Discrimination Law Review
Response from the University & College Union (UCU)

UCU represents around 120,000 academics, lecturers, trainers, instructors, researchers, managers, administrators, computer staff, librarians and post-graduate students in universities, colleges, prisons, adult education and training organisations across the U.K.

This response has been written following consultation with relevant members of UCU's staff and with its Equality Committee. A link to the Green Paper was also sent to all our branch secretaries, asking for any comments, and a few were received. The main points of principle made here are in fact continuing policy positions of UCU, and of the two unions (NATFHE and the AUT) which merged to form UCU in June 2006.

Introduction

In principle, UCU supports the idea of a single Equality Act. The need to remove the plethora of complex and inconsistent legislation which has grown up piece-meal since the 1970's, and which offers significantly different levels of protection to different strands is obvious to anyone involved in equality issues. The Discrimination Law Review appeared to provide a unique opportunity to move to fair, comprehensive and effective legislation for all strands, legislation which would not only tackle discrimination, but also actively promote equality. UCU shared the profound disappointment expressed by most organisations with an interest in the equality agenda with the proposals contained in the Green Paper. The 'Framework for Fairness' document only tinkers around the edges, and in some cases, notably Chapter 5 on the public sector equality duties, the proposals would greatly weaken the existing position.

UCU sincerely hopes that this is a genuine consultation, and that you will listen to the criticisms of many of the proposals contained in the Green Paper that we are confident you will receive from a wide range of organisations with expertise in this area. It would be a tragedy if the once-in-a-lifetime opportunity to provide a legal framework which truly supports the principles and practice of non-discrimination and equality were missed. We remain hopeful that if the Government is prepared to take on board the constructive suggestions for improvement received in this consultation, it will still be possible to produce a single Equality Act which is a great leap forward, and not a soft-shoe shuffle.

We will respond to those of your questions which affect our members at work, but would like to state at the beginning that there are three key areas where we hope for major improvement.

These are:

- Proposals for the public sector equality duties

- Proposals for the private sector
- Proposals on equal pay

Part I
Harmonising and Simplifying the Law
Chapter 1

Direct Discrimination

UCU does not agree with the proposal to retain a requirement for a comparator in order to prove direct discrimination. In practice, this has meant that the courts focus too much attention on identifying the comparator, rather than focussing on and addressing the issue of less favourable treatment. This also causes difficulties in relation to cases of multiple discrimination. If a lesbian felt she was being discriminated against both because of her gender and her sexual orientation, she would currently have to identify two comparators, a man, and a heterosexual woman.

Disability Discrimination.

We do agree with the proposal to have a single definition of disability discrimination. However, we believe the scope of the question is far too narrow, and that this opportunity should have taken to consider the proposals for change to the definition of disability put forward by the Disability Rights Commission. We support the DRC's position that the definition of disability should be changed to one that gives protection from discrimination to everyone who has [or has had] an impairment, without requiring the effects of that impairment to be substantial or long-term. The focus of legislation should be on the act of discrimination, and not the extent of the impairment. This shift would change the current absurd position where most of the time and effort at employment tribunals is directed towards proving whether a claimant does or dies not come under the DDA definition. As most disability cases that are lost are lost at this stage, the discrimination faced by many disabled people is never addressed. What is needed is a definition which protects anyone who experiences discrimination on the grounds of an impairment.

Perception and Association.

We think the proposals in relation to perception and association are messy and incoherent. The principle behind the single Equality Act should be to remove inconsistencies across the treatment of the strands unless there is a compelling reason not to do so.

We believe that the protection currently in place for race, religion or belief and sexual orientation in relation to discrimination based on perception or association is the right model. We do not agree that this protection should not exist in relation to disability discrimination. This proposal seems to be based on a fear that extending this protection

would be very costly, as it would bring millions more people under the DDA provision. But people who are not disabled would not have a right to have reasonable adjustments made for them, because they have no need of one. They would simply be protected from detrimental treatment based on stereotypical and prejudiced assumptions about them. For example, some employers might think that any gay man is likely to be HIV-positive, and find an excuse to sack an employee once they find out he is gay. Others might think that mental health problems "run in the family" and find an excuse to get rid of a worker once they know s/he is related to someone with a mental health problem. These forms of discrimination need legal protection. It is hard to imagine that there will be many cases concerned with sex or age discrimination based on perception or association, but if such discrimination occurs, it should be protected. Intrasex people are currently not covered by the law. All seven (including transgender people, a wider group than your term of transsexuals) strands should have the same levels of protection here. The simplest solution would be to adjust the definition of sex discrimination to align with the other strands [e.g. "on grounds of race" and by analogy "on grounds of gender"] so that all the issues around gender identity are covered.

Indirect Discrimination

We agree strongly with the proposal to extend indirect discrimination to cover gender reassignment. We think there are arguments on both sides in relation to extending it to cover disability. We recognise that a practice is unlikely to disadvantage all disabled people equally, as it will depend on the nature of the impairment. However, indirect discrimination claims recognise the group dimension of discrimination and there may be times when it can be identified that a particular working practice impacts unfairly on a group of workers with a particular impairment. A stronger requirement to take anticipatory action in relation to removing barriers might be the right approach, but we can see occasions when an indirect discrimination claim might be helpful in relation to disability equality. A requirement not to indirectly discriminate would encourage institutions such as colleges and universities to think ahead and make anticipatory adjustments.

UCU does agree with the proposals to harmonise the definition of indirect discrimination across all strands, to introduce a single test of objective justification for disability discrimination, and to have a single threshold for the point at which the duty to make reasonable adjustments is triggered.

We also support a harmonised objective justification test, but believe that the current wording of "a proportionate means of achieving a legitimate aim" needs to be changed to the wording used in the European Directives i.e. '….. objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' We do not agree with your assertion that 'proportionate' has the same effect as 'appropriate and necessary'. The European wording has a stricter meaning, and is the formula which should be used.

Victimisation

UCU agrees with the proposal to harmonise the approach to victimisation in discrimination law and employment law.

Genuine Occupational Requirement Test

UCU agrees with the proposal to introduce a GOR test for all grounds, including disability. The example you give of the need for a Chief Executive of a gay rights organisation to be gay surely would apply equality to a chief executive of a disability rights organisation? We do not see the need to retain the specific genuine occupational requirement qualification listed in the SDA and the RDA, with the exception of privacy-related needs for same-sex staff in prisons, hospitals etc.

Genuine Service Requirement Test

UCU does not agree with the introduction of a Genuine Service Requirement defence. A GSR would be far too open-ended and open to abuse. It could allow direct discrimination by service providers to be justified A few particular cases of targeted service provision, such as men-only and women-only sexual health services should be made subject to specific legal exceptions. Measures to prevent or compensate for disadvantage (e.g. provision of classes for older learners) should be addressed by a much more robust approach to positive action measures. The line taken in the European Race Equality Directive should be applied across all strands i.e. "….. 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 racial or ethnic origin."

Specific Exceptions

UCU believes very many of the specific exceptions set out in Table 1 of Annex A, which you propose to retain, should be removed entirely. In particular, we are opposed to the blanket exception given to the Armed Forces from the provisions of the DDA, the exceptions for religious organisations in the Sexual Orientation and Religion or Belief Regulations, and exceptions for faith schools. As the number of these continues to grow, it is particularly important that they are not allowed to discriminate on the grounds of religion.

We do support exceptions for provision of separate services for men and women for privacy or personal safety reasons.

Insurance

We agree very strongly that the Regulations which allow differential treatment of people on grounds of their sexual orientation should not be allowed to continue.

Chapter 2

UCU agrees with the proposals to harmonise the way goods, facilities and services and public functions provisions are treated across all strands. Exceptions should be streamlined and consistent across public authorities and private bodies.

Chapter 3 – Equal Pay

The general timidity of approach and inability to propose radical change apparent throughout the Green Paper is at its worst in this Chapter. It begins with the breath-taking statement 'We are proud of our record on equal pay.' Why? When [according to the EOC's latest report] the gender pay gap per hour still stands at 17% for full-time workers and at 38% for part-time women workers compared to full-time men workers, what is there to be proud of? Thirty-seven years after the introduction of the Equal Pay Act, progress towards removing the gender pay gap is agonisingly slow. The document seems to perpetuate the perverse view of the report of the Women and Work Commission that the answer is to get more women to go for jobs in male-dominated industries. Nowhere does it address the issue of the persistent undervaluing of female-dominated jobs and the need for a far more radical, fundamental and collective approach to the question of what constitutes work of equal value.

The proposals set out in this Chapter seem to be driven by fear of the cost of actually implementing equal pay, the fact that employers would not like mandatory equal pay reviews, and the fact that major change would take some time to bed down, so we should avoid it. You make some astonishing statements '……. The evidence does not support legislation mandating equal pay reviews.' What more evidence is needed than the persistence of the gender pay gap and the evidence that only 22% of public and 10% of private sector employers have voluntarily embarked on equal pay reviews, according to the EOC's Equal Pay Reviews Survey 2005?

'We are developing a light-touch diagnostic tool – the gender equality check tool – which will enable employers to assess quickly and cheaply where any problems they have on gender equality might lie.'

And then what? Is the employer supposed to do anything about the problems diagnosed? Voluntary codes we know from experience (e.g. the Voluntary Code on "Age Diversity in Employment" which existed before the Age Regulations came into force) are largely ignored by employers, and "a light-touch diagnostic tool" sounds even less robust than a voluntary code.

'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.' This is not only wrong, it is immoral. The scandal of the gender pay gap running through all of the years of women in paid employment is a massive and continuing injustice on a scale the extent of which can hardly be calculated. It cannot begin to be addressed without the clearest and most effective compulsion on employers to do something about it.

Our experience in Higher Education is illustrative of the scale of the problem.

The gender pay gap for academic staff is currently at a UK average of 14.1% according to HESA statistics. This shows a very slow decline in the gap, from 15.6 in 1999-2000. There is also the problem of women academics finding it much harder to get promoted than men. Women constitute 42% of lecturers, 30.8% of senior lecturers and only 16.5% of professors.

The 'Framework Agreement' reached between the HE employers' body and the unions recognised in HE included a commitment to undertake equal pay reviews. Indeed, before that, in HE, there was a national agreement to undertake equal pay reviews which covered sex, race and disability. The experience of our branches, however, has been that it has been very difficult to get most institutions to implement equal pay reviews.

What is needed is a truly radical approach to the problem. Equal pay principles should apply across all the strands, not just in relation to gender, although gender is the area where we have the evidence to base actions on. The Equal Pay Act should be consigned to the dustbin. There should be a section in the Single Equality Act which makes it illegal to pay people less, or give them fewer benefits, contractual or otherwise, on the basis of sex, race, disability, religion or belief, age, sexual orientation or gender reassignment. Equal pay reviews should be mandatory on all employers, most definitely including private sector employers. These currently face only a small risk of equal pay litigation, and the absence of a requirement for transparent pay systems means they frequently rely on opaque pay arrangements that make it difficult for women to identify claims.

The requirement in the public sector gender equality duty to look at pay arrangements is too weak to make a real difference, and is dealt with very inadequately in gender equality schemes produced by many colleges and universities.

The Single Equality Act should include a legal requirement on all employers to conduct Equal Pay Reviews across all strands, to have action plans with clear targets for reducing pay inequality with a fixed time-scale, and to make their pay arrangements transparent and public.

The current system, which has so clearly failed, is based on individuals taking claims (often currently, multiple individual claims against local government employers which accounts

for the huge increase in equal pay claims that you are apparently proud of). Extensive time and resources are taken up taking multiple individual claims to address a problem which is clearly collective. In the interests of efficiency and justice, trade unions must be allowed to bring representative actions on behalf of an identifiable group of workers (women, black people etc) who are facing systematic pay discrimination.

It follows from the above that we do not support most of your specific proposals. We do agree that Equal Pay (and not just between women and men) should be dealt with in the single Equality Act. We think that keeping the distinction between contractual and non-contractual benefits is nonsensical, and simply causes confusion. Codifying equal pay case law would look back to the failed system of the past, based on a rigid and unsatisfactory comparator-led approach to equal pay. We strongly disagree with your opposition to the case for hypothetical comparators, which are allowed in so many other areas of existing discrimination law. The current model of having to find an actual comparator does nothing for women in predominantly female workplaces where there is difficulty finding a man doing work of equal value. What is needed is a system of truly establishing what is work of equal value, by, for example, plotting pay lines of male jobs and female jobs and establishing what the proportionate male rate would be for a job undertaken by a woman at a specific level of skill, responsibility and effort. Hypothetical comparators are essential for such a process to be undergone.

Overall, a much bolder approach is necessary if equal pay is ever to become a reality.

Part 2: More Effective Law

Purpose Clause

In your introduction to Part 2, you raise the issue of a purpose clause, only to dismiss it out of hand. This appears to be one of the questions you have already decided on, and it is apparently not up for discussion. However, UCU, in common with many other organisations, including all three of the existing Commissions, believes that the single Equality Act should begin with a clause that sets out its purpose and principles. This would aid both the general public and tribunals and courts to understand the basic principles and intentions in the Act. While it is true that in the past purpose clauses have not been widely used in UK legislation, the Equality Act 2006 did include a clause setting out the general duty of the CEHR. Indeed, having dismissed the idea of a purpose clause to introduce the Equality Act, you then go on in Chapter 5 to propose a purpose clause for a public sector single equality duty. We believe that a purpose clause setting out guiding principles and objectives but not proceeding to specifics would avoid the risk you refer to of causing confusion about the meaning of substantive provisions. We support the wording of the Illustrative Purpose Clause produced jointly by the CRE, EOC and DRC, i.e.

The purposes of this Act are:

(a) to prevent discrimination on any of the grounds, whether singly or in any combination and ensure that every person has an equal opportunity to participate in society, including by means of different treatment as required or permitted by the Act;

(b) to secure full equality in practice and promote the social inclusion of individuals and groups by

(i) eliminating and preventing patterns of systemic discrimination and inequality; and

(ii) the adoption of measures to alleviate the disadvantage related to any of the grounds singly or in any combination;

(c) to ensure respect for and protection of the human dignity of every person;

(d) to provide effective remedies for victims of unlawful discrimination, harassment and victimisation; and

(e) to promote good relations between individuals and groups.'

Chapter 4 - Balancing Measures

Broadly speaking, UCU agrees with the general approach taken in this chapter, and the answer to all the specific questions you pose is yes, we do agree.

It is the experience of our local negotiators that many colleges and universities are made very nervous by suggestions for positive action, and are extremely concerned that they might be breaking the law by moving towards positive discrimination. Therefore, we think a much more robust and unashamed approach to positive action provisions, which you are now calling "balancing measures", would be a big step forwards. It would be very helpful if the CEHR were to produce a Code of Practice, with plenty of examples of imaginative approaches to using balancing measures to address disadvantage, but we agree that there should be no need for the CEHR to approve specific positive action measures. Here are a few examples from our own sectors of where more clarity about positive action measures would be helpful.

Migrants who arrive in this country with little or no English are clearly at a huge disadvantage both socially and in terms of job opportunities. It should be possible to provide them with ESOL classes in as advantageous a way as possible, to address their disadvantage.

Parents (predominantly women) wishing to return to study after a period of child-rearing, or adults seeking retraining after a period of unemployment, may not feel comfortable in

standard FE classes, and the tradition of Access courses for students over a certain age should be allowed to continue.

Pensioners who may face social exclusion should be encouraged to participate in fee-reduced adult education classes.

We agree that the concept of 'reasonable adjustment' should not be extended beyond disability, as that would run the risk of only applying to those who could prove 'typical' characteristics for a protected group e.g. an assumption that all Jews require to stop working by sunset on Friday.

Chapter 5 – Public sector equality duties

UCU is deeply concerned about the proposals in this Chapter, which we, in common with many others, believe would fatally weaken the impact of the current equality duties. In our view, the change of approach first introduced in the Race Relations (Amendment) Act (RED), and then reflected in the later legislation introducing the gender equality duty (GED) and the disability equality duty (DED) has been the most significant and positive development in equality legislation for many years. The shift away from placing the burden of fighting discrimination onto individual victims of discrimination, and moving the emphasis onto institutions taking proactive measures to positively promote equality has been a huge step forwards. This should be the template for the development of the equality agenda in the 21st Century. It should be extended to cover all the strands, and should apply to all employers, in the public and the private sector. There are of course weaknesses in the way that the current three equality duties work, and the extent to which they are properly implemented, but lessons have been learnt, and improvements made. DED and GED show significant improvements on RED, making the need for action plans and implementation much clearer. The insistence on the active involvement of disabled people in DED, and of trade unions in GED are examples of increased understanding of what makes this approach work.

It is our experience within colleges and universities that it is the precise requirement of the specific duties which give the equality duties their teeth. The need to produce an equality scheme, to have an action plan, and targets for when the actions will have been achieved, and to conduct equality impact assessments on all policies and practices is what makes a difference. Action plans identify the times by which something must be done, and the person responsible for implementation. To replace these specifics with 'priority equality objectives' and the need to take "proportionate action" towards their achievement runs the risk of returning to equality policies which are high on rhetoric and very low on action. Objectives could simply be general well-meaning statements.

An integrated and extended duty

We do agree that the three existing duties should be brought together into a single equality duty. We also strongly support extending the duty to cover sexual orientation, religion or belief, age, and gender identity. Given that all of the strands have different issues, it is essential that it is specified that a single equality scheme has as well as overarching content, separate sections for each of the strands. Not to extend the duty to all strands would perpetuate the hierarchy of equality that currently exists. The introduction of the disability and gender duties has caused colleges and universities to concentrate on these areas, which is positive, but the negative side-effect is that areas not covered by the legislation become neglected. In FE, research carried out by the Centre for Excellence in Leadership ["Equality and Sexual Orientation: The Leadership Challenge for Further Education"] supported by other key stakeholders, including UCU, revealed the shocking extent of the harassment and bullying suffered by LGB staff and students in colleges, and also the high levels of ignorance about the law and the institutional failure to address or even recognise the issue. This situation is the legacy of Section 28, which has led to a blindness about the extent of the sexual orientation discrimination. We therefore find it deeply disturbing when you make remarks such as 'they (i.e. public authorities) may not have the resources to tackle every area where action to address discrimination and disadvantage is needed' and 'a single public sector equality duty would not require the same level of action to be taken for all groups' and that the priority objectives 'will not therefore be aimed at guaranteeing equal outcomes for all groups". That last remark is truly shocking. Either we are striving to remove discrimination and promote equality for all citizens or we are not. If you were a gay student who had been beaten up and left lying in the gutter, would it seem reasonable to you that your college would say they couldn't do much about tackling homophobia in the college because their priority objective this year is tackling race hate crime, not homophobic hate crime? If priorities are to be set, it must be clear that there will be priority objectives for each of the strands, and that there is no hierarchy of importance amongst the strands. The invisibility of sexual orientation discrimination for example, may lead to a lack of awareness of the scale of the problem, and to objectives being set in ignorance.

A further example of the lack of parity across the strands was the Learning and Skills Council's 'Skills Strategy Equality Impact Assessment'. The proposed changes to the funding regime in the lifelong learning sector have huge implications for all the equality groups, but are particularly disadvantageous for learners aged over 19. The LSC's equality impact assessment focused almost entirely on race, disability and gender, where there was a legal duty. Religion was mentioned as a side-issue to race, sexual orientation was not mentioned at all, and age, which was the biggest issue, was only referred to very briefly. A single equality duty should include a requirement to do equality impact assessments across all the strands.

Improving effectiveness

It should be clear from the above that we think most of your proposals for improving effectiveness will do the exact opposite. Taking the best from the three existing duties would mean that the structure is about right. Where improvement is needed is in the implementation, which requires resources, and involvement of all interested parties. Your document makes no reference at all to the role of trade unions, but our experience has been that only in colleges and universities where management has worked in partnership with trade unions (as specifically required in GED) have the duties been effectively implemented. In Further Education, UNISON and UCU worked together on DfES funded projects, first on the RED, and then on the DED. Working in partnership with pilot colleges, some very effective work was developed. For example, on the RED training events aimed at activists were devised to cover the legislation and provide an impact assessment framework. These sessions were delivered in Birmingham (2), Bradford, Bristol, Gateshead, Harrogate, Leeds, London (6), Manchester (2), Newcastle and Nottingham. Over 340 union members attended the training events.

Support networks established for attendees were established from the training sessions and these networks now form part of the wider UCU Black members' forum. Links were also established with pilot colleges and the impact assessment agenda was successfully advanced in four of the six colleges. These four colleges now have race equality impact assessment steering groups and are working towards impact assessing all policies and procedures.

On DED, the project will continue until September. 600 members of staff have been trained through the project. Some startling advances have been made in the pilot colleges. For example, in the Isle of Wight College, the disclosure rate for disability amongst staff was 0.5%. The college set a target of increasing the disclosure rate to 5% within a year, and actually achieved this in two months. The build up of trust was due to the partnership working. At Kensington and Chelsea College, the disability equality scheme was drawn up jointly with the unions, who worked together on a positive image campaign for disabled people, with posters and a newsletter. At Sutton Coldfield College online forums were used as a mechanism to involve disabled staff. The views expressed on the forums were used to help shape the college's disability action plan. Again, this has been developed in partnership with the unions. These positive outcomes were the result of building an environment in which the positive promotion of equality, and the taking of pro-active measures to implement it, was supported by management and unions.

Both the race and the disability project have produced training manuals covering all aspects of RED and DED, which continue to be used for membership training after the end of the project. Lack of similar funding for GED has meant we are struggling to deliver the same level of support and training to our branches on gender equality. Nevertheless, the lessons learnt from the two projects inform the information we give to branches on GED.

UCU has frequently insisted on equality impact assessments when colleges and universities have not lived up to their responsibilities. A frequent example is redundancy exercises, which often seem to impact disproportionately on women (often in part-time employment) and black people.

A further example of unions making positive use of the duties was the incident at Bath University, where the BNP leader Nick Griffin was invited to speak to a student society. UNISON and UCU campaigned vigorously against this, pointing out the requirement in RED to promote good relations between people of different racial groups. The presence on campus of someone preaching racial hatred is in direct conflict with the requirement. In the end, the University agreed that Nick Griffin could not be invited onto campus.

In summary – to improve the implementation of the equality duty, the role of unions needs to be written into the legislation, and support and funding to train representatives around the duty required. One most welcome step would be to give statutory status to union equality representatives. The Government is providing funding through the Union Learning Fund to develop such representatives, but a further move is needed, to give them the same statutory rights as Health and Safety representatives have.

Nature of the equality duty

We are very concerned by the proposals for a single equality duty set out on pages 87-93 of the Green Paper.

We do agree with having a purpose clause (so why not for the Equality Act?). While we have no argument with the four 'dimensions of equality' set out, we think there is a major omission in that there is no mention of the need to eliminate unlawful discrimination and harassment when an authority is carrying out its functions. The current equality duties have two main aims – to eliminate discrimination and to promote equality. This should continue.

The proposal that a 'strategic' equality duty should identify priority equality objectives and take proportionate action towards their achievement sounds harmless, until it is made clear what this would leave out. The current requirement is that an authority must pay 'due regard' to equality in carrying out all its functions – i.e. equality must be mainstreamed. This is a much stronger requirement than what you are now proposing. Of course, every authority will have certain priorities, but that should not mean they can ignore equality issues which they do not prioritise. We do not think it would be helpful for Government to set national priorities. This could lead to Government setting, and authorities implementing, a few well-publicised and tokenistic quick-win equality goals, while neglecting to address deep-seated institutional inequality. We have already made it clear that we think retention of the specific duties is absolutely essential. Without them, the general duties become empty rhetoric, and unenforceable. 'Principles' are absolutely

no replacement for impact assessment, equality action plans and timetables for achievement. We think it astonishing that you suggest, for example, that there might no longer be a legal requirement for 'employment monitoring of different racial groups.' Without employment monitoring of all the strands, how will it be possible to know where discrimination and disadvantage is operating in the workforce? Monitoring, equality impact assessments, equality schemes and action plans are the indispensable tools for implementing the equality duty.

UCU's view is that the duty should apply to all public authorities. It would be messy, inconsistent and confusing to exclude some. All authorities are required to take proportionate action, so smaller authorities are already protected from undue burdens. The general equality duty must apply to private bodies when exercising public functions. This it the only way to ensure that public bodies do not try to contract out of their equality obligations.

In terms of timescale, we think one year from the passing of the Equality Act would be a reasonable period for a single equality scheme, covering all the strands, to be produced. Within the post-16 education sector, bodies such as the LSC and HEFCE, and some universities and colleges have already produced a single equality scheme, covering all the strands. This should be encouraged. Those who are pro-active and are truly trying to promote equality across all strands should be held up as role models of best practice, and their experience used to help those who are doing the bare minimum and lagging behind.

Enforcement mechanisms

UCU disagrees with the suggestion that there should be a single enforcement mechanism for the single equality duty, leaving it all to the CEHR. There are 43,000 public bodies in Britain, and the CEHR has a very wide remit, and limited resources. We think the sheer number of public authorities will overwhelm the new Commission, which will not be able on its own to carry out true enforcement. How much more would this be the case if, as we believe should happen, the equality duty was extended to cover the private sector? We believe that trade unions and individuals ought to be able to enforce the specific duties as well as the current capacity to enforce the general duty by judicial review. A number of UCU branches have drawn the attention of one of the three existing Commissions to non-compliance in a college or university, with positive effects. When trade union representatives are trained in the equality duties and challenge the employer or work in partnership with them, equality gets a higher priority within the organisation. The vexed question of monitoring for sexual orientation is a problem to many managements. A positive approach at Castle College Nottingham was initiated by the UCU branch, and now with management support, all homophobic incidents are logged and monitored. This method of 'unofficial' monitoring and enforcement should now be made official. Within colleges and universities, the equality duty will only really work if it is prioritised and enforced by staff and students challenging non-compliance.

Role of Inspectorates

UCU also believes that public service inspectorates, such as Ofsted and the QAA should be required to monitor compliance with the equality duty as part of their routine performance assessments. Excellence and reward should be dependant on compliance. For example, Ofsted should not award 'outstanding' grades to any college not meeting the requirements of the equality duty. HEFCE and the LSC should not fund providers that are in serious and persistent breach of the duty.

Public sector procurement

UCU believes that the Equality Act must expressly provide that the public sector equality duties apply to the procurement functions of public bodies. Specific duties relating to procurement are needed to assist public bodies in meeting their equality obligations in this area. The sort of guidance you propose is simply not enough, given that a recent report on the National Procurement Strategy for Local Government identified that only 34% of authorities were specifically addressing equality in their procurement strategies. The three existing Commissions all agree that, despite the fact that each of them has issued detailed guidance on the relationship between equality obligations and procurement, there is still disparity of practice and confusion amongst public authorities. We agree with their joint recommendation 'that clear direction is provided through either primary legislation or in supporting regulations on how public bodies should embed equality into their procurement practice.'

This issue is of great concern to UCU because of the growth of the involvement of private organisations in areas of post-school education which were once entirely provided by public bodies. This now extends not just to catering and accommodation services (in HE, there has been a huge trend for new student accommodation to be PFI) but to the provision of education itself. The Leitch Report makes it clear that the Government intends this trend to go much further. 'Train to Gain' is based on employers providing training, and this is a flagship policy.

In FE, private companies such as Capita Training and Future, or voluntary bodies such as Rathbone are in charge of courses, and in HE private companies such as INTO, Kaplan and Study Group International are now approaching universities to offer to provide education services in IT, vocational training and language teaching. .

If it is not absolutely clear that any procurement process that college and universities enter into, to deliver student services or education, are fully covered by the equality duty, a very uneven playing field could develop. Government concerns for higher quality standards in the delivery of education could be substantially undermined by this situation

The explosive growth of the private sector in providing public post-school education is yet another argument for why it is not fair or viable for the equality duty to apply only to public bodies. In the post-Leitch world, one learning provider, a college, would be subject to the equality duty, while another a mile or so away, a private training company, would not. This is nonsense.

The drafting of this section of a single Equality Act would require very careful consideration to ensure that organisations providing public services, whether they are in the public, private or voluntary sectors, are bound by the same equality obligations. It should be explicit in the Act that private and voluntary bodies which tender for work in the provision of, for example, education are bound by the equality duty.

Chapter 6 - Promoting good equality practice in the private sector

UCU has devoted a large amount of space to the public sector equality duty, because this is the proposal which will impact most directly on our members. In terms of the population as a whole, however, it is Chapter 6 of the Green Paper which is most significant, and its significance is entirely negative. 80% of the workforce is in the private sector, and these proposals offer them nothing at all in terms of real moves towards removing discrimination and improving equality. The Chapter is a cop-out on a massive scale, and seems to be largely motivated by trying not to upset the CBI. The paper is littered with references to not imposing burdens on businesses. If an equality duty is such an insupportable burden, why impose it on the public sector? The 'business case for diversity' is a nice phrase, but the 'business case for equality' is what counts. Equality will have business benefits in the long term, but in the short term it is bound to involve some effort and cost. Equality is not easily achieved, but it is a moral imperative to strive for it. Equal Pay for men and women, for example, will never be achieved even in the public sector unless the Government accepts that the righting of this long-running historical wrong requires considerable funding.

The 'light touch' approach that you suggest here is entirely inadequate for addressing the scale of the problems of inequality in the private sector. An 'equality tool check' may help those few private sector employers who are truly striving to promote equality, but it will do nothing to bring to light bad practice, such as opaque pay systems which hide the gender pay gap. A voluntary 'Equality Standard Scheme' would again only preach to the converted.

UCU is strongly in favour of the imposition of reporting and monitoring obligations on all employers, public and private. The Northern Ireland requirements which you dismiss as peculiar to a particular historical and social context have in fact been highly beneficial. These requirements are standard in the US, and in fact many British businesses are used to having to fulfil them because of international links.

UCU would argue strongly for the extension of the equality duty to the private sector. It is not reasonable or just or fair to continue to require a higher standard of fairness and equality from the public sector than from the private sector. The line between the public and private sectors is becoming increasingly blurred, as we are only too well aware of in the post-school education sector. Prison education, for example, has been moved wholesale to control by private companies. Many of the lowest-paid workers, mainly women and ethnic minorities, have suffered from the contracting-out of previously public sector jobs, and have not been able to draw on the support of the public sector equality duties. The 'light touch' approach suggested for the private sector in the Green Paper exacerbates the danger that private sector employers, not having to meet their equality obligations, will use their position to further undercut public authorities. Those same public authorities will be even more tempted to rely on procurement or contracting out, thus avoiding meeting some of their duties. There will be a further reduction of the number of staff and service-users who are covered by the equality duty.

Unless the same duties and obligations apply to both the procurement process and private sector companies as currently apply to the public sector, any significant move towards equality for the majority of the population is a long way off.

Chapter 7 – Effective dispute resolution

UCU has no objection to the use of Alternative Dispute Resolution, or an enhanced role for Ombudsmen. Going to court is not an agreeable experience for anyone, and anything that resolves problems effectively without such resort is to be welcomed. Nonetheless, there are times when only a legal approach will suffice. We are disappointed that you claim that the part of your remit which covered an investigation of different approaches to enforcing discrimination law has been covered by the DTI's Dispute Resolution Review. This review contained just two questions relevant to discrimination claims. It was not the right forum for dealing with the very real problems of promoting access to justice and enforcement in relation to discrimination law. Enforcement and remedies must surely be an integral part of a single Equality Bill. You dismiss the very valid arguments that have been made about using equality tribunals rather than County/Sheriff courts for dealing with service claims. More seriously, you also dismiss the arguments for representative actions to be brought.

UCU would support both these proposals. We agree with those who argue that because very few service cases are taken to court in relation to equality issues, and because discrimination in employment is dealt with by employment tribunals, the courts have very little expertise in discrimination law. We know, for example, that although the Regulations on Sexual Orientation and on Religion or Belief gave students who felt they were being discriminated against on those grounds the right to take a college or university to county/sheriff court, to the best of our knowledge no such case has been taken. We do not believe this is because no students feel aggrieved on these grounds, but rather

because they either are not aware of this right, or if they are, are confused or intimidated by the system and put off by the cost.

The Employment Tribunal system, for all its faults, is more user-friendly than the courts and could be made more so. If some Employment Tribunals were designated as Equality Tribunals, to cover both employment and service cases, and the whole system of application made much simpler and more widely publicised, access to justice could be much improved. UCU would urge that student claims of discrimination in the provision of post-school education should also be moved from the county/sheriff courts to equality tribunals.

We have already referred to the need for representative or class action in the Equal Pay section. You appear to dismiss this on the grounds that business wouldn't like it. But the current system of taking multiple individual claims to address a collective problem is hugely wasteful of time and money for individuals, unions and businesses. An institutionalised form of discrimination against a particular group can only be dealt with effectively by class actions which address the institutional problem, not a false construct that it is an individual issue.

Equality tribunals should also have the power to make enforceable recommendations on an employer's policy and practice in relation to discrimination claims.

Your comments on multiple discrimination are also very disappointing. A major rationale for creating the CEHR was a recognition that people's identities are increasingly multi-layered and complex. The law needs to adapt to reflect the multiple identities people have, and their experience of discrimination on more than one ground. Removing the requirement for a comparator, and permitting discrimination claims to be brought on combined, as well as single, grounds would be a very helpful step. You claim there is no evidence that people are failing to bring cases because they can't refer to multiple discrimination. This ignores the obvious point that currently individuals are forced to choose the single ground on which they claim discrimination, and thus are forced to shape their case to fit into one ground. They are likely to choose the ground which is best placed in the hierarchy, thus disguising the number of discrimination cases related to less well-protected grounds.

Part 3 – Modernising the Law

UCU agrees with the proposal to remove the list of 'capacities' from the definition of disability. However, please note our earlier comments about the definition of disability.

We accept that there have been many positive steps to support carers in recent years. However, we still think there is an argument for extending protection against discrimination to carers as a group. It is far from inconceivable that employers would

either not select for employment, or find an excuse to sack a worker if they became aware that s/he was caring for a child with a severe impairment.

UCU is of the view that everyone should be protected from discrimination on the basis of their marital status and not just married persons and civil partners. There may be some residual discrimination against married women, with a belief that they don't need to live on their pay because they are supported by their husbands. Historically, the idea that women were working for "pin money" was one of the reasons for complacency about the gender pay gap, and such attitudes linger on long past their sell-by-date. But single people may also face discrimination, as for example in the use of single room supplements by hotels or in the stereotypical critical view of single parents often expressed by the media and some politicians.

We also disagree with you that there is no need to provide legislation to prohibit genetic predisposition discrimination. You say you agree with the recommendation of The Human Genetics Commission not to amend the DDA to provide protection on these grounds. The Commission did indeed say that, but it also said that legislation was required, but that the DDA was not the appropriate vehicle. With the explosive growth of technological information and techniques, so that a huge range of information about all individual citizens is available, it is hard to see how the danger of information about genetic predisposition being used negatively will not become a growing problem.

You say at the beginning of this chapter that attitudes about what constitutes unacceptable discrimination have shifted dramatically over the last 40 years. This is true, and will no doubt also be true of the next 40 years. You do not ask if there are new areas of discrimination to consider. We are not asking for immediate action on this, but UCU would like to make the point that personal appearance is increasingly an area for consideration. Many employers unashamedly talk about the need for an "aesthetic workforce" and a number of surveys have shown that, in particular, being fat is a major barrier to initial employment and to promotion. The current mania about the 'obesity epidemic' is no doubt exacerbating this problem, and at some time in the future, it may need to be addressed by legal means.

Chapter 9 – Age Discrimination beyond the workplace

UCU is strongly of the view that legal protection against age discrimination in the provision of goods and services is needed. To have a single Equality Act which offered this protection across all strands, with the sole exception of age, would be an anomaly indeed.

We do accept your arguments that there are many instances when age differentiation is beneficial and justifiable, and the danger of unintended consequences. We have some experience of this in our sector. The Age Regulations already in place in fact cover colleges and universities as 'service providers' because the Government has defined all

courses provided in FE and HE as vocational training. Traditionally, many colleges provided adult education courses either specifically aimed at retired people, or offered to retired people at concessionary rates. Now many providers are questioning whether they can do this, or finding elaborate mechanisms to advertise courses or provide concessions which do not mention age. The overall effect of the Age Regulations for older students has been predominantly negative. The benefits to society of providing training for older workers, and of providing courses which encourage retired people to continue engaging with society are too obvious to need stating. It cannot have been the intention of the Age Regulations to reduce the provision of education for older students, but that has been the unintended consequence.

You ask for examples of unfair age discrimination outside the workplace. Government policy on the funding of post-school education is a glaring example. The concentration of priority funding on the 16-19 age group, and to a lesser extent on the under 25's, has meant that many providers have had to cut their adult education provision, with devastating consequences. The Government's own figures show that in 2006-7 there was a 4% cut in the adult education budget, and that 500,000 student places have been lost. Things are set to get worse this year. The rule that anyone aged over 60 cannot receive a student loan to study a degree is another example. The Government justifies its funding policy in terms of the existing Age Regulations by saying that state-funded schemes are excluded from the European Directive which made the Age Regulations necessary. But the thinking behind this policy – that in post-school education, younger learners are intrinsically more valuable than older ones – is a prime example of an ageist culture which you say it will be the responsibility of the CEHR to change. The thinking that says it is more worthwhile to spend money training young people because they will be in the workforce for longer leads eventually to the view that we shouldn't waste health-care resources on old people, but simply let them die.

Clearly, in the provision of social and health care, there is negative discrimination against older people, and it can only be addressed by legislation, not by commissions and frameworks and surveys and voluntary codes.

We do accept that legislation in this area will need to contain a number of exceptions, so that the provision of beneficial age-differentiated services is not affected. We think, however, that a much stronger and more imaginative approach to positive action or 'balancing measures' could deal with many scenarios. For example, access courses for mature students (it is another outcome of the existing Age Regulations that many providers are questioning whether they can even use the expression 'mature students') could be justified in positive action terms.

Finally, we are very uneasy with your statement that those under 18 would be excluded from any new legislation on age altogether. While it is clear that children of different ages need particular forms of education and services, to exclude them altogether sends out a

very negative message. The common sense interpretation of such a message would be that it is alright to discriminate against children because they are children. It seems to us there is a human rights issue here, and children can be protected from negative discrimination (e.g. from the fact that it is legal for parents to hit their children, when if they did the same to an adult it would be treated as an assault) without the absurd consequence of treating a five-year old exactly the same as a seventeen-year old.

Chapter 10 – Gender reassignment

UCU very much welcomes the proposals to extend protection from indirect discrimination to transsexual people, and to prohibit discrimination on grounds of gender reassignment in the exercise of public functions. Generally we are in favour of the same level of protection from discrimination for all strands. As you say, this is a small group of people, but the discrimination directed against them can be very severe, and they need the fullest protection that the law can offer.

We do not agree with the exclusion of school pupils. There is plenty of evidence that those who experience a sense of gender dysphoria start to do such at an early age. Many pupils stay on at school until they are 18. It would be highly illogical that 16-18 year olds studying at an FE college or working would be protected, while those studying at school would not.

We do not consider that organised religions should be allowed to treat people differently on grounds of gender reassignment, any more than we agreed with the exemptions given to organised religions in the Sexual Orientation Regulations. 'Treating people differently' in this context always means discriminating against, and religious belief should not be a justification for negative discrimination.

We do not agree with the proposal to keep the existing definition of gender reassignment, which fails to protect large numbers of people. It excludes intrasex people, and those who experience gender dysphoria but for various reasons cannot seek gender reassignment. The definition needs to incorporate the whole Trans community, not just transsexuals.

Chapter 11 – Pregnancy and maternity

UCU entirely agrees with the proposal to extend protection on the grounds of pregnancy and maternity to cover the exercise of public functions.

We do not agree that school pupils should be excluded from this protection. It is of course the case that pregnant school girls may need different provision than other pupils. The guidance and obligations you refer to could still apply. But we would make the same point that we did in relation to excluding children from age legislation. Treating people in different circumstances differently is fine. Discriminating negatively against any group is

not fine. The law should contain a clear statement that discrimination against pregnant women and new mothers is unlawful, whether they are at school, in work, or anywhere else.

Chapter 12 – Private Clubs
Chapter 13 – Use of residential premises

UCU agrees with the proposals in these chapters.

Chapter 14 – Harassment

UCU welcomes the thoughtful approach in this chapter, and the sense that a genuine consultation is going on. We could wish that in some other complex areas of debate, you did not appear to have closed down the options.

Protection from harassment on all strands already exists in the further and higher education sectors, because as you point out, the employment and vocational training regulations cover further and higher education as providers of education and as employers. It is our experience that this protection is absolutely vital across all the strands.

We think the current definition of harassment is very clear, and if strictly interpreted, should not produce a blurring of the lines between 'legitimate freedom of expression' and harassment of individuals. We welcome your concern to protect 'academic or critical enquiry and debate.' Academic freedom is very precious to our members, and we certainly would not want it curtailed. Examples such as the calls by some Muslims to ban 'The Satanic Verses', by some Sikhs not to stage "Behzti" or the outrage of the Christian right about the televising of "Jerry Springer – the opera" would be totally opposed by UCU. Particular concerns about banning harassment on the grounds of religion or belief are understandable because certain religious groups claim to be deeply offended by people expressing views critical of their beliefs, or satirising them. They must be told firmly that this is not harassment within the meaning of the law. But it cannot be right to legislate to prevent harassment on every ground except religion or belief. Currently, one of the groups most likely to experience the kind of harassment which really does come fully within the current definition is Muslims. It would be irresponsible not to provide express protection from harassment on these grounds.

The area where protection from harassment is probably most needed is sexual orientation. For lesbians, gay and bisexual people, the form of discrimination that is most prevalent and problematic is harassment and bullying. Stonewall's campaign around homophobic bullying in schools has provided ample evidence of the extent of the problem. Yet until very recently, although most schools had clear policies on racist bullying, they were silent on homophobic bullying. You ask for examples of harassment which is occurring on grounds currently unprotected. We would refer to the report recently produced by the Centre for Excellence in Leadership ["Equality and Sexual Orientation: The Leadership

Challenge for Further Education"] on the experience of being lesbian, gay or bisexual in further education. Everyone who read the report was shocked by the extent and severity of the problems exposed. Its findings are born out in colleges where harassment on this ground is being logged.

UCU's position is that there should be a totally consistent approach across the strands.

Express statutory protection against harassment should be extended to cover religion or belief, sexual orientation, age and disability, and should cover goods and services, education in schools, premises and public functions. We do not think that specific exceptions should be provided in legislation. Instead, we think that the CEHR should be charged with producing a Code of Practice on harassment. This should have many examples of what does and does not constitute harassment under law. It should make crystal clear that a robust intellectual rebuttal of religious belief for example, does not constitute harassment, and nor do novels or plays satirising religious figures.

We do not think there is a valid distinction to be made between harassment in an 'open' and 'closed' environment. The type of behaviour envisaged in the current definition of harassment is wrong, and should be treated as such wherever it occurs. There is a distinction between avoidable and unavoidable sources of offence however. No-one has to read "The Satanic Verses". It requires a positive act to open the book and peruse its contents. But BNP posters with messages of race hatred displayed on a street which everyone has to walk down constitute harassment. Black students who had no choice but to attend the lectures of a racist lecturer who was constantly expounding his views that black people are intrinsically less intelligent than white people would be victims of racial harassment

As for 'third parties', most harassment and bullying policies in colleges and universities make it clear that if a member of staff is harassed by students, a not uncommon event, this will be dealt with under the Student Disciplinary Procedure. The Single Equality Bill should make it clear that employers have a duty to protect their employees from harassment on any of the strands.

Annex B – Implementing the EU Gender Directive

Generally, UCU is happy with the proposals set out in Table 1.

We think the ban on differences to insurance premiums due to maternity or pregnancy costs should be implemented as soon as possible. We think it would be helpful to define maternity for the purposes of the Act. One year seems a very limited period however. For example, mothers are now being encouraged to breastfeed for a longer period than this. We would suggest two years is more appropriate.

Conclusion

UCU would urge the Government in the strongest possible terms to grasp the opportunity to strengthen, simplify and bring consistency to discrimination law. We hope that the Single Equality Bill which emerges at the end of this consultation has the following features:

- it removes the sense that there is a hierarchy of oppression and treats all strands with equal seriousness
- it uses a consistent approach for all seven strands in all the topics covered by the Bill (e.g. harassment) except when there is a compelling reason not to
- it produces a stronger, rather than weaker public sector single equality duty, covering all strands
- it extends the equality duty to cover the private sector
- it requires all employers to conduct equal pay reviews covering all strands, and to take action where pay gaps are identified
- it is calculated to make both public and private bodies take positive steps to actively promote equality for all.

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