

## EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY DOCUMENT

### PROPOSAL FOR A COUNCIL DIRECTIVE ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

Submitted by the Department for Education and Employment

6 January 2000

## SUBJECT MATTER

### Scrutiny History

1. This is a new proposal, there is no scrutiny history.

### Background

2. This proposal is part of a package of three proposals in the area of equal opportunities published by the European Commission on 25 November 1999 under Article 13 of the EC Treaty.
3. The framework directive in the area of employment would prohibit direct and indirect discrimination on the grounds of a person's racial or ethnic origin, religion or belief, disability, age or sexual orientation and harassment based on these grounds. In the area of disability, it would also provide for "reasonable accommodation" to be made to enable disabled people to participate or advance in employment. It would apply to conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, access to vocational guidance and training, employment and working conditions including dismissals, pay, and membership of, involvement in, and benefits from, organisations of workers or employers, and professional organisations.
4. The directive would provide for certain exceptions, allowing differences of treatment on the above mentioned grounds where this is justified by the need for a genuine occupational qualification. The case of religious organisations is mentioned separately in this context as are certain circumstances in which direct discrimination on grounds of age is justified.
5. The directive would allow for, but not require, positive action to compensate for disadvantages people might experience because of their ethnic origin, religion or belief, disability, age or sexual orientation. It would also allow Member States to introduce or maintain more favourable provisions for the protection of equal treatment than those laid down in the directive.
6. The directive would reverse the burden of proof in cases of alleged discrimination, other than in criminal procedures, so that following the establishment of a prima facie case to answer, it would be for the respondent to prove that there had been no breach of the principle of equal treatment. The draft directive also covers victimisation to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint on grounds of equal treatment.

7. Member States would be required to implement the directive within 2 years of its adoption.

## **MINISTERIAL RESPONSIBILITY**

8. The Secretary of State for Education and Employment has the main responsibility for policy issues arising from this document. The Home Secretary has an interest arising from his responsibility for discrimination on the grounds of race and religion. Responsibility in Northern Ireland for legislation against discrimination based on gender, race, disability or political opinion lies with the First Minister and Deputy First Minister of the devolved administration. The Scottish Minister for Communities has an interest due to her responsibility for the promotion of equal opportunities in Scotland as does the Chair of the Committee on Equality of Opportunity of the National Assembly for Wales. The Secretary of State for Trade and Industry has an interest in view of his responsibility for employment relations legislation.

## **LEGAL AND PROCEDURAL ISSUES**

### 9. (i) Legal basis

Article 13 of the EC Treaty.

### (ii) European Parliament Procedure

Article 250 (consultation) procedure.

### (iii) Voting procedure

Unanimity.

### (iii) Impact on United Kingdom law

The UK already has anti-discrimination measures covering the grounds of racial or ethnic origin (the Race Relations Act 1976) and of disability (the Disability Discrimination Act 1995). The Race Relations Act, like the directive, is based substantially on sex discrimination law and thus is likely to require only minor changes (for example, to implement the changes to the burden of proof). There are nonetheless some changes from the sex discrimination model (for example, a variation in the definition of indirect discrimination) which it would also be necessary to reflect.

The Disability Discrimination Act, however, departs from the sex discrimination model in a number of respects. The most important of these are that:

- the prohibition against discrimination under section 4 of the Act is both applied differently from sex discrimination law and capable of justification; and
- the Act does not include a prohibition on indirect discrimination as such, but instead applies the concept of a duty to make reasonable adjustments in favour of disabled people.

The proposed directive picks up the latter concept. It allows for genuine occupational qualifications to justify direct discrimination; but this does not appear to be as wide as the general defence of justification under the Act. It also applies direct and indirect discrimination models based on the sex discrimination model to disability. If the directive were to remain in this form, the Act would require amendment. In several cases the intention of the directive is not clear, and the Government will be examining these points further as negotiations proceed.

Finally, the framework directive provides for anti-discrimination measures on the grounds of religion or belief, age and sexual orientation. New legislation would be required to give effect to these measures (except in Northern Ireland, where discrimination in employment and in the provision of goods, facilities and services is currently unlawful).

The directive applies to Gibraltar.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

10. The directive could be applied to the non-EU Member States of the EEA by a decision of the EEA Joint Committee.

## **SUBSIDIARITY**

11. The Government believes that the approach of bringing forward a framework directive in this area is in line with the principles of subsidiarity and proportionality. However, the detail of the proposal does raise some issues. The directive's requirement that Member States ensure adequate dissemination of information within the workplace goes further than is necessary; the level and nature of dissemination of information being best decided at national or local level. Similarly, the provisions requiring Member States to promote social dialogue are over prescriptive. The Government will aim in negotiations to ensure that a more satisfactory approach to these issues is adopted.

## **POLICY IMPLICATIONS**

12. The Government supports the principles enshrined in Article 13 and welcomes the Commission's proposals as a step forward in combating discrimination and exclusion across the EU. The detail of the employment-related framework directive will have to be considered carefully especially with a view to how certain provisions (e.g. indirect discrimination) will work in practice in relation to each of the grounds for discrimination covered by the proposal.

13. Our negotiating strategy will have to take account of an evolving domestic agenda. Adoption of the proposal in its current form would require changes to UK law. The Government is open to making necessary and proportionate changes in this area to promote equal opportunities if the case is made. However, the need to avoid unnecessary and burdensome regulation will remain a priority in the Government's considerations. It will also be guided by assessments of the progress which can be achieved through non-legislative means such as codes of practice. The possible requirement for legislative change differs according to the type of discrimination.

- Race or ethnic origin: the proposal is largely consistent with existing provisions and the minor changes are on the whole not problematic, although we will be examining the detail carefully to make sure that any changes are appropriate.
- Disability: as explained at paragraph 9 iii, the approach taken by the directive differs from domestic law in a number of ways. We also have concerns that in following a sex discrimination model, the directive creates overlaps and loopholes which would not be helpful to disabled people seeking to establish their rights. For example, UK law would not allow an occupational qualification to be cited as a reason for refusing to employ a disabled person without consideration first of whether reasonable adjustments could be made. This link does not seem to exist in the current proposal. We intend to examine constructively with our partners how the directive can be improved in this area.

- Sexual orientation and age: the Government has produced a Code of Practice on discrimination in employment based on age and proposes that a Code of Practice on discrimination on the ground of sexual orientation should be produced, in conjunction with the Equal Opportunities Commission.
- Religion or belief: there are no generally applicable provisions in GB statutory law on employment. However, as a result of case law, Jews are recognised as a racial group and as such protected under the Race Relations Act. Sikhs also receive protection via special legal provisions, particularly in the Employment Act 1989. The Government is currently conducting research into this complex area.

## **REGULATORY IMPACT**

14. The proposal will have implications for business. A full analysis will be carried out in consultation with representative organisations from the business world and this will inform negotiations. This analysis will seek to establish what costs might be imposed on business in order to comply with the terms of regulatory provisions resulting from the directive. These costs will take into account direct expenditure and also administrative costs. The analysis will also seek to assess any potential benefits (e.g. opening up a wider pool of people from which employers can recruit) and areas where new provision will have a neutral effect either because of domestic provisions already in force (e.g. the Race Relations Act) or because employers are voluntarily taking action (e.g. under voluntary codes of practice on age or sexual orientation).

## **FINANCIAL IMPLICATIONS**

15. There are no direct financial implications arising from this proposal, although there will be indirect costs associated with its implementation if UK legislation has to be enacted as a result of the final directive agreed.

## **CONSULTATION**

16. The Department for Education and Employment is seeking the views of key external partners. A wider consultation process will be launched once more is known about how the Presidency intends to handle negotiations and what the likely time scale for these will be. Members of the general public will also be invited to express their views via the Department's website.

## **TIMETABLE OF FURTHER ACTION**

17. The Portuguese Presidency will decide on the timetable and handling of negotiations. At present it is not known whether the Presidency will take forward the package as a whole or by individual element.

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