

UK Race & **Europe**

NETWORK



<p>UKREN Response to: UK Consultation on the European Commission Proposal for an Equal Treatment Directive</p>
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28 July 2009

About the UK Race and Europe Network

The UK Race and Europe Network (UKREN) is a UK-wide network representing over 160 organisations. These organisations - predominantly non-governmental and community-based in nature - are involved in race relations and in working to eliminate racism at local, national or European level.

UKREN welcomes the publication of this draft Directive as we consider that a combined directive dealing with non-discriminatory access to goods, facilities and services in relation to religion or belief, disability, sexual orientation and age will be important in achieving a level playfield across Europe and ensure common standards of anti-discrimination law. We urge the UK government to support the proposed directive at every level within Europe.

We welcome the fact that this draft directive uses the same concepts of discrimination found in the other article 13 directives as well the gender directives. These definitions are widely understood across the Member States.

Executive summary

- 1. UKREN strongly supports the addition of a further directive to cover the non-employment matters in relation to disability, sexual orientation, religion or belief and age.**
- 2. We consider that harassment should be prohibited on all the grounds covered by the directive.**
- 3. We consider that different treatment on grounds of age should be permitted when the treatment is objectively and reasonably justifiable by a legitimate aim and the means of achieving that aim are legitimate and necessary.**
- 4. We consider that the scope of the directive should be the same as that of the Race Directive – including health care, education and housing.**
- 5. We consider that multiple discrimination should be explicitly recognised within the directive.**

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UKREN is a formal member of the European Network Against Racism (ENAR)

Question:

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

Harassment in relation to access to goods, facilities and services is prohibited in the UK on grounds of sex, race and disability; it is currently not prohibited on grounds of religion or belief. The UK Race in Europe Network (UKREN) can see no reason why religion or belief or sexual orientation should be excluded from protection from harassment. Furthermore, we consider that retaining this exclusion will perpetuate an undesirable hierarchy of rights.¹

The harassment provisions in the draft directive are more rigorous than the UK provisions. If there is concern about the impact of harassment provisions in relation to goods, facilities and services on grounds of sexual orientation or religion or belief the more demanding standard used in the draft directive could be adopted.

Whilst the prohibition of direct discrimination will deal with some cases of harassment it will not deal with all instances of harassment, for example, cases where there is no actual or hypothetical comparator or instances where others are treated equally badly. It is procedurally more difficult to bring a case of direct discrimination compared to a harassment case when harassment is the more appropriate remedy. Acts of harassment are frequently also qualitatively different from direct discrimination because they involve undermining the dignity of the harassed person.

The specific prohibition of harassment carries an important public information message, harassment as a concept is widely understood by the general public. A prohibition on harassment is likely to act as a preventative measure.

It is not easy to find examples as there is currently no legal protection in these areas. However, an example might be the case of someone visiting a bar where he is referred to as the 'the gay wanker in the corner' whilst others are referred to as 'the old git' or 'the black bastard'. He will not be able to claim direct discrimination in the service that he is receiving because he is not receiving less favourable treatment he is receiving the same, hostile and humiliating, treatment as others in the bar. They might not retain many customers but it would be harassment rather than direct discrimination.²

Examples

This example is taken from a report in Muslim News.

In September 2006 11 year-old Sundus Al-Ameen was called an 'Iraqi suicide bomber' on three separate occasions. The first abuse happened at 9.10am on September 8. Sundus had taken that lightly and did not report it. The second abuse happened two hours later, when the same white girl came with a gang of eight others. She even encouraged others to verbally abuse Sundus. A frightened Sundus went to the head teacher, Lesley Lyon, to complain, and was told to come back should it happen a third time. The third time came at 1.15pm when the same girl taunted her by screaming, 'Help, Help, Suicide Bomber, Suicide Bomber!' and ran away from Sundus. This time, Sundus complained to the other head teacher, Jo Horsey, who promised Sundus she will look into the matter. However, her father asserts that nothing was

¹ See - Equality Bill – Impact Assessment, April 2009, p 117.

² See for example, in relation to sex discrimination the case of *Brumfitt v Ministry of Defence* [2005] IRLR 4.

*done, the school 'took no account of the serious nature of the incident...[and] failed to do anything to end such provocations and harassments.'*³

Another real life example has been given by the Stonewall Housing Association –

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

This is harassment. In this case, if their housing officer was equally ineffective over other complaints of problems between neighbours they would have no discrimination claim.

The Equality Network, Edinburgh did a limited survey into experiences of harassment of lesbian and gay people from providers of goods, facilities and services.⁴ Some of the experiences described to them are quoted directly here:

"I was the butt of homophobic jokes by a health service worker."

"When working in one of Scotland's busiest sheriff courts as a prison officer, I witnessed severe bullying of feminine men, mostly by other prisoners but also by prison officers (men!). No action was taken. Food was thrown at these men, they were called names (this was all by other prisoners) but prison officers laughed it off or ignored it."

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

Yes, we can see no justification for excluding religion or belief or sexual orientation from protection against harassment. People are just as likely to experience harassment on these grounds when accessing goods, facilities and services as are others on grounds of sex, race or disability. Additionally, it should be noted that the definition of harassment in the directive is a more rigorous one than the definition of harassment in UK law.

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

No.

Age discrimination

UKREN considers that legislation to protect people from age discrimination in access to goods, facilities and services has a vital role to play in establishing a fair and equal society.

³ Tan, Safa Suling. 2006, 'Since 9/11, students bullied for being Muslim in schools.' *Muslim News*, 24 Nov. available at: <http://www.muslimnews.co.uk/paper/index.php?article=2717>, accessed 28 July 2009

⁴ Equality Network, Edinburgh, December 2008, see 'Sexual orientation harassment by providers of goods facilities and services in Scotland – results of a survey' available at: [http://www.equality-network.org/Equality/website.nsf/webpages/7A04E6CE01520B5D80257523004087E1/\\$FILE/Sexual%20orientation%20harassment%20in%20goods%20and%20services.pdf](http://www.equality-network.org/Equality/website.nsf/webpages/7A04E6CE01520B5D80257523004087E1/$FILE/Sexual%20orientation%20harassment%20in%20goods%20and%20services.pdf), accessed 28 July 2009

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

Different treatment on grounds of age should be permitted when the treatment is objectively and reasonably justifiable by a legitimate aim and the means of achieving that aim are legitimate and necessary.

Insurers and financial institutions have argued that age is an easy way to evaluate risk and financial liability and choose to use it in decisions about access to services, either as an individual indicator or as part of a wider basket of indicators. However, the use of age as a proxy is questionable and the impact on older people of these decisions can be quite unacceptable particularly when there are stark differentials between different ages. Consequently while we consider that exceptions can be made for the use of age as an actuarial factor in the assessment of risk these must be clearly and transparently based on relevant, accurate and up to date actuarial and statistical data.

There are however times when preferential treatment on grounds of age can be justified, article 2.6 makes provision for such discrimination where they are justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. This provision can be used to provide concessionary train, bus and coach fares, cinema tickets, haircuts etc for both older and younger people often aimed at times when the services in question are less heavily used. It can also be used to justify free prescriptions and eye tests for over 60s and under 18s.

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

The draft directive makes provision for differences in treatment on grounds of age if 'they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary' (clause 2(6)). The similar clause in article 6(1) of the Employment Equality Directive adds the requirement that to be permissible any differences in treatment must be '**objectively and reasonably** justified by a legitimate aim...' It would be better to use exactly the same text. Defining a legitimate aim can always be difficult and some guidance may well help to achieve legal certainty. However, clarification that the justification must be objectively assessed would help to reduce the risk of undesirably wide interpretation being given to this provision. It would also ensure that the same standards were being applied to both employment situations and those involving goods and services.

Clause 2(7) deals with the provision of financial services when age or disability is a key factor in the assessment of risk. This provision is markedly wider than the similar provision in article 7(2) of the Gender Goods and Services Directive in that the Gender Goods and Services Directive requires that the factor concerned in the assessment of risk is a '**determining**' factor whilst this draft only requires that it is a '**key**' factor. A 'determining' factor must be one which is overwhelming in its impact, whereas a 'key' factor whilst important may be one of a number of different factors being considered. This lack of coherence is likely to be problematic if adopted as proposed.

Scope of directive

The scope of the directive reflects the scope of the Race Directive 2000/43/EC. We think that this is the right approach which leads to consistency between the different grounds for discrimination. We

strongly support the retention of the scope of the race directive, which we believe has not caused any problems for Member States since the Race Directive was implemented in 2003.

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

- **health care**

The European Community Treaty article 3(1)(p) explicitly sees the role of the European Community as contributing towards 'the attainment of a high level of health protection'. This is built on in article 152 which requires that 'Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'. Whilst the organisation and delivery of health care services remains within the area of individual Member States competence healthcare itself remains a service for the purposes of article 50 of the European Community Treaty. Thus in the case of *Geraets-Smits* the European Court of Justice held that 'it is settled case-law that medical activities fall within the scope of Article 60 [now 50]'.⁵

Examples: clinics could not exclude lesbians from receiving fertility treatment which was available to heterosexual women, key clinics could not be held at times inaccessible to those of a particular religion unless an alternative time was offered. Treatments could not be restricted to those of particular ages unless this can be justified.

- **education**

The European Community Treaty article 3(1)(q) explicitly sees its role as contributing to the 'education and training of quality'. The treaty goes on to set out:

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

This means that the EC does have competence to deal with education although it is subject to the EC rules on subsidiarity, and, in particular, the subject of the content of teaching and the structure and organisation of educational systems is to be decided at national level. Broadly speaking the EC in its equality directives seeks to balance respect for national competencies with the upholding of the prohibition of discrimination.

This has been well reflected in the current draft directive provisions, in particular Article 3 (3) which sets out the limitations on the education provisions in a way that precisely echoes the EC's powers under the treaty:

Article 3(3) This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief.

⁵ Case no C-157/99, *Geraet-Smits* [2001] ECR I-05473, para 53.

It should also be noted that the Race Equality Directive 2000/43/EC covers education in Article 3(1)(g) and this has proved uncontroversial.

Examples:

Teachers would not be able to demean gay pupils, or exclude Muslim pupils from school trips.

- **Housing**

Clause 3(1)(d) includes within the scope of the directive 'access to and supply of goods and other services which are available to the public, including housing'. This provision is identical to the equivalent provision in the Race Equality Directive 2000/43/EC.

Examples: Harassment of older people, disabled people, gay people or Muslims by private landlords, unjustifiable exclusion of older or younger people from new housing schemes.

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

Age discrimination does operate to a limited extent in the social housing sector when estates which have no additional services or provisions for older people are designated as estates for elderly. This can discriminate against younger people. Supported housing schemes and sheltered housing schemes can clearly be justified when their additional services are directed towards older people.

UKREN has no views on questions 8 to 15.

Transposition:

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

16) Do you think the proposed timetable is realistic?

Yes.

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

None

You are welcome to comment on any of the other articles or on the draft Directive as a whole.

Multiple discrimination

There is now an increasing realisation within Europe of the complexity of the operation of discrimination within our society. People do not simply fit into single issue categories as black, disabled or gay. They are diverse, complex and multi-layered, and sometimes they are treated badly for more than one reason. We believe that this problem should be recognised within the draft directive.