire Disability and the Guide Dogs for the Blind Association fully supported the inclusion in the Directive of transport vehicles that are not currently covered by specific accessibility regulations, such as aeroplanes and ferries. Disability Action also echoed this view. Organisations cited experience of inaccessibility with regard to both aeroplanes and ferries. The 2007 Leonard Cheshire Disability report *Now Boarding: Disabled people's experiences of air travel* found that, of the disabled travellers surveyed:

- 61% had difficulty boarding the flight;
- 11% had to cancel or delay a trip because of problems accessing a flight;
- 37% experienced negative attitudes from staff on board flights and at airports; and
- 67% experienced difficulty with seating on board their flights.

The joint response also submitted anecdotal comments regarding shipping companies refusing to let guide dogs out of the car once on board the ship or not allowing them on board at all. They also mentioned a lack of information in accessible formats once disabled passengers were on board the ship.

The DLA also supported transport being in the Directive, and believed that the tests within Article 4 for anticipatory accommodation measures, including that of disproportionate burdens, meant that transport providers were '*unlikely to create immediate major new burdens or huge new costs for operators of transport services*'.

Education

Many organisations such as Stonewall, the Northern Ireland Commissioner for Children and Young People, EDF and the EHRC fully supported the inclusion of education in the Directive. The British Humanist Association supported the inclusion of education in the Directive but wished to see fewer exceptions in this area; in particular, they believed that state-funded religious schools should have no special opt-outs. They argued that state-funded schools should no longer be able to *'discriminate on religious grounds in their admissions policies'* and that the Directive should prohibit discrimination in terms of the curriculum:

'Sex and relationship education (SRE) in all schools would be objective, balanced and give proper consideration to the equal treatment on non-heterosexual aspects of sex and relationships.'

They went on to say that they did not agree that *'state-funded religious schools should be allowed to have religious instruction rather than a broad and balanced religious education curriculum'*.

Detailed Responses

The consultation document included specific questions on Article 2 – Concept of discrimination; Article 3 – Scope; Article 4 – Equal treatment of persons with disabilities and Article 15 – Implementation. Respondents were also invited to respond on any other aspects of the draft Directive that they felt relevant.

QUESTIONS

Article 2 – Concept of discrimination

Harassment

Discrimination law in the UK does not provide free-standing protection against harassment related to religion or belief and sexual orientation outside the areas of employment and vocational training.

Through the Government's public consultation on the proposals for a new Equality Bill in Great Britain in 2007, we sought, but were not provided with, evidence of the need for the extension of free-standing protection against harassment in the above-mentioned areas.

The consultation document on the draft EU Directive provided us with an opportunity to ask for any new or additional evidence that pointed towards a need for this legislation.

1) What recent evidence do you have of harassment that would be prohibited by virtue of the Directive that would not currently be prohibited by UK discrimination law on the grounds of a) religion or belief and b) sexual orientation?

There were a number of responses to this question, including from EDF, the EHRC, CWU and DLA. The common theme in the (mainly hypothetical) evidence that they submitted was that the Directive would result in the UK introducing additional, specific protection against conduct that would amount to harassment related to sexual orientation and religion or belief:

'To challenge harassment on grounds of religion or belief or sexual orientation outside the field of employment or further or higher education relying on current UK discrimination law would involve a claim of direct discrimination, and would require the identification of a suitable or hypothetical comparator who has not or would not be treated in the same way.' (DLA)

Organisations submitted evidence that they felt demonstrated where the Directive would provide additional protection in cases where a comparator could not be found:

'A Muslim man who travels on the same bus route to and from his work complains of anti-Muslim remarks made by several of the bus drivers. He receives a letter from the management saying that they regularly receive complaints about all sorts of remarks by their staff, for example alleging that drivers make racist or sexist remarks; however, their greater concern is to protect their drivers from the abuse they receive from members of the public. As the company has not take action when they have received other complaints from passengers, they are not proposing to investigate his complaint.' (DLA)

'Two gay men in a pub holding hands receive abuse from other customers; they complain to the landlord who does nothing, so they are forced to leave. The landlord establishes that he never stops customer abuse.' (DLA)

The EDF submission discussed the case of *Brumfitt v Ministry of Defence and Anor*,¹⁰ which applied to sex discrimination, but felt that the case exposed the need for the additional harassment protection in the Directive for sexual orientation, or religion or belief, as the case could easily have been lost on either of these two grounds:

'Ms Brumfitt attended a training course during which her male supervisor directed a substantial number of offensive and obscene remarks at both the female and the male personnel in attendance.

'The employment tribunal acknowledged that Ms Brumfitt found the language to which she had been exposed 'offensive and humiliating to her as a woman' and that women were more likely to be offended by the conduct than men. However, Ms Brumfitt's complaint was dismissed because she had not been exposed to the conduct because of her sex but rather, like others of both sexes, because she had been required to attend the training course. She had not been exposed to less favourable treatment than that received by the men on the course – she had received the same treatment. The Employment Appeal Tribunal (EAT) agreed with this approach.'

¹⁰ [2005] IRLR 4.

Some organisations also submitted anecdotal examples of circumstances in which people considered themselves to have been subjected to sexual orientation or religion or belief harassment, which are capable of being covered by the direct discrimination provisions in existing law and in the Directive. Some examples from the EHRC helpline were:

'Enquirer has issues with the management of a shopping centre. On more than one occasion the shopping centre was approached by the caller's charitable organisation to put a stand in the shopping centre for World AIDS Day on 1 December 2007. On all occasions they were refused. Enquirer complained about this to the general manager. It was stated by the manager that he did not think it appropriate to have gay people in the centre as it was a family area where children were and he did not want them upsetting [anyone]. Comments were made saying that he did not think that the promotion of lesbian or gay activity in the centre was appropriate.'

'Enquirer and another female were in a restaurant. A waiter came over and made comments presuming that they were a couple. Then the manager came over made more insulting comments and told them to leave. Comments made to them were such thing as calling her a 'bitch', 'You shouldn't flaunt your sexuality' and 'It's not healthy.'

2) Do you support the proposal in the Directive to extend protection against harassment on the grounds of a) religion or belief and b) sexual orientation? Please explain why.

Some organisations did express support for the proposal in the Directive to extend protection against harassment on the grounds of religion or belief, and sexual orientation. The organisations that submitted evidence as discussed above felt that there was a great need for the extension for the following reasons:

- a) to prevent a hierarchy of rights in discrimination law in the UK and in Europe;
- b) that it would send an important message across Europe that the harassment of individuals on these grounds is not acceptable;
- c) that it would provide greater protection for UK citizens while they are living or holidaying in the rest of Europe; and

- d) that it would provide additional protection in the UK for the reasons outlined in response to question 1.

However, some organisations expressed opposition to the proposal, mainly (but not entirely) religious organisations and individuals that responded to the consultation. Their concerns are laid out below in response to question 3.

3) Do you have concerns about the proposal? Please explain why.

Concerns about the proposal in the Directive to extend harassment provisions on the grounds of sexual orientation and religion or belief fall into two categories.

Category 1

These concerns centred on a fear of erosion of freedom of speech, the right to proselytise one's religion and the right to provide services with a religious ethos in a manner that the religious organisation deems fit.

Organisations such as CCFON expressed their fears, and organisations submitted examples of what might happen if the Directive was agreed with the harassment provisions included:

'The Directive subjects churches and individual Christians to frivolous allegations of harassment, merely for: 1) preaching the Gospel; 2) proselytising; or 3) expressing Biblical views on faith or sexual ethics ... The language proscribing an 'intimidating, hostile, degrading or offensive environment' invites abuse similar to that experienced under the Religious Vilification legislation of Victoria, Australia. In the case of Islamic Council of Victoria v Catch the Fire Ministries [2004] VCAT 2510, one of the allegations made was that an audience 'laughed' at recitations from the Qur'an. Under Article 2(3), the potential exists for someone to make a similar allegation under the Directive alleging 'harassment' on the basis that such laughter would be 'humiliating or offensive' to a Muslim. Likewise, the same allegation could be brought against those who mock the Bible.' (CCFON)

In their response, Affinity stated:

'Complaints have been made by people who think that it is no longer permitted or acceptable that Christians should preach or practise Christianity. In some of these cases the police and other authorities have acted in a disproportionate way, causing considerable stress and

injustice to the Christians concerned. In the vast majority of these cases the investigations have not led to any offence being identified, but this does not make the experience for innocent people any less stressful.

'Further provisions to curb 'harassment', which the law allows to be defined by the complainant, will only make the situation worse, increasing the spread of the 'victim culture' and creating the inequalities and social divisions which the whole family of anti-discrimination legislation is intended to remove.'

Category 2

Concerns were also expressed by those who supported the inclusion of the harassment provisions in the Directive about the need to protect freedom of speech. The majority of these responses, however, were confident that the European Court of Justice (ECJ) and/or the UK Government, in transposing or interpreting the Directive, would balance these rights as far as possible, and saw no reason why the necessary balancing of rights should result in sexual orientation and religion or belief being excluded from the harassment provisions:

'The proposed Directive confirms that the EU Treaty is based on human rights principles that the EU respects fundamental rights as guaranteed by the ECHR [European Court of Human Rights] and that this Directive respects these fundamental rights as recognised by the Charter of Fundamental Rights of the EU (including rights to freedom of expression and freedom of thought, conscience and religion). We would expect any national court or the ECJ, in interpreting any provision of the proposed Directive including in relation to harassment, to do so consistent with the ECHR and the EU Charter, carefully balancing rights to freedom of expression or freedom of religion with rights of an individual not to have their dignity violated and being forced to endure an intimidating, hostile, degrading, humiliating or offensive environment.' (DLA)

'The Commission does not underestimate the difficulties raised, but believes there is a clear need for this legislation; that there is already an appropriate human rights framework in place to deal with conflicts; that appropriate checks and balances have been demonstrated in the court's approach to other types of harassment cases; and that uncertainties about what these new harassment provisions would entail can be clarified through guidance and Ministerial statements.' (EHRC)

Age

The UK Government committed to banning age discrimination against adults following the Discrimination Law Review consultation. The Government believes that different treatment on grounds of age in the provision of financial and other services should be permitted where justified.

The Government Equalities Office consulted during the summer of 2009 on what exceptions to create to the ban on age discrimination against those aged 18 and over in services and public functions, and when to implement the ban. We sought preliminary views before that consultation for the purpose of informing discussions with partners in Europe.

4) What different treatment on grounds of age is justifiable in the provision of services generally and financial services in particular? Please provide evidence to support your answer.

While there was considerable disagreement among respondents about whether or not harmful discrimination was occurring in financial services on the basis of age and disability, there was a broad acceptance that age-based pricing was integral to risk management in financial services.

Organisations such as the EHRC and the Older People's Advocate for Northern Ireland argued that it was vital that if age-based pricing was to continue, it should be based on data that were regularly updated and available to the public. Many other organisations also wanted transparency. EDF, for example, said:

'While we consider that exceptions can be made for the use of age as an actuarial factor in the assessment of risk, these must be clearly and transparently based on relevant, accurate and up-to-date actuarial and statistical data.'

Or, from CWU:

'In setting higher premiums, it should be clear what the rationale is for setting such a rate.'

Equality organisations generally argued that different treatment on the grounds of age should be allowed only where it could be objectively justified, and did not see objective justification as burdensome for businesses or likely to present difficulties.

'The test is well established within other legislation under Article 13 of the European Treaty as a means of determining whether discrimination is lawful or unlawful. For direct discrimination on grounds of age in the field of employment and vocational training, the objective justification test has been clarified by recent decisions of the European Court of Justice; for example, Incorporated Trustees of the National Council on Ageing v Secretary of State for Business, Enterprise and Regulatory Reform (Case C-388/07); David Hutter v Technische Universitat Graz (Case C-88/08).' (EHRC)

The EHRC strongly opposed minimum and maximum age limits at entry to and exit from insurance products, and although they accepted that age bands in insurance pricing should be permitted, they thought the legislation should encourage the use of much narrower age bands through the principle of proportionality.

Equality organisations acknowledged that measures to provide preferential treatment on the grounds of age, in the way of concessions, or specialist services should be protected. Concessionary train fares, haircuts or cheaper fish and chips for people over or under a certain age were given as examples.

Stonewall Housing used the example that those under the age of 25 and those over the age of 50 often needed specialist housing:

'Young LGBT [lesbian, gay, bisexual or transgender] people need access to safe, emergency accommodation, with support in place to access more permanent accommodation. Older LGBT people have specific housing needs because of their age and the needs to reflect their current and future support and care needs.'

Because of this, they believed that different treatment on the grounds of age can be justifiable.

The TUC believed that the following age-based treatment was justifiable and should be allowed to continue:

'Treatment that is intended to overcome disadvantage that a particular age group might suffer; treatment that is intended to meet the different needs of particular age groups (e.g. youth clubs).'

The EHRC summarised:

'We believe that different treatments on the grounds of age are objectively justifiable where they are a proportionate response to a legitimate aim, or when they are targeted measures designed to address or prevent disadvantage.'

The EHRC thought that Article 2.7 should allow for the possibility of financial services providers relying on evidence other than data (for example medical knowledge).

The financial services and insurance sector argue that taking age into account in assessing risk is crucial, legitimate and fair, and having to objectively justify this practice each time would be an overwhelming burden.

The majority of financial services respondents broadly agreed with the ABI's statement:

'Insurance is priced according to the level of risk posed. This means the higher the level of risk posed, the higher the premium will be. Risk pricing helps the insurance market work efficiently as it uses available information to calculate a cost-reflective price. As consumers present different degrees of risk to insurers, these risk factors need to be taken into account when pricing insurance products. Age is an essential factor when assessing risk in insurance. It can act as a proxy for other risks and can allow insurers to develop innovative products to meet the different needs of particular age groups. Furthermore, whether a consumer is taking out insurance on a sports car or a world trip, insurers can revert to the claims history of particular age groups to assess the risk of the current insurance applicant, thus keeping the cost of underwriting low. Accordingly, treating consumers differently on the basis of age is justifiable in the provision of insurance. Any restrictions on an insurers' use of age to determine premiums or other age-related practices would risk pushing up the cost of insurance for all consumers, reducing consumer choice and endangering competition in the market.'

It was argued that having to objectively justify differential treatment on such a wide scale would be logistically difficult, and would increase costs for businesses and customers and increase bureaucracy:

'Insurers need to be profitable to prosper and to ensure we are still around to provide products in years to come. To do this we have to be able to underwrite relative risks and charge accordingly. If we are

not able to charge at an appropriate level to cover relevant additional risks associated with age, then the only alternatives will be to decline to offer products which might be loss-making, or to charge higher premiums or provide lower benefits to cover the additional exposure. Outlawing variations based on age may result in less choice being available to those most in need.' (Aviva)

Respondents gave examples of the relationship between age and risk:

'Younger drivers are ten times more likely to be killed or seriously injured than more experienced drivers in a road traffic accident.¹¹ This means that they will usually pay higher premiums than other motorists. At the other end of the scale, older drivers pose greater risks than middle-aged drivers. The average cost of a claim by an 80-year-old is almost 50% higher than that of a 60-year-old.¹² This means that older drivers will usually pay more for their motor insurance than middle-aged drivers, but less than younger drivers. Thus, differential treatment according to age does not constitute harmful discrimination but ensures that consumers pay a fair price for the risk they pose.' (ABI)

'Products such as life insurance or annuities are priced by considering life expectancy, and age is a key factor in assessing risk. In the case of motor insurance, both younger and older drivers are likely to make more frequent and higher claims than drivers in the middle of the age spectrum, and thus usually pay higher premiums than drivers aged between 25 and 60 years.' (Aviva)

Respondents said that using age as a proxy to determine physical and behavioural characteristics such as health or mobility benefited consumers as it 'simplifies the underwriting process and keeps the cost of insurance cover down for everyone' (ABI). Zurich continued in a similar vein, saying that: 'firms need to be able to draw upon (and be prepared to cite in justification if challenged) the sources they believe are most relevant in determining the basis for fair treatment applicable for their chosen markets and customers'.

¹¹ ABI estimate, derived from Department for Transport road casualty statistics and United Nations (UN) population data, 2006.

¹² ABI estimate, derived from our members' claims data, 2007.

5) How do you think the Directive could best reflect the intention to eliminate unjustifiable age-based discrimination in services generally and financial services in particular?

The UK Race and Europe Network (UKREN) and EDF saw the Employment Equality Directive and the Gender Goods and Services Directive as better drafted in similar clauses. Article 6.1 of the Employment Equality Directive requires that for a difference in treatment to be permissible, it must be *'objectively and reasonably justified by a legitimate aim'* (EDF). They believe that a similar requirement would *'help to reduce the risk of undesirably wide interpretation being given to the provision and that it would ensure the same standards were being applied to both employment situations and those involving goods and services'* (EDF).

UKREN, the TUC and EDF preferred the drafting of Article 5.2 of the Gender Goods and Services Directive because it states that *'the factor concerned in the assessment of risk is a determining factor'*, to the drafting of Article 2.7 in this Directive, which instead refers to a *'key'* factor. The difference, they argued, is that *'a determining factor must be one which is overwhelming in its impact, whereas a key factor, whilst important, may be one of a number of different factors being considered'*. They also argued that the difference between the Directives was likely to be problematic.

ABI also preferred the term *'determining'* to *'key'*:

'This approach ensures that all customers are treated equitably according to their actual risk, rather than cross-subsidising between consumers. The use of the term 'key' factor in the Commission-proposed Article 2(7) implies that insurers would need to prioritise the factors they use and that age must be an essential element in the pricing structure. This approach would restrict an insurer's ability to assess risk fairly. We prefer the use of the term 'determining' in the French text as this implies that a factor would only need to have an impact on the pricing of the policy but not be the only or most important factor. This would allow insurers to use age and a range of appropriate factors when providing insurance.'

The DLA thought that Article 2.7 as drafted would allow current discriminatory practices in banking and insurance that disadvantage young people, older people and disabled people to continue with little change. They argued that, as a minimum, the drafting should be amended to reflect:

'The same requirements for transparency, review and oversight as are contained in the Gender Goods and Services Directive (Article 5(2)). This would allow Member States to permit differences in treatment on grounds of age or disability only if they require providers of financial services to publish up-to-date actuarial or statistical data relevant to each 'risk' area.'

Ideally, however, the DLA agreed with the recommendation of the European Economic and Social Committee (EESC)¹³ that after a period of time, Member States *'should be required to review the evidence for differential treatment and to consider gradual sharing of risks and equalisation of premiums'*. It went on to note that *'sharing of risks or costs has been accepted for many years in the context of public services, such as education or health or highway maintenance, where there is no profit motive or competition for customers'*.

Disability Action disagreed with the inclusion of a list of differential treatments which may be justifiable, as it believed that legislation cannot contain exhaustive lists of non-discriminatory treatments. It advised that the objective justification test is used.

There was support among some organisations, including the TUC, Young Equals and UNISON, regarding the draft wording of the Directive:

'The draft Directive reflects the intention to eliminate unjustifiable age-based discrimination while permitting justifiable age-based treatment to continue.' (TUC)

'The aim must be to overcome disadvantage suffered, or to meet differing specific needs. The draft Directive rightly aims to eliminate age-based discrimination but to allow for justifiable age-based treatment. It is vital that the wording is clear and defined on this ... the important principle is that there is a process of objective justification in the future to reflect the intention to eliminate unjustifiable age-based discrimination in the provision of services,

¹³ EESC Opinion on the Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, SOC/326, 14 January 2009, para. 3.1.3.5 – As quoted in DLA's response.

i.e. a legitimate aim, in this regard we welcome the wording in Article 2(7) of the Directive.’ (UNISON)

‘Alternatively, respondents from the financial and insurance sector welcomed the recognition in Article 2.7 that ‘insurers need to differentiate between consumers on the grounds of age and disability.’ (ABI)

These respondents had reservations about some aspects of the drafting and argued for the use of data to be extended to include actuarial principles, accurate statistical data and medical knowledge.

Financial and insurance organisations did not want to see the Directive impose further requirements regarding age and financial services, particularly on the publishing of data as set out in the Gender Goods and Services Directive:

‘We do not believe the approach taken on publication in the Gender Directive should be reflected in the Equal Treatment Directive. Gender is binary; there are only two groups a person can belong to. Age and disability are not. There are many groups a person can belong to along with an infinite number of medical conditions, co-morbidities and complications. It would not be feasible for insurers to predict all possible permutations and publish data on these. Furthermore, insurance companies take into account factors other than age and disability when calculating premiums. These factors will vary between each type of policy, but may include expenses and commission; underwriting practices; medical records; lifestyle; location and social group; age; postcode; usage; gender and no-claims discount. Information published on any one risk factor will not provide any constructive information to a consumer.’ (ABI)

ABI, with the support of the insurance industry, proposed instead a right for consumers to challenge underwriting decisions similar to that under the current Disability Discrimination Act (DDA) 1995. The *Insurers Guide to the DDA* in Section 3.3 states that:

'All underwriting decisions must be based on relevant information or data as stated in 3.2 ... You will need to be able to provide evidence to show that your underwriting decision was justified at the time it was made if you are asked to do so. A challenge can be made at any time, either before or after the start of the policy. However, good practice is to be willing to explain how and why you made your decision if you are asked to do so, regardless of whether the customer is covered by the DDA.'

Other issues raised by the finance and insurance sectors on support of the French Presidency text, the continued use of projections of future changes to mortality and morbidity, and to proportionate legislation, are further discussed on pages 7–9.

Article 3: Scope

Community competence

6) Given the limits of Community competence, and subject to the proposals being clarified in relation to housing, as described above, can you provide examples of the practical effects of the Directive in the areas of:

- **health care**

There was a significant response from many organisations that supported the idea of healthcare being within the scope of the Directive and many organisations cited case law to the effect that healthcare was within Community competence to the extent that it was a service under Article 50 of the EC Treaty. EDF argued that:

'While the organisation and delivery of healthcare services remain within the area of individual Member States' competence, healthcare itself remains a service for the purposes of Article 50 of the European Community Treaty. Thus in the case of Geraets-Smits the European Court of Justice held that 'it is settled case law that medical activities fall within the scope of Article 60 [now 50]'.¹⁴

¹⁴ Case no C-157/99, Geraets-Smits [2001] ECR I-05473, para 53.

Examples given of where the Directive could have an effect on healthcare included the following from EDF:

'Clinics could not exclude lesbians from receiving fertility treatment which was available to heterosexual women, psychiatry specialisms such as liaison psychiatry and rehabilitation psychiatry could no longer be restricted to people below a certain age and key clinics could not be held at times inaccessible to those of a particular religion unless an alternative time was offered. Treatments could not be restricted to those of particular ages unless this can be justified.'

UNISON cited practical effects of the Directive in relation to healthcare; for example, helping to guard against age discrimination towards older people and children and the provision of appropriate services to those of certain religions. UNISON also hoped that the implementation of the Directive would mean that LGBT people would receive equal treatment in areas where they may currently be excluded, for example in areas of fertility treatment.

The DLA cited examples of discrimination from the UK and Europe where they believed that the Directive could have a practical effect in relation to access to healthcare:

'Age – rationing of healthcare: upper age limits restricting access to treatments such as kidney dialysis, heart bypass operations, cardiac rehabilitation programmes and knee replacements; age boundaries for cancer screening; people over certain ages being excluded from drug trials; gaps in mental health services organised by age groups, young people's health needs poorly met, often excluded from both children's health and mental health services and those services provided for adults.

Disability – exclusion of disabled people from certain forms of treatment; sterilisation of young women with mental health impairments; 'do not resuscitate' orders where the person with a serious illness is disabled.

Religion or belief – failure to respect and/or to accommodate certain religious beliefs in provision of appropriate healthcare.

Sexual orientation – denial of IVF treatment for lesbian women; non-acceptance of homosexual partners as 'next of kin'.

The EHRC provided examples of where the Directive could have an effect on outlawing discrimination in healthcare in relation to age, which is something that the Government is already committed to prohibiting in the Equality Bill. It argued that:

'Explicit age criteria are used for mental health services, where provision for people of working age is organised separately with higher levels of investment. This has led to a system where older people's services are under-resourced and offer fewer options; for example, people over the age of 65 are less likely to have access to innovative services such as Assertive Outreach. The nature of mental health services available to older people, such as daycentres, is predicated on an assumption that most service users suffer from dementia. In reality, a large number of older people suffer from depression for which they may receive little or no treatment. There is also research evidence that older people are less likely to be referred for certain types of specialist treatment, for example for particular types of heart conditions and strokes. Certain types of service heavily used by older people receive less investment than they need – for example, chiropody services, hearing aids and wheelchairs – leading to long waiting times for older patients.'

Mind highlighted the significance of a European-wide Directive on the issue and stated that: *'prohibiting discrimination in access to healthcare services at an EU level will acknowledge the severity of the problem and impress upon Member States and healthcare providers their responsibility to address it'*.

- **education**

Many organisations supported education being included within the scope of the Directive and argued that the EC does have competence in relation to education, noting that it is subject to EC rules on subsidiarity. EDF explained this as follows: *'The European Community Treaty article 3(1) (g) explicitly sees its role as contributing to the 'education and training of quality'*. The Treaty goes on to set out:

'Article 149 – The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.'

The TUC summarised that *'while the Directive will not require legislation to ensure certain schools are established or certain topics are included on the National Curriculum, it will require Member States to prohibit discrimination and harassment on the four grounds covered by the Directive in the way that education services are provided'*.

EDF provided examples where it would have a practical effect, saying that *'Teachers would not be able to demean gay pupils,¹⁵ or exclude Muslim pupils from school trips'*. The DLA said that the following were practical examples:

- Religion or belief – impact of Islamophobia, harassment of Muslim pupils, imposition of dress codes, breadth of exceptions for faith schools.
- Disability – disabled pupils excluded from mainstream education and further or higher education, disabled pupils excluded from various activities within schools or organised by schools, failure by educational institutions to make reasonable adjustments to enable disabled pupils to have equal educational opportunities.
- Age – recent restrictions for access to further and higher education indirectly discriminating against older people wanting to study in new fields.
- Sexual orientation – homophobic bullying and harassment by staff and other pupils.

And the TUC cited the following examples of practical effects:

'They would have to ensure there is no discrimination in access to school places (except on the grounds of religion or belief in the Directive), the treatment of pupils while at school, and in the way that the curriculum is taught.'

- **housing**

The main area where it was felt that the Directive could make a difference in relation to housing was in the harassment provisions. Further discussion of this can be found on page 17. Mind argued in its response to question 6 that people with mental health problems *'face high levels of verbal and physical harassment in their homes and in the community'*, and provided several

¹⁵ Hunt, R. and Jensen, J. (2007) *The School Report*. London: Stonewall. This report concluded that 65% of lesbian and gay secondary school pupils in Great Britain had experienced homophobic bullying, 41% of these had been physically bullied and 17% had experienced death threats.

See www.stonewall.org.uk/education_for_all/research/1790.asp

testimonies that they believe illustrate what kind of treatment they hope could be prevented by this Directive.

One of the testimonies reads: *'I had trouble with my neighbour. It was really bad; he wanted me put back in hospital. I don't know how he found out but I was targeted because I had been in hospital [because of mental health problems].'*

The EHRC argued that:

'LGBT people have frequently identified harassment and abuse as particularly salient concerns for them in studies of their housing needs. Stonewall Cymru (2006, p. 6), for instance, found that 'harassment in and around the home was the most prolific cause of housing problems', noting that it happened across all tenure types and ranged from verbal abuse to physical abuse. They also note that such abuse and harassment tended to escalate over time. Keogh et al. (2006) found similar types of abuse but their respondents also reported incidents of criminal damage, fouling and neighbours playing repeatedly loud songs with homophobic lyrics.'

The DLA argued that harassment and abuse suffered by older people in housing could be remedied by this Directive and also prevent homophobic harassment from public or private sector landlords' staff and other tenants. The EHRC stated:

*'There is also some evidence that as a result of age-based differences in housing benefit, private sector landlords are less likely to offer properties to tenants under the age of 25. Advertisements for accommodation sometimes stipulate 'over 25s only' or exclude students, who are more likely to be young people. There is also evidence of harassment of older people by landlords in the private rented sector.'*¹⁶

Aside from harassment, Young Equals argued that older children are treated less favourably in the provision of housing services¹⁷ and that:

¹⁶ Carlton, N., Fear, T. and Means, R. (2004) Responding to the harassment and abuse of older people in the private rented sector: legal and social perspectives, *Journal of Social Welfare and Family Law*, 26(2), 131–145

¹⁷ [As cited by Young Equals' response] Ofsted (2008) *Safeguarding children: The third joint chief inspectors' report on arrangements to safeguard children*. London: Ofsted; Kenrick, J. (2007). *Locked out: The prevalence and impact of housing and homelessness problems amongst young people, and the impact of good advice*. London: Youth Access; Shelter (April 2007): *Good practice: briefing: Tenancies for minors. An overview of the law on, and good practice in, letting to 16- and 17-year-olds*. London: Shelter.

'In 2007, the Children's Society carried out a review of police and local authority responses to young runaways. The charity found that some local authorities had 'unwritten policies of refusing any [social services] accommodation for 13- to 15-year-olds.'

Young Equals hoped that a practical effect of the Directive in housing would be redressing what it perceived to be unfair treatment of young adults in the provision of social housing.

As discussed earlier in the document, several organisations raised concerns about the disadvantages of the Directive in relation to housing being included within its scope, as they feared negative side effects, which are discussed further on pages 15–16. In addition to the concerns already discussed, the National Landlords Association was one of several organisations that raised concerns about successive alterations in assured short-hold tenancies, saying that:

'A landlord could have a blind tenant, followed a year later by a deaf tenant, followed by an elderly tenant who needs a stair lift and then an able bodied person. When taken individually, the cost of adjusting one property may not be sufficient to exempt the landlord under the disproportionate burden provisions but when taken as a whole, the cost of adjusting the property would be significant.'

Several organisations, including the Equality Commission for Northern Ireland, made strong references to the fact that the previously agreed Race Directive, also based on the Article 13 Treaty, includes healthcare, education and housing within its scope and that this was considered legitimate. The TUC broadly summarised this common view thus: *'given that it [the Race Directive] has been implemented subsequently in the UK without problem, it is difficult to understand what the Government's concerns are with regard to the proposed scope for this new article 13 Directive.'*

7) Do you have evidence of any harmful age discrimination in the provision of social housing?

Although several organisations argued for more social housing to be available so that the *'specific housing needs of all age groups are met'* (Stonewall Housing), little evidence was submitted in answer to this question. For example, UNISON said:

'In the area of housing there is widespread evidence of discrimination which is unchallenged. This can range from harassment through to ... inappropriate exclusion from social housing of certain age groups.'

EDF stated:

'Age discrimination does operate to a limited extent in the social housing sector when estates which have no additional services or provisions for older people are designated as estates for the elderly. This can discriminate against younger people.'

Many responses dealt with differences in treatment on the basis of age in housing in the full text of their overall response but, in the main, argued that it was for beneficial purposes.

Manufacture and design of products

8) Should the manufacture and design of products be covered by the requirements of the Directive?

9) What difficulties could you foresee?

As discussed on page 27, many organisations argued that the manufacture and design of products should be covered in the scope of the Directive. Leonard Cheshire Disability, EDF, the EHRC, Disability Action and the DLA were just some of these organisations and evidence they submitted in support of this, included in the above section, should be read alongside the answer to this question.

Several organisations argued that it was important for the Directive to include manufactured goods because the DDA does not currently go far enough: *'The DDA does not guarantee equal access to products for disabled people'* (Sense), and *'One major weakness of the DDA is that it does not address the barriers to independent living caused by inaccessible products'* (RNID). It was hoped that if manufactured goods were included in the Directive, it would be a step forward for the UK's existing legal framework. Disability Action suggested that a general accessibility obligation should be formulated for inclusion in legislation; public authorities should be obliged to procure only accessible products and services.

As discussed on page 28, many organisations from the business sector also had grave concerns about including manufactured goods in the Directive. Fears of cost, no set specific standards being set across the EU and reductions in EU competitiveness were all cited as reasons for concern.

The Spinal Injuries Association argued, in response to this question, against the premise that including manufactured goods in the Directive is likely to put European manufactures at a disadvantage:

'Many considerations could be addressed at the design stage and consequently would not incur greater cost, rather greater thought prior to manufacture ... it certainly seems unreasonable to assume that that all modifications that could benefit disabled people would be cost prohibitive and that, as such, no action should be taken to improve product design for disabled people.'

The TUC also argued:

'We recognise that it would be difficult for manufacturers to consider the needs of a large group of people with a wide variety of different impairments in their product development. However, concerns about imposing unreasonable burdens on manufactures would be addressed by the qualifications in Article of 4 the draft Directive.'

The EDF response continued in a similar vein:

'It is estimated that the annual spending power of disabled people in the UK is around £80 billion (Family Resources Survey 2006). Accessible design should be seen as an opportunity for industry to access some of this relatively untapped consumer market.'

Transport vehicles

10) Do you support the proposal that transport vehicles not currently covered by specific accessibility regulations should be subject to Article 4?

11) Do you have concerns about the proposal? Please explain why.

There was support for transport vehicles not currently covered by specific accessibility regulations to be subject to Article 4. Organisations including the EHRC, EDF, RNID, Sense, Disability in Action, the Spinal Injuries Association, the Equality Commission for Northern Ireland, Stonewall Housing, the TUC, Disability Action, UNISON and Leonard Cheshire Disability all argued that it was a very important opportunity in the Directive that should be seized:

'... disabled people are as likely to use the forms of transport not covered by the DDA – such as aeroplanes, ferries and taxis – as any other members of the public. As such they should have an equal right not only of access to these vehicles, but also to any facilities on board such as toilets and accommodation. In the past it has been difficult to legislate for vehicles that cross international borders due to the potential for conflicting standards from different states. By addressing the accessibility of these vehicles as a bloc of nations, the EU is presented with a fantastic opportunity to address this inadequacy and ensure that disabled people get equal rights to all forms of transport.' (Spinal Injuries Association)

Organisations argued that the exemption of taxis, aeroplanes and ships from the current anti-discrimination legislative framework is part of a system that causes a whole host of other issues:

'Inaccessible transport is one of the most significant obstacles to employment, accessing services and social inclusion for disabled people. Poor accessibility for disabled people can be due to several factors such as: lack of supporting infrastructure, e.g. good access between vehicle and platform; lack of accessible footways leading to and from vehicles; poor operator and staff training; lack of audio and visual announcements; unavailability of hearing loop systems; and a lack of good-quality and accessible information to enable journeys to be planned with confidence.' (EDF)

'People with disabilities are less likely to own their own vehicle and therefore often rely on public transport in order to work, socialise and attend educational institutions. Inability to do so often constitutes an infringement of their ability to live independently and to maintain private and family life, as well as interfering with the right to work, the right to education and the right to adequate healthcare.' (SDEF)

There were specific mentions of how inaccessible taxis in the UK and their exemption from the DDA exacerbated this issue:

'Inaccessible taxis frequently prevent disabled people from accessing other forms of transport such as trains, ships and aeroplanes.' (EHRC)

'Encouraging disabled people into work is proving very difficult for people who are reliant on the very few wheelchair-accessible buses and taxis.' (Stonewall Housing)

Additionally, organisations such as the EHRC also argued the importance of ferries and ships being accessible specifically in the UK:

'Forms of transport such as ferries are a lifeline to remote and island communities in the Highlands and Islands of Scotland. To a much greater extent than in other parts of the UK, ferries are essential for accessing core services such as health and education. The demographic make-up of the islands means that there are older people, and so statistically higher levels of disability.'

Later on in their response the EHRC additionally stated:

'In relation to shipping, problems arise where some companies refuse to let guide dogs on board or do not let them out of their car, with the result that some passengers with visual impairment either cannot travel or are forced to stay in their cars once on board.'

The Spinal Injury Association recognised that the Department for Transport has recently consulted on accessibility standards for taxis, and argued that *'any potential conflict between the outcome of the DfT consultation and any forthcoming EU standards must be borne in mind before imposing new legislation on the taxi trade'*.

Questions 12–15 were in the large majority answered as one question probably due to the fact that most respondents interpreted accessibility by anticipation to mean, in some circumstances, physical alterations to premises. The answers to questions 12–15 are therefore answered together below:

This proposal could be interpreted as meaning that accessibility by anticipation should apply in respect of new and existing premises.

This proposal could be interpreted as meaning that the requirement to provide accommodation for disabled persons in particular cases should require landlords and controllers of let premises to make physical alterations to those premises.

12) and 14) Do you support these proposals? Please explain why.

As summarised on pages 24–28, there was a significant level of disparity between the responses regarding the proposal of accessibility by anticipation applying to new and existing premises. The answers as discussed here should be read in conjunction with the section on anticipatory adjustments.

The equality lobby and disability rights organisations continued to argue for the importance of accessibility by anticipation in their answers to this question. Examples of their reasons why are as follows:

'Without this obligation the exclusion of disabled people from work and leisure and culture, as well as decent homes, will be perpetuated. Having regard to the tests in Article 4(1)(a), namely that such measures should not impose a disproportionate burden (which is further defined in Article 4(2)), nor require fundamental alteration or the provision of alternatives, we do not anticipate that this duty will be unduly burdensome on owners and managers of existing premises.' (DLA)

'Better action is required to ensure that accessible existing housing materialises to meet the needs of a growing number of disabled and older people. Meeting demand through retro-fitting existing inaccessible housing stock is unlikely to be economically sustainable. For example, around £14 million is spent every year in Glasgow alone on adapting existing, non-barrier-free houses for disabled people.' (EHRC)

'Bed-blocking' is becoming an increasing problem in the NHS as a consequence of patients not being able to return to their inaccessible homes after treatment. Relying on new houses to be built that are accessible will not be enough. Legal obligations are required to create and retain accessible housing. This is where the proposed EU Directive will plug the gaps and bolster the Government's housing policy and strategy.' (EHRC)

'It would improve social mobility for disabled people by increasing their housing choices. This would allow disabled people more freedom to relocate and, in turn, improve their opportunities in fields such as employment.' (Spinal Injuries Association)

**13) and 15) Do you have concerns about the proposal?
Please explain why.**

Many organisations also expressed grave concerns at these proposals but expressed them in the general body of their text instead of in answers to the specific questions. Organisations were concerned broadly with the potentially massive cost implications, the impossibility of catering to such a wide range of possible disabilities, taking the choice of individually chosen adjustments away from disabled tenants and the definitions of what is 'anticipatory'. Examples of their concerns are as follows:

'What may be seen as capable of being anticipated by one person may not be seen in the same way by another; therefore it is likely in due course it would fall to either the Government or the courts to decide what was capable of being anticipatory and what was not. This would involve additional legislation or costly court cases.'
(National Landlords Association)

'Accessibility 'by anticipation' is a matter of concern given the owner of premises cannot anticipate all the needs of all people with any of a wide range of disabilities, neither can they anticipate how technology will develop to facilitate their access. While the focus is so often on the needs of wheelchair users, the experience of those with sight or hearing impairments, for example, can be greatly improved as technology develops, yet this must be balanced with what a business can afford. The UK Disability Discrimination Act requires that 'reasonable steps' are made to facilitate access; this is a more manageable requirement than the seeming open-cheque-book approach proposed by the draft European Directive.' (BH&HPA)

'In new houses, it is very difficult to anticipate accessibility requirements. For example, a disabled person might require a ramp up to the front door, whereas an elderly person may prefer a step.'
(National Landlords Association)

Although supportive of the proposal, SDEF also raised serious concerns about the possible negative side-effects of anticipatory adjustments and sought to ensure effective recourse was in place to meet these concerns:

'We are also concerned that this may cause landlords to refuse to take on disabled tenants in the first place. While this would clearly constitute direct discrimination, there are currently insufficient mechanisms for enforcement to ensure that it does not occur ... If

a disabled person is refused accommodation because the landlords fears that he will have to make costly adjustments, the disabled person must have effective recourse.'

Article 15

The Directive as currently drafted gives Member States two years to transpose the Directive into national law, and four years in the case of effective access for disabled persons.

16) Do you think the proposed timetable is realistic?

17) What, if any, difficulties would it cause?

Many organisations, particularly those that welcomed the scope of the Directive, including the DLA, CWU, TUC, UNISON, the EHRC, Disability Action and EDF, did agree that the proposed timetable was realistic for the UK but had differing opinions on how difficult it might be for other Member States:

'The DLA considers the proposed timetable to be realistic and that it is unlikely to cause difficulties for Member States. A mapping study carried out in 2006¹⁸ for the European Commission disclosed that most Member States had national laws that prohibited discrimination on all or some of the grounds and in one or more of the areas covered by this Directive. This is, of course, true in the UK. All Member States will now have specialised bodies to comply with the Race Equality Directive and the Gender Goods and Services Directive, so the requirement to designate a specialised body under this Directive should be an easier task. National legislatures will be familiar with the key concepts and legal procedures for implementation will already be in place.' (DLA)

'EHRC supports the timescale for transposition set out in the Directive as currently drafted, and although we recognise that a longer timescale might have to be agreed to accommodate other Member States who do not have as extensive existing anti-discrimination legislation as the

¹⁸ McColgan, A., Niessen, J. and Palmer, F. (December 2006) *Comparative Analyses on National Measures to Combat Discrimination Outside Employment and Occupation: mapping study on existing national legislative measures – and their impact in – tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, and sexual orientation, VT/2005/062*, Utrecht: Human European Consultancy, Brussels: Migration Policy Group.

UK, we would urge the Government to nevertheless transpose the Directive within this timescale as a matter of best practice.'

'There is no need to give a long implementation period for changes to policies, practices and procedures ... changes to physical features may take longer and we recommend Member States be given four years to do these.' (Sense)

There were concerns expressed at the suggested timetable of the Directive. These ranged from organisations that did not agree with the scope of the Directive to those that did not think the proposed timetable was quick enough:

'We do not think that Article 15 allows sufficient time for implementation because of the need properly to consult stakeholders, and because of the need for firms to prepare for compliance. However, we do not support the implementation of the Directive in the first place because of its adverse impact upon Christian beliefs and values as detailed in our own impact assessment.' (CCFON)

'It is unlikely that the economy will be out of recession before the Directive is implemented and the costs of 'anticipatory' adaptations to let premises – which may or may not actually be required by customers – would be to the detriment of profitability (and perhaps employment).' (BHPA)

'Modification to listed buildings may not be possible. There are also issues with high-rise buildings and lifts within them. This could be an increased insurance liability where someone fails to interpret or implement a physical alteration to the premises.' (BIBA)

'Age Concern and Help the Aged are concerned that some of the suggestions for implementation periods are so lengthy as to be unrealistic. An implementation date beyond two years from the coming into force of the Directive would be too far away to encourage Member States and service providers to take action to eliminate age discrimination. A period of two years is a sensible timescale for an appropriate action plan to tackle age discrimination. A deadline beyond this will result in Member States and service providers failing to take serious action and risks undermining the Directive.'

The consultation document welcomed comments on any of the other articles or on the draft Directive as a whole.

There was a vast array of other comments submitted on other articles and the Directive as a whole. The common themes of these are itemised below:

Discrimination by association

Carers UK, the EHRC and Mind were just some of the organisations that supported an explicit reference in the text that discrimination by association will be covered.

Multiple discrimination

Carers UK, the National AIDS Trust, Mind, the DLA, the EHRC and EDF were just some of the many organisations that supported the inclusion of multiple discrimination in the Directive and wished to see the Government align the Directive in this respect to the UK Equality Bill.

Adverse effect on business in general

In its response, CBI was particularly concerned about the overall effect this Directive could have on business, and that the *'increased bureaucratic and financial burdens to be incurred by companies as a result of the Directive's proposals sit in stark contrast to the broader orientation of the EU social agenda.'* They felt strongly that the Directive undermines the Lisbon strategy objective of greater competitiveness.

Burden of proof

CBI did not feel that the burden of proof in the Directive should be reversed in its application to goods facilities and services, as it a) cuts across the principle of subsidiarity, b) would cause a great deal of confusion, and c) is not an appropriate requirement, as the transitory relationship between a business and its customers is very different to the often longer-term relationship between employer and employee.

Lack of evidence

The DLA stated in their response that it has not previously been a precondition of EC anti-discrimination legislation that *'in respect of every element within the scope of the legislation there needed to be evidence of discrimination'*. This approach gave the DLA cause for concern as it felt that experience in the UK has shown that *'once anti-discrimination laws are in place ... complaints come forward in significant numbers'*.

Signposting

BIBA suggested in its response a signposting initiative. This would be where, if an insurer deems a consumer to be too high a risk, they should be required to signpost the enquirer to a provider that can assist. It suggested that this be a government-run initiative.

Family status exemptions

The EHRC argued in its response that the reference in the Recitals excluding 'reproductive rights' should be deleted, as reproductive health services fall within the material scope of the Directive as a service. The EHRC also argued that there:

'Is no precedent for an exclusion related to laws on marital status, family status and reproductive rights in the articles of other EU Directives based on Article 13. In relation to a similar exception in the General Framework Directive, the European Parliament stated that 'exceptions linked to marital status ... has limited the protection against discrimination on grounds of sexual orientation.'

Next Steps

We concluded the consultation period on this Directive on 28 July 2009 and we have now concluded our analysis of the responses.

We are grateful to all those who took the time to respond to this consultation, which has informed our further consideration of the proposal.

Negotiations are continuing under the Spanish Presidency of the European Union in January 2010.

Annex A

Text of European Commission Proposal for an Equal Treatment Directive as published July 2008

Delegations will find attached a set of Presidency drafting suggestions concerning the above proposal.

Changes in relation to the previous version (doc. I4009/09) are indicated as follows: additions are in **bold** and deletions are marked [...].

The full text of the draft Directive is provided for convenience, although the changes mainly focus on the disability provisions (Articles 4, 4a, 4b, 7 and 15 and corresponding Recitals 19b, 19c, 19d, 20a, 20b and 20c). Suggestions are also made as regards Articles 2(1), 2(2)(c), 2(5), 2(6), 3(2)(d) and 5(2). The Presidency is also aware of the need for further discussion on other parts of the text.

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and in particular Article 13(1) thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas:

- (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which [all] Member States are signatories. In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination.
- (3) This Directive respects the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights of the European Union. Article 10 of the Charter recognises the right to freedom of thought, conscience and religion; Article 21 prohibits discrimination, including on grounds of religion or belief, disability, age or sexual orientation; and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.
- (4) The European Years of Persons with Disabilities in 2003, of Equal Opportunities for All in 2007, and of Intercultural Dialogue in 2008 have highlighted the persistence of discrimination but also the benefits of diversity.
- (5) The European Council, in Brussels on 14 December 2007, invited Member States to strengthen efforts to prevent and combat discrimination inside and outside the labour market³.
- (6) The European Parliament has called for the extension of the protection of discrimination in European Union law⁴.
- (7) The European Commission has affirmed in its Communication 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe'⁵ that, in societies where each individual

³ Presidency conclusions of the Brussels European Council of 14 December 2007, point 50.

⁴ Resolution of 20 May 2008 P6_TA-PROV(2008)0212.

⁵ COM (2008) 412

is regarded as being of equal worth, no artificial barriers or discrimination of any kind should hold people back in exploiting these opportunities. Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living, and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of abolishing of obstacles to the free movement of persons, goods and services between Member States.

- (8) The Community has adopted three legal instruments⁶ on the basis of article 13(1) of the EC Treaty to prevent and combat discrimination on grounds of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation. These instruments have demonstrated the value of legislation in the fight against discrimination. In particular, Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. However, variations remain between Member States on the degree and the form of protection from discrimination on these grounds beyond the areas of employment.
- (9) Therefore, legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including social protection, education and access to and supply of goods and services, including housing. Services should be taken to be those within the meaning of Article 50 of the EC Treaty.
- (10) Directive 2000/78/EC prohibits discrimination in access to vocational training; it is necessary to complete this protection by extending the prohibition of discrimination to education which is not considered vocational training.
- (11) Deleted.
- (12) Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation.

⁶ Directive 2000/43/EC, Directive 2000/78/EC and Directive 2004/113/EC

- (12a) (new) In accordance with the judgment of the Court of Justice in Case C-303/06⁷, it is appropriate to provide explicitly for protection from discrimination by association on all grounds covered by this Directive. Such discrimination occurs, *inter alia*, when a person is treated less favourably, or harassed, because, in the view of the discriminator, he or she is associated with persons of a particular religion or belief, disability, age or sexual orientation, for instance through his or her family, friendships, employment or occupation. Moreover, discrimination within the meaning of this Directive also includes direct discrimination or harassment based on assumptions about a person's religion or belief, disability, age or sexual orientation.
- (12b) (new) Harassment is contrary to the principle of equal treatment, since victims of harassment cannot enjoy access to social protection, education and goods and services on an equal basis with others. Harassment can take different forms, including unwanted verbal, physical, or other non-verbal conduct. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise so serious in nature that it has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the mere expression of a personal opinion or the display of religious symbols or messages are presumed as not constituting harassment⁸.
- (13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
- (14) The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the 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.

⁷ Case C-303/06, *Coleman v. Attridge*, judgment of 17 July 2008, nyr.

⁸ Wording taken from Recital 17 (see doc. 12792/09, p. 3).

- (14a) Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, for example, special age conditions regarding access to certain goods or services such as alcoholic drinks, arms, or driving licences.
- (15) Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where service providers have shown, by relevant actuarial principles, accurate statistical data or medical knowledge, that such factors are determining factors for the assessment of risk.
- (16) Deleted.
- (17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, the freedom of association, the freedom of expression and the freedom of the press.
- (17b) (new) This Directive covers access to social protection, which includes social security, social assistance, and health care, thereby providing comprehensive protection against discrimination in this field. Consequently, the Directive applies with regard to access to rights and benefits which are derived from general or special social security, social assistance and healthcare schemes, which are provided either directly by the State, or by private parties in so far as the provision of those benefits by the latter is funded by the State. In this context, the Directive applies with regard to benefits in cash, benefits in kind and services, irrespective of whether the schemes involved are contributory or non-contributory. The abovementioned schemes include, for example, access to the branches of social security defined by Regulation 883/2004/EC on the coordination of social security systems⁹, as well as schemes providing for benefits or services granted for reasons related to the lack of financial resources or risk of social exclusion.
- (17c) Deleted.

⁹ OJ L 166, 30.4.2004, p. 1.

- (17d) (new) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute a professional or commercial activity. In this context, the concept of professional or commercial activity may be defined in accordance with the national laws and practice of the Member States.
- (17e) (new) This directive does not alter the division of competences between the European Community and the Member States in the areas of education and social protection, including social security, social assistance and health care. It is also without prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.
- (17f) (new) The exclusive competence of Member States with regard to the organisation of their social protection systems includes decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and health services and the conditions of eligibility. In particular Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities. Moreover, this Directive is without prejudice to the powers of the Member States to organise their social protection systems in such a way as to guarantee their sustainability.
- (17g) (new) The exclusive competence of Member States with regard to the content of teaching or activities and the organisation of national educational systems, including the provision of special needs education, includes the setting up and management of educational institutions, the development of curricula and other educational activities and the definition of examination processes. In particular Member States retain the possibility to set age limits for certain education activities. However, there may be no discrimination in the access to educational activities, including the admission to and participation in classes or programmes and the evaluation of students' performance.
- (17h) (new) This Directive does not apply to matters covered by family law including marital status and adoption, and laws on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.

- (18) Deleted.
- (19a) Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.
- (19b) (new) Measures to [...] **ensure accessibility** for persons with disabilities [...], on an equal basis with others, to the areas covered by this Directive play an important part in ensuring full equality in practice. Such measures [...] **should** include [...] the identification and elimination of obstacles and barriers to accessibility. [...]. **They should not impose a disproportionate burden.**
- (19c) (new) [...]
- (19d) (new) Improvement of accessibility can be provided by a variety of means, including application of the “universal design” principle. “Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest possible extent, without the need for adaptation or specialised design. “Universal design” should not exclude assistive devices for particular groups of persons with disabilities where this is needed.
- (20) Legal requirements¹⁰ and standards on accessibility have been established at European level in some areas while Article 16 of Council Regulation 1083/2006 of 11 July 2006 on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999¹¹ requires that accessibility for disabled persons is one of the criteria to be observed in defining operations co-financed by the Funds. The Council has also emphasised the need for measures to secure the accessibility of cultural infrastructure and cultural activities for people with disabilities¹².
- (20a) (new) In addition to general measures to ensure accessibility, individual measures to provide reasonable accommodation play an important part in ensuring full**

¹⁰ Regulation (EC) No. 1107/2006 and Regulation (EC) No 1371/2007

¹¹ OJ L 210, 31.7.2006, p.25. Regulation as last amended by Regulation (EC) No 1989/2006 (OJ L 411, 30.12.2006, p.6).

¹² OJ C 134, 7.6.2003, p.7

equality in practice for persons with disabilities to the areas covered by this Directive. Reasonable accommodation means necessary and appropriate modifications and adjustments not imposing a disproportionate burden, where needed in a particular case, in order to ensure to persons with disabilities access on an equal basis with others.

- (20b) (new) In assessing whether measures to ensure accessibility or reasonable accommodation would impose a disproportionate burden, account should be taken of a number of factors including the size, resources and nature of the organisation or enterprise, as well as the costs and possible benefits of such measures. A disproportionate burden would arise, for example, where significant structural changes would be required in order to provide access to movable or immovable property which is protected under national rules on account of their historical, cultural, artistic or architectural value.**
- (20c) (new) The principle of accessibility is established in the United Nations Convention on the Rights of Persons with Disabilities. The principles of reasonable accommodation and disproportionate burden are established in Directive 2000/78/EC¹³ and the United Nations Convention on the Rights of Persons with Disabilities.**
- (21) The prohibition of discrimination should be without prejudice to the maintenance or adoption by Member States of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation. Such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.
- (22) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

¹³ OJ L 303, 2.12.2000, p. 16.

- (23) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (24) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
- (25) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.
- (26) In its resolution on the Follow-up of the European Year of Equal Opportunities for All (2007), the Council called for the full association of civil society, including organisations representing people at risk of discrimination, the social partners and stakeholders in the design of policies and programmes aimed at preventing discrimination and promoting equality and equal opportunities, both at European and national levels.
- (27) Experience in applying Directives 2000/43/EC¹⁴ and 2004/113/EC¹⁵ show that protection from discrimination on the grounds covered by this Directive would be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.
- (28) Deleted.
- (29) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

¹⁴ OJ L 180, 19.7.2000, p. 22.

¹⁵ OJ L 373, 21.12.2004, p. 37.

- (30) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives.
- (31) In accordance with paragraph 34 of the interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.

Article 1 – Purpose

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment within the scope of Article 3.

Article 2 – Concept of discrimination

1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination, **or discrimination in the form of denial of reasonable accommodation**, on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1, the following definitions apply:
 - (a) direct discrimination shall be taken to occur 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 referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) (new) denial of reasonable accommodation in a particular case, as provided for by Article 4a of the present Directive as regards persons with disabilities, shall be taken to be discrimination.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
- 3a. Discrimination includes direct discrimination or harassment due to a person's association with persons of a certain religion or belief, persons with disabilities, persons of a given age or of a certain sexual orientation; or based on assumptions about a person's religion or belief, disability, age or sexual orientation.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. [...]
6. Notwithstanding paragraph 2, differences of treatment on grounds of age shall not constitute discrimination, if they are objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In this context Member States may **lay down in their national law [...]** aims which can be considered to be legitimate **and means which can be considered appropriate and necessary.**

Such differences of treatment may include the fixing of a specific age for access to social protection, including social security, social assistance and healthcare; education; and certain goods or services which are available to the public, **as well as maintaining or adopting more favourable conditions of access for persons of a given age, in order to promote their economic, cultural or social integration.**

- 6a. (new) Notwithstanding paragraph 2, differences of treatment of persons with a disability shall not constitute discrimination, if they are aimed at protecting their health and safety and if the means of achieving that aim are appropriate and necessary.
- 7. Notwithstanding paragraph 2, in the provision of financial services, proportionate differences in treatment where, for the service in question, the use of age or disability is a determining factor in the assessment of risk based on relevant actuarial principles, accurate statistical data or medical knowledge shall not be considered discrimination for the purposes of this Directive.
- 8. This Directive shall be without prejudice to measures laid down in national law 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 the protection of the rights and freedoms of others.

Article 3 – Scope

- 1. Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to access to:
 - (a) Social protection, including social security, social assistance and healthcare;
 - (b) [Deleted.]
 - (c) Education;
 - (d) and the supply of, goods and other services which are available to the public, including housing.

Subparagraph (d) shall apply to natural persons only insofar as they are performing a professional or commercial activity defined in accordance with national laws and practice.

- 2. This Directive does not alter the division of competences between the European Community and the Member States. In particular it does not apply to:
 - (a) matters covered by family law, including marital status and adoption, and laws on reproductive rights;

- (b) the organisation of Member States' social protection systems, including decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and services and the conditions of eligibility;
 - (c) the powers of Member States to determine the type of health services provided and the conditions of eligibility; and
 - (d) the content of teaching or **of educational** activities and the organisation of Member States' educational systems, including the provision of special needs education.
3. Member States may provide that differences of treatment based on religion or belief in respect of admission to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice, shall not constitute discrimination.
 - 3a. This Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols.
 4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief.
 5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4 (new)¹⁶ – Accessibility for persons with disabilities

1. [...] Member States shall take the necessary and appropriate measures to ensure accessibility for persons with disabilities, on an equal basis with others, within the areas set out in Article 3, **unless this would impose a disproportionate burden.**

¹⁶ In the previous version of the Swedish Presidency “accessibility” was addressed in Article 4a. See doc. 14009/09.

2. Such measures shall include the identification and elimination of obstacles and barriers to accessibility, including with regard to the physical environment and to information and communication technology and systems.
3. [...]

Article 4a¹⁷ – Reasonable accommodation for persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3 [...], unless this would impose a disproportionate burden.
2. Reasonable accommodation means **necessary and appropriate modifications and adjustments [...]** where needed in a particular case, [...] to ensure **to persons with disabilities access on an equal basis with others.**

Article 4b (new) – Common Provisions Regarding Accessibility and Reasonable Accommodation [...]

1. For the purposes of assessing whether measures necessary to comply with Articles 4 and 4a would impose a disproportionate burden, account shall be taken, in particular, of:
 - a) the size and resources of the organisation or enterprise,
 - b) the nature of the organisation or enterprise,
 - c) the estimated cost, [...]
 - d) the possible benefits of increased access for persons with disabilities, and
 - e) **(new) the historical, cultural, artistic or architectural value of the movable or immovable property in question.**

The burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the equal treatment policy of the Member State concerned.

¹⁷ In the previous version of the Swedish Presidency, “reasonable accommodation” was addressed in Article 4. See doc. 14009/09.

2. Articles 4 and 4a shall not apply to the design and manufacture of goods.
3. [...]
4. This Directive shall be without prejudice to the provisions of Community law [...] providing for detailed standards or specifications on the accessibility of particular goods or services [...].

Article 5 – Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.
2. (new) In particular, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt more favourable provisions [...] for persons with disabilities as regards conditions for access to social protection, including social security, social assistance and healthcare; education; and certain goods or services which are available to the public, in order to promote their economic, cultural or social integration.

Article 6 – Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

Chapter 2 REMEDIES AND ENFORCEMENT

Article 7 – Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive

are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 shall be without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.
4. (new) [...]

Article 8 – Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the prohibition of discrimination.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Member States need not apply paragraph 1 to proceedings in which the court or other competent body investigates the facts of the case.
5. Paragraphs 1, 2, 3 and 4 shall also apply to any legal proceedings commenced in accordance with Article 7(2).

Article 9 – Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10 – Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

Article 11 – Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

Article 12 – Bodies for the Promotion of Equal treatment

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
 - (a) without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
 - (b) conducting independent surveys concerning discrimination, and
 - (c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER III FINAL PROVISIONS

Article 13 – Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected within the scope of this Directive and in particular that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14 – Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Sanctions may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.

Article 14a (new) – Gender mainstreaming

In accordance with the objective of Article 3(2) of the EC Treaty, Member States shall, when implementing this Directive, take into account the objective of equality between men and women.

Article 15 – Implementation

- I. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest [X years after adoption]. They shall forthwith inform the Commission thereof and shall communicate to the Commission the text of those provisions.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. In order to take account of particular conditions, Member States may, if necessary, establish that

a) [...]

the obligation to ensure accessibility as set out in Article 4 [...] **and 4b** has to be complied with by ... at the latest [...] **5** years after adoption] regarding new buildings, facilities and infrastructure, **as well as existing buildings, facilities and infrastructure undergoing significant renovation** and by [20 years after adoption] regarding all other existing buildings, facilities and infrastructure.

Member States wishing to use any of these additional periods shall inform the Commission at the latest by the date set down in paragraph 1 giving reasons. Member States shall also communicate to the Commission by the same date an action plan laying down the steps to be taken and the timetable for achieving the gradual implementation of Article 4 [...]. They shall report on progress every two years starting from this date.

Article 16 – Report

1. Member States shall communicate to the Commission, by at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the viewpoints of national equality bodies and relevant stakeholders, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 17 – Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 18 – Addressees

This Directive is addressed to the Member States.



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