



Rights of Women Response:

DISCRIMINATION LAW REVIEW

About Rights of Women

Rights of Women is a well established and expanding not-for-profit feminist women's organisation committed to informing, educating and empowering women on the law and their legal rights. We are a membership organisation, with almost 200 members, both individual women and other women's organisations. Our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential free legal advice helplines for women provided by women, one general advice line specialising in family law issues, including domestic violence, and another on criminal law and procedures in relation to sexual violence.¹

Discrimination Law Review

Rights of Women welcomes the opportunity to contribute to the Discrimination Law Review (DLR). Rights of Women is concerned about the continuing discrimination and inequality experienced by women. Currently anti-discrimination law is set out in a patchwork of different pieces of legislation. These laws have often been enacted reactively to ensure that we are meeting our obligations under European Law, rather than a proactive commitment to tackling inequality. As a result of this piecemeal development of anti-discrimination law there are gaps and inconsistencies in legal protection, and often different processes or procedures. This area of law is highly complicated.

Rights of Women believes that it is crucial that the law is transparent and accessible. This is particularly in the case with laws that create protections and remedies for individuals, such as of anti-discrimination and equality laws. Laws must be accessible to be enforced. Given the current level of complexity, Rights of Women welcomed the Discrimination Law Review which sets out to create a Single Equality Act by harmonising and simplifying the law, making the law more effective and modernising the law. We believe that the DLR and the Green Paper on the introduction of a Single Equality Act (SEA) provided a significant (and thus far unique) opportunity to simplify the current law, provide better protection and remedies and therefore better

¹ Sexual Violence and Criminal Law Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). General Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2-4pm and 7-9pm and Friday 12-2pm).

address the discrimination and inequality still present in our society. However, we are not convinced that this opportunity has been seized by the Government in the Green Paper. We are particularly concerned by aspects of the Green Paper which appear to be levelling down, rather than levelling up legal protections against discrimination. We are also concerned by the lack of proposals to address inequality in the private sector. The following sections highlight Rights of Women's position on particular issues of concern set out in the Green Paper.

Chapter 3: equal pay

Equal pay is still a major problem for women. The Equal Opportunities Commission (EOC) states that women who work full-time earn, on average, 17% less per hour than men working full-time and it will take at least twenty years for equalisation.² It further states that for women who work part-time, the gap in pay relative to full-time men is 38% per hour, and it will take at least 25 years for equalisation. Rights of Women believe that action is required to address this failure. We are therefore disappointed that the Green Paper has rejected the need for mandatory pay reviews, and instead says the Government is '...focusing on promoting the spread of good practice' (paragraph 3.8).

We do not agree with the Green Paper's reasoning on this issue, where it says

"Equal pay reviews directly address only one of the causes of the gender pay gap – that of gender pay discrimination – and have had a relatively minor impact in the private sector in those countries and provinces in which they are mandatory. Enforced equal pay reviews may also contravene better regulation principles as the costs to employers may be out of proportion to the scale of the problem they will address." (Paragraph 3.7)

Whilst, there are various causes of the gender pay gap, we believe that the importance of discriminatory pay between men and women should not be underestimated. Rights of Women notes that the DLR does not refer to any of the countries or research which indicates that equal pay reviews have had a 'relatively minor impact on the private sector,' nor is any analysis or the reasons for this provided. Further, the EOC has found that where equal pay reviews have been conducted the majority of employers found them to be useful and there was no obvious relationship between the costs of and time.³

We are not convinced that the spread of good practice is sufficient. After four years of promoting voluntary equal pay reviews, the EOC found that just one third of large organisations had completed a review. It also found that there were significantly less equal pay reviews being conducted in the private sector

² EOC Completing the Revolution: The Leading Indicators, July 2007, see www.eoc.org.uk

³ EOC Completing the Revolution: The Leading Indicators, July 2007, see www.eoc.org.uk

than in the public sector.⁴ In addition, it was found that because pay reviews are not compulsory, there were considerable differences in the way organisations conduct the review, what should be considered within a pay review and only a minority followed recommended good practice.⁵

Rights of Women believes that it is crucial that equal pay reviews are made mandatory for all public and private sector employers. We believe that pay reviews can be a very useful tool for highlighting equal pay problems. In fact, we question how an employer can take any action to address equal pay if they do not have accurate information about the pay gaps that exist in their workplace. The EOC Code of Practice on Equal pay 'recommends equal pay reviews as the best means of ensuring that a pay system delivers equal pay...Involving recognised trade unions or other employee representatives also [i.e. in addition to consulting the workforce] helps to ensure that pay systems meet the legal requirement for transparency.'⁶ Given that 22 years after the Equal Pay Act 1970 came into force we cannot expect equal pay for at least another twenty years, Rights of Women urges the Government to introduce mandatory equal pay audits for all employers.

Chapter 5: proposed changes to the public sector duties

In principle, Rights of Women welcomes the proposed extension of the public sector duties to the additional equalities 'strands' of age, sexual orientation and religion/belief. However, we do not think there has been enough time for the Gender Equality Duty (GED) to be fully established, given that it was only introduced in April 2007. We are concerned that without the GED gender will not be prioritised in practice and that key equality issues, such as tackling violence against women, will continue to be marginalised. We are concerned that this may be the case if a single public sector duty covering all strands is implemented. Rights of Women would welcome clarification on how the single public sector duty would work and what assurances can be given that gender will not be marginalised.

Rights of Women also have very serious concerns that at the same time as proposing the expansion of the public sector duty the Green Paper is also proposing to diminish the duties' content. Rights of Women opposes the proposals to replace the specific duties with 'key principles' (paragraph 544). Rights of Women is concerned by proposals that public bodies would no longer be required to produce three-year schemes with detailed requirements, including monitoring. We are also concerned that under the proposals there would no longer be provision for individuals, women's groups, trade unions and others to challenge the decisions of public bodies where equality has not been taken into account. This is particularly worrying, given that the DLR has also rejected representative action (see below). The specific duties are important tools that can be used by women's groups and others concerned

⁴ EOC Working Paper Series No. 42 Equal pay reviews survey 2005, Winter 2005-6, see www.eoc.org.uk

⁵ EOC Working Paper Series No. 42 Equal pay reviews survey 2005, Winter 2005-6, see www.eoc.org.uk

⁶ Paragraph 6, see www.eoc.org.uk/PDF/law_code_of_practice.pdf

about equality, to ensure that the public sector is addressing equality and discrimination. To lose these current measures would be a backwards step and represent a levelling down rather than levelling up of anti-discrimination and equality protections.

Chapter 5: public sector procurement

Rights of Women strongly disagrees with the Green Paper's rejection of the need for a public sector duty to include equality in procurement processes. It is Rights of Women's understanding, following discussions with a major London funder, that the GED does apply to procurement or the commissioning of services. Rights of Women does not support the proposed change which would remove the GED from the commissioning process.

This issue is of central importance to the survival of the women's sector. As funding for the voluntary sector is moving more towards commissioning and procurement, it is vital to ensure that these processes involve equality. Without including equality in the procurement process, many women's organisations will be unable to access this kind of funding. This will mean that women's organisations will continue to be disadvantaged and the vital services we provide to women and the contributions we make to policy and legal debates will be compromised, if not lost. Rights of Women therefore believes that any public sector duty should include equality in the commissioning and procurement process.

Chapter 6: new equality rights in the private sector

In general, Rights of Women is disappointed that there is little consideration in the DLR assigned to tackling inequality in the private sector. We are concerned by the Green Paper's refusal to consult on the applying to the private sector the current public sector duties (in relation to employment) or mandatory equal pay reviews. We believe there is a clear need to address discrimination and inequality in the private sector. Rights of Women is not convinced that the 'light touch "equality check tool"' proposed by the DLR is sufficient to address discrimination in private sector. This has clearly not worked in relation to equal pay. In 2004, 41% of private sector workers were women⁷ and research indicates that the equal pay gap is significantly larger in the private sector.⁸ In addition, not applying an equality duty to the private sector perpetuates the divide between the public and private sector works, which essentially creates a lower standard of protection for those employed in the private sector.

Chapter 7: representative actions

⁷ Office of National Statistics, www.statistics.gov.uk/ci/nugget.asp?id=1292

⁸ The ECO has found that the gender pay gap in the private sector is nearly ten percentage points higher than in the public sector. In addition, only 39% of large private sector organisations have completed an equal pay review or have their first EPR in progress (compared to 61% in the public sector). EOC press release: Voluntary approach to equal pay reviews is failing - a new approach is needed, 27 January 2006.

Rights of Women is disappointed and concerned that the Green Paper has rejected the use of representative actions (also called class actions). These would allow third parties, such as voluntary sector organisations, trade unions and others, to take actions on behalf of groups of people. This would go a considerable way to alleviate the current burden placed on individuals to take cases to address discrimination they have faced (see below, Enforcement and access to justice). The law currently looks at the discrimination individuals face because they are members of a particular group, e.g. a woman (sex discrimination). However, enforcement of the law relies on individuals taking cases. This means that cases are about an individual's experience of discrimination and cases cannot adequately tackle the discrimination experienced by the group or the root causes of the discrimination. Rights of Women, strongly urges the Government to seriously reconsider allowing representative actions.

Chapter 7: multiple discrimination

Rights of Women is particularly concerned about how the law deals with the intersections of discrimination that women face. Equalities need to be understood and addressed in terms of cross-cutting issues, not as artificially separated issues. Women are not a homogenous group, they come from many different cultures, races and faiths, they occupy different class and economic positions, they have different sexualities, they are disabled, and they are many different ages. Taking the example of a disabled black woman, who has faced discrimination because she is disabled and black and a woman. Under the current law each of these discrimination strands are dealt with separately. Separate claims do not reflect the reality or lived experience of discrimination.

We note that the Green paper states that there is no evidence of multiple discrimination, that it would welcome information on multiple discrimination and will then consider whether there is a need to develop an approach to this discrimination (paragraph 7.3.4). However, Rights of Women is not convinced by the assertion that there is no evidence of multiple discrimination. For example, the EOC⁹ has found that the average hourly pay gap for minority women (13 per cent) is almost three times as high as the average hourly pay gap for minority men (5 per cent) and that Pakistani women have the highest pay gap among women at 28 per cent, compared with the pay gap among white British women of 17 per cent.¹⁰

Rights of Women believes that there is clear evidence for the law to develop to consider multiple discrimination. We believe that the cumulative effects of experiencing discrimination should be dealt with by the law. As a minimum Rights of Women believes that the Single Equality Act must make provision to

⁹ EOC, Key statistics Moving on up? Bangladeshi, Pakistani and Black Caribbean women and work, March 2007

¹⁰ Moving on up? Ethnic minority women and work, PAY GAPS: THE POSITION OF ETHNIC MINORITY WOMEN AND MEN, 2006.

consider claims of multiple discrimination, rather than forcing women to bring the separate claims.

Enforcement and access to justice

Current anti-discrimination laws (with the exception of the public sector equality duties) places the burden on individual women to take legal action to enforce their rights to not be discriminated against. Discrimination law cases are often long and complicated and for many taking legal action is not a realistic option. This is particularly the case for women, who are faced with the prospect of having to take action against an employer that is already discriminating against them, who are likely to be on a lower wage, who are more likely to be working part time and to have caring responsibilities for dependent children or relatives.

In addition the problems with the process, the Green Paper also fails to acknowledge the crucial issue of access to justice. Given the massive restructuring of public funding (legal aid), we believe this is a serious omission. Rights of Women agrees with the Greater London Authority, that:

‘Access to adequate and effective legal advice, advocacy and representation is essential if those who suffer from discrimination and disadvantage are to avail themselves of the very protections and remedies promised by anti-discrimination legislation. Research has shown that complainants who are not legally represented are less likely to win their cases. The fundamental principle of fair and equal access to justice must be reviewed in the context of increasing the availability of publicly funded legal services for actions brought as a result of workplace discrimination. Even if a case is won at tribunal, it may prove difficult for an individual to enforce any award of compensation [18¹¹].¹²

Access to justice is a vital issue – if protections set out in law are to have any value they must be accessible and enforceable. Rights of Women is therefore bewildered that the DLR has not taken into account the impact of reforms to legal aid. As an organisation with over 30 years experience of advising women on their legal rights, we know that women are more likely to have experienced or be at risk of domestic violence, be involved in full-time care of children, elderly or disabled relatives and be in an economically weaker position than men. Cases can also be more complex if a woman has language or literacy issues, mental health problems, a disability, or is housebound or in prison. We believe that the impact of legal aid reforms and difficulty accessing justice will be felt disproportionately by those who already experience discrimination and therefore the very people the Single Equality Act is supposed to protect.

Violence against women

¹¹ Footnote in original text: ‘Hollow Victories – An Update on the Non-Payment of Employment Tribunal Awards’, Citizens Advice Bureaux, 31 March 2005.’

¹² The Discrimination Law Review: Initial Submission from the Mayor of London, page 14, see www.london.gov.uk/mayor/equalities/docs/discrimination-law-review-submission.pdf

We are concerned at the absence of violence against women in the Green Paper. Whilst the Green Paper refers violence against women a limited number of times, this is in relation to work done, rather than to continue to develop this work under the DLR. The United Nations Declaration on the Elimination of Violence against Women, states that “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’ (Article 1). Article 2 of the Declaration further states that violence against women encompasses, but is not limited to:

- ‘(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.’

The prevalence and impact of violence against women is one of the key factors contributing to women’s inequality. It is an outcome of discrimination against women, in much the same way as pay inequality is an outcome of discrimination against women. Rights of Women is therefore disappointed that the Government has not taken the opportunity of the DLR to introduce a statutory definition of violence against women, nor to develop Governmental policy in the area further.

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