

A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain

Response Form

Proposals for a Single Equality Bill for Great Britain

The main consultation document addresses various proposals and options for changing discrimination law in order to create a clearer, more streamlined equality legislative framework, which produces better outcomes for those who currently experience disadvantage. The following questions are reproduced from the main document, in the order and with the same numbering in which they appear there. In addition, you are asked for your comments generally on the estimated provisional costs and benefits, as shown in the Initial Regulatory Impact Assessment and the Equality Impact Assessment.

Part 1 – Simplifying the law

Chapter 1: Simplifying definitions, tests and exceptions and promoting compliance

Simplifying definitions and tests

Direct discrimination

Q1 Do you have any comments on our intention to keep the existing requirement for a comparator in direct discrimination claims?

Yes. There are arguments for and against the use of the comparator model featured in equality law as explained in the CIPD research report *Discrimination and the Law: Does the system suit the purpose?*

While it can be argued that the comparator model can be more definite and achievable than other approaches, the use of a comparator as a yardstick to improve the position of the less advantaged is seen as inflationary and damaging to competitiveness, even though there is no legal obligation to go beyond the gold standard defined by the identified comparator.

There are also concerns that the comparator model is fundamentally flawed in failing to truly recognise and value diversity – people are uniquely different, not just shadows or reflections of others and therefore the integrity of individuals and groups should be respected for what they are in their own right.

On a practical level, gaining and assessing evidence regarding comparators is time-consuming and challenging for claimants, employers and tribunals and can lead to protracted decisions.

However, on balance, we agree with the proposal to maintain the use of the comparator model in connection with direct discrimination, until such time that more radical proposals for simplifying discrimination law are available.

In connection with Q9 we agree that the use of comparators in victimisation claims is not appropriate.

In connection with Q19, although we recognise that there are practical problems regarding evidence and proof in connection with the use of hypothetical comparators

in equal pay claims, in our view it would be inconsistent to rule out their use. They are used in other discrimination law and may be useful in circumstances where normal comparators are not available. For example where women are marginalised in certain sectors of the labour market and where there is a dominant female workforce. We would argue that unless the use of hypothetical comparators is uniform in discrimination law it will neither be consistent nor simplified.

Managing diversity is highly complex and needs a variety of tools and levers to make progress and root out unfair discrimination. Denying the use of a technique just because it is seen to be 'too difficult' will stop progress being made.

Q2 Do you have any comments on our proposal to replace the separate definitions of discrimination in Part 3 of the Disability Discrimination Act with a single definition?

Yes. We support the rationalisation of the definitions of disability as an important step forward in helping employers to develop more coherent approaches to creating inclusive work forces and working environments, marketplace activity and service delivery. This will improve understanding and make it easier for employers to get to grips with making progress.

Q3 Do you agree that we should largely keep the existing approach in relation to discrimination on the basis of perception and association, except for an extension to protect against discrimination on the grounds of association with transsexual people?

No. In the interests of making discrimination law a more effective, consistent and simpler tool for supporting the progress of diversity we have serious concerns about the reasons given in the Green Paper not to extend the concept of perception to disability law as it is featured in other discrimination law.

The fact that the Green Paper infers that this would give far too many additional people protection begs the question 'Does the Government have serious commitment to the achievement of inclusion or is it tokenistic?'

It is accepted that perceptions and stereotyping can wrongly influence the way decisions are made about people in connection with jobs and training and can be at the root of unfair discrimination and prejudice. We therefore think that it is inconsistent not to adopt the same principle in connection with disability law. We hold this view regarding protection on the basis of 'association' which is influenced by 'perception' especially in the light of the proposal to extend protection on the basis of association with a transsexual person, which we support.

Given that case law on 'by association' is developing rapidly, it seems short-sighted not to cover this issue in new law.

Drawing a line around age and association as beyond the scope of the proposed legislation looks like a defensive response to limit the scope of law, to afford protection to people who experience unfair disadvantage based on age.

We find the proposals in the Green Paper regarding protection on the basis of perception and association will mean the legal model for a single act will be fundamentally flawed rather than being founded on consistently applied principles and evidenced reasons. Those given to support the proposals are neither robust nor convincingly evidenced.

Our concerns are that the inconsistencies in the proposals will cause confusion and undermine the confidence of employers in driving change in valuing and managing diversity. These are loopholes that will need to be addressed in more radical change.

Indirect discrimination

Q4 Do you agree with our proposal to extend indirect discrimination to cover gender reassignment but not explicitly introduce it to disability discrimination law?

Yes. In its response to the Green Paper the DRC has put forward the concept of introducing an **anticipatory duty** in connection with employment and training to reflect that built into service delivery and education, as a way of supporting the progress of inclusion for people with disabilities and encouraging employers to be more proactive.

This is suggested to put the progress of disability diversity on a par with the progress of other forms of diversity and we believe that this idea is worthy of consideration to make sure that the progress of all forms of diversity is more uniform.

Definition of indirect discrimination

Q5 Do you agree with our proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds?

Yes. This will make approaches uniform and facilitate understanding and practice.

Objective justification

Q6 Do you agree with our proposal to harmonise the objective justification test?

Yes. This will improve the consistency of the law on tackling discrimination and should still enable organisations to balance what they do against operational needs and challenges. This is very important as progressing diversity needs to be appropriate and relevant to the organisational objectives to be sustainable, as shown by CIPD research on managing diversity generally. In progressing diversity at the level of the organisation legislation needs to provide for business imperatives and objectives to be taken into account on the basis of workable solutions.

Justification of disability discrimination

Q7 Do you agree that there should be a single test of objective justification for disability discrimination in employment and vocational training, goods, facilities and services, housing, education, private clubs and public functions?

Yes. It makes sense and enables consistency to adopt this approach and is simpler.

The threshold for reasonable adjustments

Q8 Do you have any comments on our proposal to establish a single threshold for the point at which the duty to make adjustments is triggered?

Yes. This enables consistency and chimes with the duty on employers to *treat a disabled person more favourably* than an able-bodied person in similar circumstances. It encourages a ‘can do’ mindset.

Questions of the potential crossover/linkage between disability and age have already been raised by employers (and we believe individuals). We will be pleased to work with the Government to explore these and scope them out.

Victimisation

Q9 Do you agree that the approach to victimisation in discrimination law should be aligned with the employment law approach?

Yes. Protection against victimisation in discrimination should not be weaker in cases of discrimination than in employment generally, especially as situations pertaining to discrimination are more likely to be traumatic and stressful. It is less confusing for employers and employees to see that victimisation is seen as unacceptable whatever the circumstances, as it damages employee relations and personal wellbeing.

The CIPD has published a range of research to show the significance of bullying and intimidating behaviour and has developed good practice guidance and an electronic tool to help employers move towards the creation of a workplace climate based on respect and dignity.

Simplifying exceptions

Genuine occupational requirement test

Q10 Do you agree that a genuine occupational requirement test should be introduced for all grounds of discrimination, with the exception of disability (where it is not necessary)?

Yes. This is more progressive than an exhaustive list of circumstances – which might be time-limited – as long as it is intended that employers should provide robust and objective, business-based evidence of operational needs and imperatives and commitment to progress diversity.

Potentially GORs could be designed so that person specifications can take into account wider organisational business imperatives to become more diverse to improve service delivery and marketplace activities.

CIPD research, including two recent survey reports, *Diversity in Business: How much progress have employers made?* and *Diversity in Business: A focus for progress*, show that creating a balanced workforce is an important business case driver and helps to improve business performance.

We would argue that if person specifications are based on objective business needs regarding operational and service delivery, they will form an important cornerstone for fair selection based on merit and suitability.

The law is weakened as a lever for diversity progress if it either by default or as an unintended consequence, acts as a barrier towards the achievement of inclusion.

That is why more radical legal changes are needed to make discrimination law *fit for purpose*.

In our view, if GORs could be used to reflect wider workforce resource imperatives related to the delivery of operations and services, this would fit with the suggestions in the Green Paper regarding goods and services and genuine service requirements and help to support the proposals regarding balancing measures.

Codes of practice and guidance about GORs should be used to illustrate the circumstances in which GORs would be justified and how to evidence them as such. Having this information in the form of guidance would be easier to keep up to date.

Q11 Do you think there is a need to retain any of the genuine occupational qualifications listed in the Sex Discrimination and Race Relations Acts?

No. As explained above in Q10, examples of GORs and how to evidence them could be given in codes of practice and other guidance and be more readily updated.

We would like to point out that people with diverse personal characteristics, for example personal experience of disability, will bring important and different insights into customer and service delivery as well as their own talents and abilities and this is why there is such an important business case for the creation of a diverse workforce. and why diversity issues need to inform organisational resourcing.

Genuine service requirement test

Q12 Do you support or oppose the introduction of a genuine service requirement test for differentiation in the provision of goods, facilities or services, housing and the exercise of public functions?

We support it. Access to specialist goods and services is an important element of marketplace provision and service delivery. As businesses increasingly tune into the diverse needs of their customers and clients new products and services evolve to improve business performance. This is central to the business case for progressing diversity. Niche markets help to satisfy needs that might otherwise not be economically viable to deliver and arguably help to improve personal choice, even though they may be exclusive.

National-level promotion of diversity opportunities to stimulate market responses will help to encourage businesses to be more proactive, which is why the CIPD has taken such a strong line on the importance of education and awareness raising and the promotion of the business case for diversity, which is now well-evidenced in CIPD research.

Specific exceptions

Q13 Do you agree with the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate?

Yes. This makes sense for simplification and coherence.

Q14 Do you have any comments on our proposals for retaining the specific exceptions set out in Table 1 in Annex A?

Yes. It would make sense to examine the specific exceptions to make sure this status is genuine, necessary and appropriate.

Q15 Do you agree that the exceptions listed in Table 2 in Annex A should be removed?

No. But it would make sense to examine the specific exceptions to make sure this status is genuine, necessary and appropriate.

Q16 Is there any need to return an exception to allow insurers to treat people differently on the grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008?

No. If there is a *genuine need* to do so we agree it should be evidenced on the basis of the treatment being *reasonable and based on actuarial or other data or information from a source on which it was reasonable to rely*.

As we pointed out in our response to Q12, promoting potential business opportunities in the insurance sector to encourage innovative offerings would help to improve the range of market offerings in response to market needs. More niche market offerings will help to address the concerns of employers about higher premiums for different sectors of the labour market such as older workers for example, where employers are required to shop around for cover to meet the requirements of the age regulations.

Chapter 2: Public functions

Q17 Do you agree that there would be benefits in adopting a harmonised approach to the goods, facilities and services and public functions provisions are structured across all protected grounds?

Yes. Mainstreaming diversity into public policy-making will inform our infrastructure, help to ensure this does not act against what discrimination legislation requires of the rest of the public and the private sectors, and underpin rather than undermine the value and relevance of addressing diversity in all organisational activities to secure an inclusive society.

Q18 Do you think the exceptions could be streamlined in this area or do you think that there are any exceptions that should apply to public authorities that it would not be appropriate to apply to the provision of goods, facilities or services by private bodies?

No. Generic exceptions need to be justified on the basis of robust evidence and be regularly reviewed to be maintained.

CIPD research on managing diversity and the business case shows that approaches to progressing diversity need to be mainstreamed with organisational objectives and circumstances to be sustainable, and to make a difference.

But, as with the age regulations regarding long service awards for example, where there is national level data to support a generic exception – as in connection with CIPD evidence about loyalty payments for up to five years' service, more specific evidence, at the level of the organisation, is needed to justify payments for longer periods of service to make sure that there is no unfair age discrimination.

This would be a sensible and pragmatic approach to adopt in connection with streamlining exceptions in public authorities and the provision of goods and services by private bodies, otherwise the legal mechanism itself could deliver unfair outcomes.

Chapter 3: Equal pay

Q19 Do you agree that the distinction should be retained?

No. We empathise with the problems presented to employers in tackling the equal pay gap, much of which is structural, especially as it can be costly to put things right when unjustifiable gaps are found between the incomes of their male and female employees.

Fear of the challenges and consequences of exposure creates inertia but many employers have taken action to audit what they do and can demonstrate the benefits of doing so. In fact CIPD research shows that 19% carried out equal pay audits in 2006 and 20% in 2007. And more private sector employers are conducting such reviews.

Those that do take action recognise the importance and benefits of fairness in reward systems and we have published unique guidance, *Reward and Diversity: Making fair pay add up to business advantage*, to help employers understand the importance of total reward and equitable treatment. This includes good practice tips, as well as an online tool to help them draw up an action plan to make progress and signposts to the EOC's recommendations for making progress. Pay equity goes beyond gender as we show in our research report.

We are represented on the Government advisory board for the creation of the *gender equality indicator* being developed as a response to the report of the Women's Commission chaired by Baroness Prosser. It is expected that after pilot trials (with which the CIPD has offered to help), that this will lead to the launch of a simple 'light touch' electronic tool.

In our view voluntary, rather than compulsory, audits are a sensible way forward as unless an employer is committed to identify underlying causes and taking action to induce systemic change, an audit can stop at superficial changes.

Carrying out an audit is an important part of investigating reward practices and ensuring that they support the way employees feel valued because being valued is linked to better performance in the workforce, as evidenced by the CIPD's work on the psychological contract.

Without doubt there is an important business case for progressing equal pay and we need an accessible legal framework which helps employers to do this more willingly and successfully. This calls for more promotion of the business case for equal pay and good practice guidance and a legal framework that supports positive change rather than a damage limitation response to law.

The causes of unequal pay are complex and the law is not easy to understand. To make it more accessible it is arguable that a more radical overhaul than that proposed is needed, which should take account of the practical difficulties faced by employers when they identify the need for progress and recognise and show that they are committed to deal with the challenges.

In the meantime we recognise that tidying up existing legislation is an important step forward but hope that this will not block consideration of the more radical change needed for good employment practice in the 21st century, which should accommodate different stakeholder interests, including businesses as the key change agents, to engage positive acceptance.

In the light of the importance of the ‘total reward’ approach advocated by the CIPD and the need for equal pay claims to address both the separate elements of a reward package and the total package, in our view to maintain the differentiation between contractual and non-contractual pay makes no sense. The impact of special bonuses for example can lead to serious differences in the pay of men and women.

Q20 Do you consider there are further areas of the law of equal pay developed by case law, which it would be helpful to codify?

Yes. To give employers time to put things right after exposing pay gaps there should be access to support and clear guidance. The CIPD additionally believe that employers should be allowed a specific time period in which to implement change (a moratorium) which will protect them against legal action along the lines outlined in the EOC response to the Green Paper.

Q21 Do you have further suggestions on how we could simplify equal pay legislation or make it easier to work in practice?

Yes. See our views set out in our response to Q19.

Q22 Do you agree that allowing the use of hypothetical comparators would be unlikely to give any benefit in practice.

No. Although we recognise that there are practical problems regarding evidence and proof in connection with the use of hypothetical comparators in equal pay claims, in our view it would be inconsistent to rule out their use. They are used in other discrimination law and may be useful in circumstances where normal comparators are not available. For example where women are marginalised in certain sectors of the labour market and where there is a dominant female workforce. We would argue that unless the use of hypothetical comparators is uniform in discrimination law it will neither be consistent nor simplified.

Lessons should be learned from how hypothetical comparators have been used in other discrimination cases to streamline the way settlements are reached and the time they take.

Managing diversity is highly complex and needs a variety of tools and levers to make progress and root out unfair discrimination. Denying the use of a technique just because it is seen to be ‘too difficult’ may hinder progress unjustifiably.

Part 2 – More effective law

Chapter 4: Balancing measures

Q23 What evidence is there of the extent to which the current ‘positive action’ provisions are being used? Do you consider that the current provisions limit the actions that employers and others would like to take?

We are not aware of numerical evidence on the extent of use of positive action provisions but there is much confusion generally about what is meant by positive action and positive discrimination.

Anecdotally, we are aware that employers who are committed to progress diversity, for example police services, are frustrated by the limits on progress that can be made because of the limitations of the law.

Such examples support the need for a radical change of approach in the legal framework and reflect the need for a sensible and credible way forward as raised in the Equalities Review.

Q24 Do you agree that it would be helpful for organisations seeking to make progress towards their goals of tackling under-representation and disadvantage to be able to use a wider range of voluntary balancing measures?

Yes. As indicated in our response to Q23, where organisations can show good practice in managing diversity to achieve greater inclusion and the delivery of operational imperatives, the law should allow the use of appropriate voluntary balancing measures.

But it is imperative that the criteria for such voluntary measures must not damage the credibility and integrity of managing diversity and lead to backlash consequences. The principle of merit should be sacrosanct, so that less well-qualified candidates should not be given preference because of their personal characteristic.

Q25 Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups?

Yes. Unless the education system is enabling it will hinder the achievement of greater inclusion in the workforce.

Q26 Do you agree with these proposals for issuing of guidance by the Commission for Equality and Human Rights, but that the Commission should not have a role approving positive action programmes?

Yes. Good practice guidance should be sufficiently explicit to enable employers to act within the law on a voluntary basis.

Q27 Do you agree that we should have a power to continue the operation of the current provision beyond 2015, if this is still necessary and proportionate?

Yes. The legislature should be an exemplar in this field if we are to achieve an inclusive society.

Q28 Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender?

Yes. The legislature should be an exemplar in this field if we are to achieve an inclusive society and follow good practice.

Chapter 5: Public Sector Equality Duties

Q29 Do you agree that the race, disability and gender duties should be replaced by a single duty on public authorities to promote race, disability and gender equality?

Yes. We are aware that there is support in the public sector for doing this and that some public sector organisations have already progressed in this way.

The Government needs to be seen to lead the way and not lag behind the good practice of leading local authorities, agencies and departments where there has been a pragmatically-led approach to tackling the overly complex current situation.

Q30 Do you agree that it would be helpful to provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations?

Yes. In our view, the lack of understanding about the purpose of law can result in unintended consequences by fuelling difficulties in interpreting how to comply. For example, the recently introduced age regulations have caused some organisations to take action to retire everyone by the default retirement age rather than considering flexible retirement beyond age 65.

A clear statement is essential. For example it is widely acknowledged that some organisations have failed to correctly implement their public duty – focusing more on process rather than outcomes.

Q31 Do you agree with the four areas set out in the proposed statement of purpose?

Yes. Prima facie these seem appropriate but if they are proved not to be there should be the scope to readily review them?

Q32 Do you think that the proposed statement of purpose adequately captures the need for work to build good relations and promote positive attitudes within and between groups and underpins efforts to build integration and cohesion?

Yes. There may be a need to clarify the purpose further in guidance and review it where it is shown to be misinterpreted.

Q33 Do you agree that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement?

Yes. CIPD research shows that organisations need to progress diversity in ways that support business goals. This also applies in the public sector. Public sector bodies need the freedom to give attention to pressing priorities in delivering better services to diverse communities in order to reduce identified problems related to disadvantage.

Q34 Do you agree that public authorities should be required to review their priority equality objectives at least every three years?

No. It might ease the burden on the public sector and enable resources and local circumstances to be addressed on a more practical basis by promoting the need for reviews to be undertaken on a regular basis indicating a range of possible timescales informed by experience.

Q35 Would it be helpful for strategic equality outcomes to be set by the appropriate national Government?

Yes. The CEHR should carry out and sponsor national level research first, to identify where particular attention is needed.

Q36 We would welcome views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, and on the four key principles we have identified. Do you prefer this approach, or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties? Please give your reasons.

In our view this approach would be more flexible than the specific approach and enable local and national priorities to be taken into account.

Q38 Do you think that the proposed single public sector equality duty should apply to all public authorities?

Yes, in principle, but there may be practical issues which would need to be taken into account.

Public sector organisations are very varied in size, function and responsibility. A public duty requirement for a local authority or organisation that has a direct client/customer interface is markedly different from that which would be appropriate for an organisation that does not have individuals as the end user of services.

Q39 Do you think that a single public sector duty should be extended to cover:

- | | |
|-------------------------------|-----|
| a) age | Yes |
| b) sexual orientation; and/or | Yes |

c) religion or belief;

Yes

Please state your reasons, including examples of the types of disadvantage you believe are experienced by people because of their age, sexual orientation or religion or belief which could be addressed effectively through such a duty.

On the basis of working towards inclusion it would be difficult to justifying excluding them as a matter of principle.

Nevertheless, there will be complex issues and controversial matters to address in doing this. For example tensions arising from sexual orientation and religious belief.

The failure of the Government to include age, sexual orientation and religion and belief within a public duty would send out two clear messages:

1. discrimination on these grounds is less important than gender, ethnicity or disability and create a hierarchy of discrimination
2. some issues are too difficult to tackle and therefore need to be avoided – for instance possible crossovers between religion and sexual orientation/gender.

At a time when the Government claims to be setting out to address the diverse communities it legislates for, this approach would be short-sighted and fails to consistently implement coherent provisions for the six protected equality strands it has itself introduced, leading to a pecking order of diversity issues to be taken into account by organisations in connection with everyday activities.

This will lead to future social problems like the ones illustrated in the Equalities Review which are the kinds of longer-term outcomes the legislation should aim to avoid.

To exclude age as a public duty would potentially disengage large parts of the electorate but its introduction will support reporting, measurement and understanding of our ageing population – which is not well understood, and by so doing support the better provision of appropriate public sector provisions such as in health and social service provision and stimulate employer opportunities and improved performance.

Q40 Might there be disadvantages in extending the duty to any of these groups?

No. As we point out in our response to Q40, it would send the wrong messages about inclusion to do so but there will be different practical challenges to address related to contextual issues and resources.

Q41 Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from recently introduced duties on disability and gender?

We have no particular view but see our response to Qs 42 and 43.

Perhaps there should be a flexible timeframe to enable public sector bodies to proceed on a practical basis.

Q42 Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling these authorities who have already taken an integrated approach to build on existing work?

Yes. We can see no advantage in curtailing the development of good practice as the experiences gained will be invaluable information for the development of guidance.

There is considerable evidence that good practice public sector employers have already implemented policy in advance of what the Government proposes. Many have (or are actively considering) integrating the three existing duties and others are looking to extend their equality schemes to cover the three newer discrimination strands. It would be perverse for the Government to hamper or delay such good practice.

Enforcements of public sector duties

Q43 Do you think that there should be a single enforcement mechanism for the proposed single equality duty, enabling the commission for Equality and Human Rights to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff's court in Scotland?

Yes.

Public service inspectorate

Q44 What do you think should be the role of the public service inspectorates in assessing compliance with public sector equality duties?

We have no particular view but we are conscious that the CEHR could be faced with an overwhelming burden in seeking to enforce compliance. The Government needs to clearly articulate firstly what it sees as the role of the Audit Commission and other regulatory bodies such as OFCOM in the drive to improve diversity practice, and minimise discrimination. And secondly what mechanisms they propose should be put in place for these bodies to feed into or partner the CEHR.

Q45 What issues would you like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, whilst ensuring that the guidance works well for business?

The Government has clearly (through the existing duties) signposted its expectations on procurement. One clear outcome of the introduction of a single duty should be to

simplify and clarify procurement guidelines – which are currently over complex. It is our understanding that while there is considerable written policy and procedure, the reality of day-to-day procurement practice is much less well defined. The Government should also seek to resolve the confusion (and potential conflict) that has arisen between ‘best value’ requirements and the drive to support non-discriminatory behaviour in suppliers of all sizes.

We believe that many sub-contractors, especially those in the small business sector will need much more help and guidance in equality and diversity in order that they can participate fully in public sector procurement processes.

The Government should promote the value of building the value of diversity issues into procurement on a voluntary basis – learning from the experiences of those who already operate this way within the private sector. The Government should produce advice and guidance on this issue. The CIPD would be happy to partner the Government in the development of this guidance and offer a liaison facility with employers and HR practitioners. This would be a progressive way of driving forward the agenda and enabling the private sector to partner and respond to the public sector more effectively. We believe that this could encourage a more uniform approach to inclusion within UK Plc.

Evidence from the CIPD national survey on the state of the nation on diversity referred to in our comments to Q46 shows that it is the business case that differentiates the leaders and the followers in the field. Therefore guidance should focus on what the business case includes and a practical tool to help employers prepare one.

The CIPD would be happy to work with Government to develop this.

Chapter 6: Promoting good equality practice in the private sector

Q46 Do you think that an “Equality Standard” would be beneficial to businesses, employees and customers?

No. We have some concerns about the application of a standard which suggests that there is a ceiling to be reached while managing diversity is a dynamic values-based process. Therefore a checklist of actions that organisations might be expected to take to make diversity a mainstream business issue might be more appropriate.

The outcomes delivered by the actions would be extremely varied and reflect the organisations business objectives and priorities, what resources they have and the relevance of a particular diversity issue to them. They would therefore be difficult to incorporate into meaningful and discerning generic standards.

The CIPD carried out a state of the nation diversity survey in 2006 designed to explore diversity policies and practices, published in two reports, *Diversity in Business: How much progress have employers made?* and *Diversity in Business: A focus for progress*.

The results provide information which organisations can use to compare what they are doing with others in the field. We developed a diversity sophistication index from the survey results and this helps organisations to benchmark whether they are leaders or followers in the field and identify areas where they could improve.

The CIPD would be happy to share with the Government the complete findings from this survey and to discuss with colleagues how the CIPD could work with the Government on developing a useful 'equality tool' that goes beyond ticking boxes and starts to deliver measurable change in the performance of UK employers of all sectors.

The survey instrument that the CIPD have already used successfully could form the basis for the design of a tool.

If yes, would you prefer an accredited or a non-accredited good practice and compliance tool?

Non-accredited.

Q47 We would welcome your suggestions for other ways in which good equality practice could be encouraged and embedded in the private sector.

We cannot emphasise strongly enough the need for the promotion of the business case and good practice guidance through a national communication strategy, facilitated networking and guidance about ways of meeting the requirements of public sector contracts used in procurement. The value of this approach is clearly evidenced in our research and the CIPD is already promoting these messages in our communications on diversity.

Chapter 7: Effective dispute resolution

Promoting early resolution of disputes

Multiple discrimination

Q52 Can you provide us with evidence illustrating any difficulties of gaining legal redress in cases of multiple discrimination?

No, we have not carried out research on this issue. Nevertheless anecdotes suggest that complainants are encouraged by their lawyers to take cases on more than one ground where the evidence shows this would be the best option for them.

There is considerable anecdotal evidence that (especially) younger (and mostly) female ethnic minorities face discrimination on the grounds of age – sometimes more severely than bias due to their skin colour. We have heard of many instances where younger BME women have faced considerable prejudice because people have not believed they were as old as they stated and did not believe that they could have achieved or experienced so much.

Q53 Are there particular issues you would want to see addressed in relation to multiple discrimination claims?

In cases of multi discrimination, employers are vulnerable to a number of different and time-consuming cases being taken against them by the same complainant who is also subjected to consequential pressures, inconvenience and stress.

With more legal protection against unfair discrimination the number of multiple discrimination cases is bound to increase. A better way of responding to them needs to be developed in a timely way, otherwise it is difficult to see how solutions would not become protracted and be against the interests of both the individual and the employer.

Part 3 – Modernising the law

Chapter 8: The grounds of discrimination

Disability

Q54 Do you have any comments on whether we should remove the list of ‘capacities’ from the definition of disability?

Yes. We support the DRC views that they could be removed but warn that many employers have come to find them helpful in guiding what they do.

Codes of practice and guidance should build on the experiences employers have had in using them.

Q55 **Do you have any comments on our approach to addressing the needs of parents and carers?**

No. The CIPD has helped to guide the Government’s approach to legislation on these issues and supports good practice based on an inclusive approach which goes beyond legal compliance.

We see no reason for these issues to be embraced by a single equality act at the moment and believe that the issues can be appropriately covered through targeted provisions and specific measures.

Married persons and civil partners

Q56 **Do you consider that the protection for married persons and civil partners is still needed in the absence of a ‘marriage bar’ in employment?**

No. We are not aware that this problem still exists.

Genetic predisposition

Q57 **Do you agree that there is no current justification for legislating to prohibit genetic predisposition discrimination?**

Yes. We are not aware of any reason for doing so at the moment but this may need to be reviewed in the longer term on the basis of evidence of poor practice which leads to unfair exclusion and disadvantage.

Other comments

Q85 **Do you have any other comments about the consultation documents or the consultation exercise itself?**

The CIPD fully supports the need for a rationalisation of discrimination law but the Green Paper, while it evidences how complex and daunting the law is, fails to go far enough to achieve either simplification or consistency and certainly does not reduce the burden on employers in either dealing with or understanding the complexities.

Simplification will call for a more radical approach than that taken in the Green Paper in which it is admitted that the proposals are constrained by the structure of existing discrimination law, and which demonstrates an apparent unwillingness both to be consistent in the principles adopted in the proposals themselves and to push the boundaries set by EU law.

In our view, serious revisions to discrimination law will take time and need to be founded on working closely with all stakeholders who should have a much more influential role in the design process itself and not merely an opportunity to comment on a very complex consultation document in such a short timescale.

Employers are key change agents in the delivery of inclusion in the workplace and society but rather than engaging their positive commitment to diversity progress and the development of good practice beyond legal obligations, the Green Paper sets out to design a compliance-based response model.

The consultation misses an opportunity to be more radical in its proposals even against the background of the simplification of regulation in employment generally. Employers are in any case unlikely to recognise a package on the lines proposed as 'simplification', since there will be areas in which additional responsibilities are imposed on them and even where greater consistency is on offer it will often come at the price of greater uncertainty about outcomes.

Managing diversity is highly complex and evolving and CIPD survey evidence reported in *Employment and the Law: Burden or benefit*, points to employers being more concerned about *bad* law than law per se. We know from our diversity, state of the nation research referred to in Qs 45 and 46 above that regulation is a main driver of diversity progress so it needs to be designed to ensure that it supports progress effectively rather than create confusion and lead to unintended consequences.

Our response to the Green Paper focuses on employment. However our work on managing diversity shows that it needs to inform how organisations operate. It is clear that the principles adopted in doing this should be applied consistently and in ways that support business goals. This is illustrated in various CIPD research into practice reports including *Managing Diversity: Words into actions* and *Managing Diversity in Practice: Supporting Business Goals*. Disjointed law in the areas of employment and the delivery of goods and services would result in mixed messages and fail to enable employers to uphold their values regarding managing diversity.

We therefore recommend that a consistent approach to managing diversity should be adopted in connection with goods and services even though we do not feel we can make detailed comments to the questions raised in the Green Paper.

The CIPD has submitted a detailed response to the recent consultation on workplace dispute resolution and will continue to offer active support to the DBERR in taking the findings forward. We strongly support the use of early dispute resolution techniques including mediation, in preference to relying on legal processes, in order to produce positive outcomes and reach solutions that better reflect the interests of both parties. In our view this would be a sensible approach to take in connection with addressing goods and services issues.

A monumental task has been undertaken to produce the ideas and suggestions contained in the Green Paper. However, although some sensible suggestions have been made for removing inconsistencies we think that there is a need for more radical proposals for a Single Equality Act – though the Green Paper explains how existing law makes this difficult to achieve. It is the very difficulties presented by the current legal models that call for a more radical approach capable of helping employers to progress diversity in the 21st century.

For example the reasonable adjustment approach used in disability law enables business challenges which cannot be overcome in practical ways, to justify this with robust evidence. Such evidence can only be provided following a full analysis of the challenges presented and the possible solutions and the law was recently reinforced to make sure this happens. In our view this approach forces employers to *think about doing something in a different way* before reaching a conclusion and therefore not merely taking a minimal compliance approach

Disability law also allows and encourages employers to improve employment opportunities for disabled people through the requirement to treat disabled people more favourably than able-bodied people because this speeds up the inclusion of disabled people in the workforce and improves the diverse nature of workforce profiles. This legal model offers the possibility of more radical change and we think it should be explored further and not dismissed as appears to be the case, because it does not fit comfortably with other legal provisions.

The CIPD has an inclusive definition of diversity which is set out in our guide *Managing Diversity: People make the difference at work – but everyone is different*. Our definition goes way beyond issues covered by existing law because we believe that *valuing all forms of difference* provides organisations with rich potential for sustaining economic growth and competitiveness. We know that other factors than those covered by law block talent and the contributions that people can make to add value to business performance. Managing diversity makes good business sense and this is increasingly evidenced in CIPD research.

We are concerned that the Green paper focuses too narrowly on changes to the law and the opportunity is not being taken to involve employers more whole-heartedly in the process of redesigning a diversity framework that reflects the needs of business. To design a legal framework capable of stimulating inclusion we need to adopt a mindset which values difference and moves away from a list of diversity issues and the existing compensation model.

We agree with the conclusions in the Equalities Review and believe it would neither make sense nor be practical, to have endless lists of exclusive legal protections, but it is the case that people can be favoured or disadvantaged unfairly for reasons not protected by existing discrimination law – social class, education and being overweight to mention a few.

For example a major issue which causes exclusion and which is already well evidenced for doing this, is the stigma of having a criminal conviction. We know that employment is a vital factor in reducing re-offending, yet proposed revisions to the employment law on the Rehabilitation of Offenders, has failed to find Parliamentary time for consideration despite a thorough consultation several years ago.

We consider that the Government has missed an opportunity in failing to take forward its own recommendations regarding the Rehabilitation of Offenders Act. This is a

significant omission given the Government's current agenda and the high media profile of offending and fear of crime.

In our view a Single Equality Act should be designed to be much more capable of facilitating progress towards inclusion because increasingly this agenda is being seen as more, not less, relevant to the challenges and opportunities we face as individuals, in the world of business, on the global stage, and in society.

We are conscious from the work we do that to make more progress in managing diversity education and awareness-raising is vital and that employers need to be active participants not just passive recipients. It is imperative that employer interests are met and that the law is pragmatic in its application and supportive of those employers who have committed to action and delivering change.

We recommend that even if the Government proceeds with the implementation of the proposals in the Green Paper this should not stop the CEHR from taking forward the huge challenge of researching and designing an appropriate enabling legal framework to support the progress of diversity as a key priority. As soon as the CEHR becomes operational it should start this work which should be based on the active participation of stakeholders with expertise in business and diversity.

After the findings of the Consultation responses have been analysed, the CIPD would be happy to partner the Government in discussions about the outcomes and how the law should be developed to make progress towards greater inclusion.

We would also be happy to provide Government with opportunities to consult with expert employment practitioners and leading diversity players to discuss where the future of law needs to be and the practical implications for business to help start and inform the debate.

In our view an enabling legal framework should be based on fairness and respect, the achievability of business-focused solutions and ambitious in aiming to deliver an inclusive society in which organisations and individuals can prosper. The UK should seize the opportunity to become a global leader by creating infrastructures to build inclusion as this is now a worldwide issue.