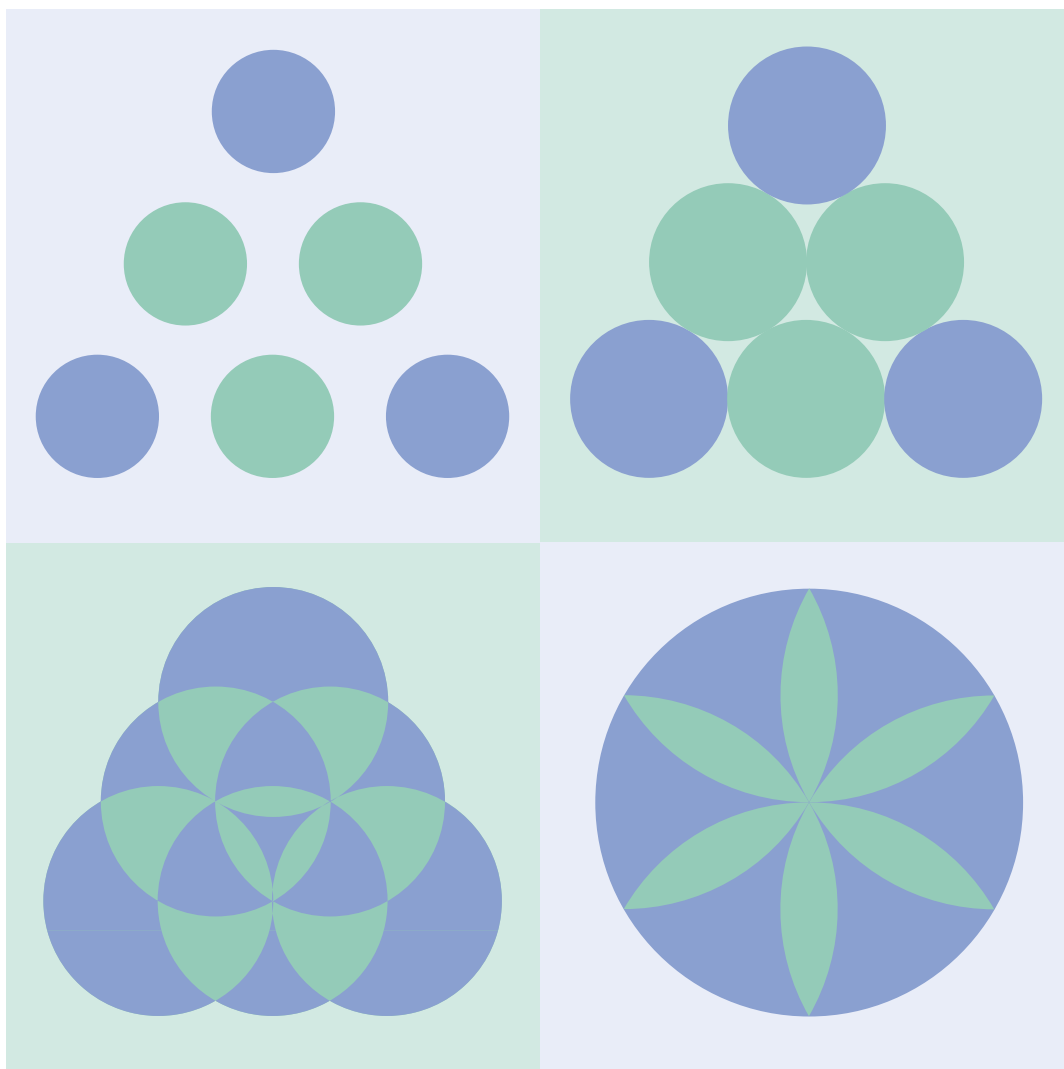


WHICH WAY EQUALITY?

The government's proposals for
implementing the EU directives



In October 2002, the government published proposals for changes to the equality laws, and to the three organisations that tackle discrimination and promote equality in Great Britain today: the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC). The government's proposals are contained in two documents.

- 1 Equality and Diversity: The way ahead** (www.dti.gov.uk/er/equality) This explains the regulations the government has drafted to amend our equality laws and to introduce new legislation outlawing discrimination on grounds of sexual orientation, religion or belief, and age. The deadline for responding is 24 January 2003.

The EU race directive

- Introduces the principle of equal treatment between people, irrespective of race or ethnic or national origin.
- Gives protection against discrimination in employment and training, education, social security, health care, and access to goods and services.
- Does not apply to acts of discrimination on the grounds of nationality or colour, which are covered by the 1976 Race Relations Act.
- Contains new definitions of indirect discrimination, harassment, victimisation, and permissible discrimination to meet a genuine occupational requirement; and shifts the burden of proof in civil cases.
- Each EU country must have an organisation to promote equal treatment and provide independent assistance to victims of racial discrimination.

The EU employment directive

- Requires new equality legislation to outlaw discrimination in employment and training on the grounds of religion or belief, sexual orientation, and age.
- Does not apply to social security, social protection or access to goods and services.
- Does not provide protection against discrimination on grounds of nationality.
- Does not require member states to have an organisation to promote equal treatment and provide independent assistance to victims of discrimination on grounds of religion or belief, sexual orientation, and age.

- 2 Equality and Diversity: Making it happen** (www.womenandequalityunit.gov.uk/equality_body/cons_doc.htm) This explains the government's proposals for future organisational structures, and its short-term arrangements for dealing with discrimination on grounds of religion or belief and sexual orientation. The deadline for responding is 21 February 2003.

We have produced this leaflet to explain some of the government's main proposals, and to examine their implications, for racial equality in particular. We set out our own preliminary thoughts, and ask you to tell us what you think, before we submit our response to the government.

This leaflet focuses on the big picture, so we urge you also to read our detailed response to the government's original proposals on our website (www.cre.gov.uk/pdfs/art13_response.pdf).

1. EQUALITY AND DIVERSITY: THE WAY AHEAD

RACE RELATIONS ACT 1976 (AMENDMENT) REGULATIONS 2003

What the government is proposing

- To implement the EU race directive through regulations under the European Communities Act 1972 rather than through primary legislation (that is, by taking a bill through parliament).
- To incorporate the new definitions introduced by the race directive (see box) into equality legislation.
- To remove exceptions to the general prohibition of discrimination in the 1976 Race Relations Act that are contrary to the principle of equal treatment.

The government acknowledges that its decision to use regulations to implement the directive will lead to inconsistencies, but it says it will rectify these 'when an opportunity arises'. However, it gives no indication of time-scale.

What the CRE says

In our response to the government's earlier consultations, we strongly advised against

The way forward

The CRE welcomes the fuller protection people will have from discrimination when the EU directives on race and employment are built into British law. However, progress towards equality depends on safeguarding the following basic principles:

- clear and coherent law, with a common core across different grounds of discrimination;
- access to publicly funded and independent legal advice and assistance for complainants;
- no reduction in the powers or resources currently available to tackle unlawful discrimination, and promote equality and good race relations; and
- no ground of discrimination should dominate or be marginalised.

implementing the race directive by regulation. We pointed out the inevitable inconsistencies, and warned that these would not only make British race relations law more complex, but lead to more uncertainty for individuals and organisations as to their legal rights and responsibilities. It would effectively create a two-tier structure.

These inconsistencies and complexities will arise in two ways.

- Since the 2003 regulations only apply to acts of discrimination on the grounds of race or ethnic or national origin (the grounds covered by the EU race directive), the new definitions they introduce will not apply to acts of discrimination on the grounds of nationality or colour, which are covered by the 1976 Race Relations Act. The definitions and standards we currently have under the 1976 Act will continue to apply to these grounds until the government deals with this anomaly.
- The 2003 regulations apply only to those public functions dealing with social provision, social security, health care, social protection, and social advantage. The Race Relations Act applies to all public functions, including law enforcement and regulatory functions. There is legal uncertainty as to whether the regulations cover law enforcement, and as to which regulatory functions are protected. This will have to be decided by the courts.

The government's decision to implement the EU directives by regulation rather than by primary legislation will have the following immediate consequences for racial equality.

- There will be two definitions of indirect discrimination; two definitions of harassment; two definitions of 'genuine occupational qualification'; two burdens of proof; and, effectively, two classes of equality. Courts and tribunals may have to use different standards for different aspects of a case, if one part is covered by the directive and another is not.
- Individuals and organisations will be left unsure of their rights and responsibilities under the 1976 Race Relations Act, as amended by these regulations.
- Litigation is likely to increase, leading to more delay and expense.
- Hearings will become more complex, and therefore longer and more expensive.

The government's decision to implement the EU directives by regulation will lead to inconsistencies and, effectively, to two classes of equality.

At a time when there is overwhelming support for greater consistency across the different grounds for discrimination, it cannot make sense to create new inconsistencies within race legislation. We therefore strongly urge the government:

- to introduce a quick bill to ensure uniform and consistent standards within the Race Relations Act; and
- to launch consultation on the wider reforms needed to produce a harmonised body of equality legislation by 2006, when the requirements of the employment directive on age have to be implemented.

We welcome the government's proposals to include the new definitions introduced by the race directive in British discrimination law. We also welcome the removal of exceptions to the protection against racial discrimination in favour of the central principle of equal treatment.

Structural options for future equality organisations

- A single equality body, dealing with all six grounds of discrimination.
- A 'single gateway', offering a one-stop shop for general information and advice on all six grounds of discrimination, but with specific services based in the existing commissions.
- An 'overarching commission' with a governing body responsible for setting strategic priorities, direction, and budgets, made up of representatives from each of the six equality 'strands'. Strand-specific boards would report to this body.

2. EQUALITY AND DIVERSITY: MAKING IT HAPPEN

FUTURE PRIORITIES FOR EQUALITY INSTITUTIONS

What the government is proposing

Recognising the important role the three equality commissions have played, the government puts their functions and powers at the centre of any future equality organisation. It also lists several priorities for the future, including dealing with cases of discrimination on more than one ground (multiple discrimination), and having a flexible approach to law enforcement, with more emphasis on conciliation and dispute resolution.

What the CRE says

We already work to many of the government's proposed priorities, and we strongly agree that effective ways of dealing with discrimination on more than one ground need to be found.

In our view, the quickest and most effective solution is through harmonised legislation for the different grounds of discrimination, as well as coherent organisational arrangements. The government's proposals say nothing about rationalising the different and complex pieces of equality legislation, to make it easier for organisations and individuals to comply with the law, and to understand and use their rights. This is surprising, since the government refers in *The Way Forward* to overwhelming support for achieving consistency between the different 'strands' of discrimination in the responses to its earlier consultation on implementing the EU directives.

Our own experience is that current law enforcement powers are often complex and time-consuming for everyone concerned. More effective methods could be introduced to achieve the flexibility the government wants. In particular, we would strongly recommend the following.

- The government should take advantage of provisions in the directives to introduce representative and class action. This would allow organisations, including the equality commissions, to take action *on behalf of* individuals or groups of complainants who are – or who could be – affected by discriminatory practices. The power should include the right

to challenge a potentially discriminatory policy or practice.

We also see a strong role for government and public organisations in using their considerable purchasing power to influence their suppliers' policies and practices on equality.

ORGANISATIONAL STRUCTURE FOR FUTURE EQUALITY INSTITUTIONS

1. SINGLE EQUALITY BODY

What the government is proposing

The government appears to favour the benefits of the integrated approach this model offers. It says the SEB could be based on either a 'strand-specific' structure, with separate units dealing with race, disability, sexual orientation, and so on, or a 'functional' one, with units dealing with common areas, such as policy or advice, across all the strands.

However, the government also acknowledges that there are risks and challenges in the SEB approach. For example, loss of focus on one or more of the strands, or on current aims and activities. Another concern is that no strand should dominate or be marginalised.

What the CRE says

We see some long-term advantages of an SEB; for example a one-stop shop for employers and service providers, and the wider appeal and influence of an organisation dealing with all equality matters. This could lead to a better understanding of all aspects of discrimination as well as the ability to deal more effectively with cases involving discrimination on more than one ground.

However, we strongly believe that legislative change needs to be implemented alongside organisational change, if the potential benefits of an SEB are to be fully realised. Otherwise, the employer ringing up the SEB for advice will still have to understand and apply at least four different laws for the different equality areas. Similarly, people who think they have been discriminated against may still find that they have different rights, depending on the grounds for the discrimination, and that some kinds of discrimination still have greater legal protection than others. Without greater consistency in the law, the coherence the government says it wants to see will be extremely difficult to achieve.

.....

***Without greater consistency in the law,
the coherence the government says it
wants to see will be extremely
difficult to achieve***

.....

We are also concerned that, turning our efforts now to making arrangements for a new SEB could detract from the priorities we have set for the next few years. These include helping public authorities to implement the new duty to promote race equality. Like the other commissions, we are also anxious that our existing powers or resources should not be diminished, and that our particular focus should not be diluted.

2. 'SINGLE GATEWAY' OR AN 'OVERARCHING COMMISSION'

What the government is proposing

The government sees these models as being possible stepping stones on the road to an integrated SEB. The advantage claimed for an overarching model is that it would provide opportunities for greater coherence and closer work between the different areas of equality – and it could include a common 'gateway' for advice – without the disruption of full-scale institutional change that an SEB would require. Possible shortcomings include the difficulties of accommodating the new strands and the

resulting tensions between the joint and strand-specific arrangements.

What the CRE says

We can see some advantages in both these options. They both appear to permit closer cooperation between the three commissions, whether as a long-term solution or as a staging post, while giving us more time to meet our current commitments. Either option would also give the government more time for a thorough review of equality legislation across the board, and the opportunity to find parliamentary time for any new legislation.

However, it is not immediately clear how support for the new areas of equality would be built into these two options. The government has ruled out making the three equality commissions responsible for them, but it does not appear to have any plans to provide complainants with support – other than advice and information – between the end of 2003 and the time that any new, across-the-board arrangements, such as an SEB, come into effect.

It would be possible in the overarching model to have a board and supporting machinery for each new area of equality – or jointly for all three of them – as well as for the existing areas. The arrangements for the new strands could be introduced when the employment directive is implemented at the end of 2003, ahead of wider equality changes.

It might also be possible to include a human rights board within either option.

EQUALITY AND HUMAN RIGHTS

What the government is proposing

The government agrees with the Joint Parliamentary Committee on Human Rights that it needs to consider the relationship between any new organisational arrangements for dealing with equality and those for promoting and protecting human rights more widely.

What the CRE says

We have always supported the establishment of a separate human rights commission. We would certainly want to be able to use the 1998 Human Rights Act to deal with racial discrimination when racial equality legislation does not

apply. There may be benefits, too, in being able to tackle situations where there is no discriminatory treatment, but there is an equality issue; for example, when someone is treated in a degrading or inhumane way.

The Scottish Parliament is committed to establishing a human rights commission in Scotland and will be consulting further in early 2003.

THE SCOTTISH AND WELSH DIMENSIONS

What the government is proposing

The government thinks that any new structure should be established for Great Britain as a whole, in line with the devolution settlement, and that it should have well-resourced offices in Scotland and Wales. Both the Scottish Parliament and the Welsh Assembly have equal opportunities committees, which have the power to promote equal opportunities.

The government discusses the possibility of a 'light touch' central body, coordinating three executive arms in England, Scotland and Wales. However, it cautions that the autonomy of the three executive bodies would need to be reconciled with the central body's overall accountability, and that they would need to share information about their work.

What the CRE says

We already have a significant presence in Scotland and Wales, as well as in England. A committee of the commission is responsible for work in each country. 'National' committees and commissioners may be one way of helping to recognise and engage with the three countries' distinctive needs and circumstances.

LOCAL AND REGIONAL DIMENSIONS

What the government is proposing

The government says it wants to build on good practice and make the most of existing advice and support for organisations and individuals, for example help-lines and websites.

What the CRE says

We are a decentralised body, with a head office in London, offices in Edinburgh and Cardiff, and four offices in different English regions. All our offices advise people with complaints of racial discrimination; build strong relationships with local communities; advise employers, public authorities, regional organisations, and others on racial equality; and develop expertise on local issues.

We also help to support about 100 racial equality councils (or RECs) in all parts of Britain. RECs play an important role locally – sometimes more widely – in supporting individuals, advising local organisations on best practice, and promoting good race relations and community cohesion. Some RECs are broadening the scope of their work to cover other equality strands, and this might be considered for wider, more systematic development when the new arrangements for administering equality are introduced.

LAW ENFORCEMENT AND PROMOTION

What the government is proposing

The government thinks law enforcement and promotion functions should be carried out by the same equality organisation. While recognising that some businesses may find it difficult to be open when seeking advice from a commission that is also responsible for law enforcement, the government thinks these tensions can be managed, by striking a reasonable balance between the two functions, and by separating them clearly within the organisation.

What the CRE says

We have always supported the combination of both functions within the same organisation. We would also point out that this means the equality commission can be more flexible about which approach to adopt, in particular circumstances.