

# Gender Equality in the 21st Century: modernising the legislation

April 2006. Kate Bellamy & Sophie Cameron

21st  
Century  
women

**Fawcett**  
closing the inequality gap  
women since 1866 men

### **Acknowledgements**

We would like to thank the Nuffield Foundation for funding this project, and PLC Employment and Matrix Chambers for supporting the costs of producing and disseminating this report.

Our particular thanks go to Camilla Palmer and Joanna Wade for their expert input, guidance and advice, and for being so generous with their time.



[www.practicallaw.com/employment](http://www.practicallaw.com/employment)

PLC Employment is an innovative online support service for employment practitioners. Our team of specialist employment lawyers provide up to the minute, comprehensive coverage and analysis of developments in employment law to help lawyers advise employers and employees on their rights and obligations.

PLC Employment are pleased to sponsor the Fawcett Society's report, Gender Equality in the 21st Century : modernising the legislation, in advance of the DTI's review of discrimination law.



Named Chambers of the Year in The Lawyer Awards 2005, Matrix is an innovative organisation founded in 2000 to meet the challenges of 21st century law.

Matrix members are ranked as leading practitioners in a number of areas of law, notably, employment and discrimination law, administrative and public law, competition and EU law, crime and criminal due process, international law and the law of human rights.

We are committed to a public service ethos. This includes a commitment to publicly-funded work, public interest litigation and pro bono work.

# Contents

- 1 Section one**  
Executive summary
- 6 Section two**  
Introduction
- 8 Section three**  
Fundamental principles and harmonisation
- 15 Section four**  
Equal pay
- 19 Section five**  
Pregnancy, maternity family and caring rights and protection
- 22 Section six**  
Employer responsibility and support
- 24 Section seven**  
Tribunal procedure, remedies and enforcement
- 27 Section eight**  
Duties to promote
- 28 Section nine**  
Positive action
- 29 Section ten**  
Concluding remarks

# Section one

## Executive Summary

Thirty years ago a series of new laws were introduced in the UK aimed at creating equality for women. In 1975 the Equal Pay Act came into force, the Sex Discrimination Act was passed and the Equal Opportunities Commission was established. In the same year the Employment Protection Act 1975 made maternity leave a statutory right. These new laws heralded considerable change in women's working lives.

Today, the 'gender gap' in economic activity rates is smaller in the UK than the EU average. Women now make up nearly half (46%) of the labour force in Britain and 70% of women are in employment<sup>1</sup>. But, behind the headline figures of near 'equality of participation', there remain major differences in the employment conditions and pay of women and men working in the UK. As the Women and Work Commission highlighted, the gender pay gap in the UK is the worst in Europe. Women working full time earn 17% less per hour than men, and women working part time 39% less per hour than men working full time. The Equalities Review interim report found that working mothers are one of the most disadvantaged groups in the UK today<sup>2</sup>. Mothers of young children face the widest pay gap, earning on average just 67% of the male hourly wage<sup>3</sup>. And despite the Labour Government's focus on improving work-life balance for parents of young children, 30,000 pregnant women are still unlawfully dismissed from their jobs each year<sup>4</sup>.

These 'gender gaps' cannot simply be attributed to women's choices. Research<sup>5</sup> has found that discrimination is a major contributor to the gender pay gap, suggesting sex discrimination legislation is not working effectively.

The evidence shows that it is also poorly enforced, meaning for example that new and expectant mothers continue to lose their jobs despite legislation to protect them. It is generally accepted that the existing legislation is patchy, complex and ineffective for both individuals and business. It focuses on cure rather than prevention and fails to deal with the complex and deep rooted causes of discrimination.

The window of opportunity for reform is now open. Equalities legislation is currently under review as part of the DTI's Discrimination Law Review (DLR) in the lead up to the introduction of the Commission for Equality and Human Rights (CEHR) and the introduction of a Single Equality Act (SEA). This review is timely given that 30 years have passed since gender equality legislation was first introduced. Questions need to be asked about the suitability of the current legislation for the modern labour market. Fawcett has seized this opportunity to take a tough-minded look at options for reform to tackle the gender gaps in pay and employment. Working with legal experts, we have examined the problems with the current system and set out our recommendations for the Single Equality Act.

We explore the following in turn: 1. The need to simplify and harmonise the current framework of gender equality legislation; 2. How to ensure the SEA is effectively enforced; 3. The role that employers should play in tackling gender inequalities; and 4. How the onus can be shifted from individuals enforcing the law, and how they can be supported in taking cases.

1 ONS, 2005

2 The Equalities Review: Interim report for consultation (2006) [http://www.theequalitiesreview.org.uk/documents/pdf/interim\\_report.pdf/rrep308.pdf](http://www.theequalitiesreview.org.uk/documents/pdf/interim_report.pdf/rrep308.pdf)

3 Newborns and New Schools: Critical Times in Women's Employment (report series number 308), Institute for Fiscal Studies, 19 January 2006 (<http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep308.pdf>).

4 EOC (June, 2005) Greater Expectations - A report of the EOC's investigation into pregnancy discrimination, ([http://www.eoc.org.uk/PDF/suffer\\_summary.pdf](http://www.eoc.org.uk/PDF/suffer_summary.pdf)).

5 Estimates vary, but research suggests that 20 to 40% of the pay gap is due to discrimination. See for example 'The impact of women's position in the labour market on pay and implications for UK productivity', Professor Sylvia Walby and Dr. Wendy Olsen, November 2002, Women and Equality Unit [http://www.womenandequalityunit.gov.uk/publications/weu\\_pay\\_and\\_productivity.pdf](http://www.womenandequalityunit.gov.uk/publications/weu_pay_and_productivity.pdf) and Women's Pay - is discrimination still an issue?, Jo Swaffield, CentrePiece, LSE, Spring 2000.

# Section one

## Executive Summary

### 1 Simplify gender equality legislation

Sex discrimination legislation dates from the 1970s and despite modest reforms over the last 30 years, equality law experts report that it is now woefully out of date, and out of step with European Law. The present system follows two distinct legislative models: the Sex Discrimination Act 1975 (SDA) which prohibits direct and indirect discrimination, victimisation and harassment on the grounds of sex, and the Equal Pay Act 1970 (EqPA) which regulates inequalities between the contractual terms and conditions (including pay) of men and women doing equal work in the same employment.

Our review finds that this 'dual' system of sex discrimination legislation is unnecessarily complicated and confusing. For a start, pay discrimination is treated differently (under the EqPA) to other cases of sex discrimination (covered by the SDA). Plus, there are many discrepancies in the protection afforded to women under these statutory regimes. For instance in relation to the use of comparators, time limits for bringing claims and the remedies available to claimants, as well as discrepancies with other sources of employment protection.

#### Recommendations:

- **Harmonisation:** Sex discrimination on both contractual and non-contractual grounds should be covered under the SEA. This would simplify the process of bringing a claim for discrimination where both elements are included and also have the advantage of providing a remedy for individuals experiencing pay discrimination on a number of different discrimination strands (for example gender and race). Under the SEA, the mechanism for bringing claims for equal pay should be harmonised with other discrimination strands in respect of time limits and remedies.

- **Comparators:** We strongly support the Women and Work Commission's recommendation that the DLR removes the requirement for actual comparators in claims for equal pay.

- **Gender Equality Code:** A gender equality code of practice should underpin the SEA. It should cover legislation and best practice related to sex discrimination, maternity rights and protection, pay, part time and flexible working and equal value. It should bring together provisions from relevant gender equality enactments as well as employment protection and health and safety legislation such as ERA 1996 and the Management of Health and Safety at Work Regulations 1999. A code of practice which covers all areas of sex discrimination, including pregnancy and harassment, should lead to employers and employees gaining a better (and common) understanding of their rights and duties. The code must be detailed and kept up to date when the law changes.

- **Dealing with multiple discrimination:** The DLR should a definition of discrimination which provides for the possibility of discrimination on multiple grounds and/or a specific mechanism for dealing with multiple discrimination in the SEA.

# Section one

## Executive Summary

### 2 Ensuring legislation works effectively

Legal opinion has it that the legislation that does currently exist is often not easily or properly enforced. This happens both due to lack of knowledge of the law - on the part of employers and employees - and weak monitoring and enforcement of legislation. Unions need to be given a prominent role in ensuring legislation is implemented correctly and adhered to, and consideration must be given to promoting equality in non-unionised workplaces. It is vital also that the Commission for Equality and Human Rights (CEHR) has sufficient power and funding to both promote and enforce legislation, and to take individual cases. Without an adequately funded equality body with the power and resources to make investigations and take proceedings in its own name, any Single Equality Act will lack teeth.

The problem inherent in individually focused remedies must also be addressed. Our review of the evidence found that at present, even if an individual is able to find the resources and evidence needed to take a tribunal claim, she is likely to receive only financial compensation. And although the tribunal may make a recommendation for corrective action, it has to relate to the particular claimant and cannot address the effect of the discrimination on the workforce more generally. Whilst compensation benefits a claimant in the short term, the policy about which she complained may also have had the effect of disadvantaging other female employees, and yet it is unlikely that there will be any change in the working conditions of these employees as a result of an individual claim.

### Recommendations:

- **Unions:** Unions have an important role to play in supporting equal pay claims, and this role must be protected and supported. For example trade unions should be able to bring claims of indirect discrimination on behalf of individual employees and unions should be involved in equality audits from the outset.
- **Equality representatives:** The introduction of equality representatives, within both unionised and non-unionised workplaces should be considered. Equality representatives must have statutory protection and paid time off for training, similar to union representatives. They will also need clear reporting lines so that they can effect change and influence within an organisation. They should also have powers to access information about pay.
- **The CEHR:** The new single equality body must be given sufficient power and resources to conduct formal investigations into practices in individual workplaces, and it should be able to take claims in its own name. If it is to be effective, the CEHR must provide education and support for employers and have sufficient funding to enforce the SEA.
- **Remedies for tackling discrimination:** Moving beyond individual remedies, where a finding of discrimination is made, tribunals should be obliged to consider recommending that employers take action to remedy discriminatory practices in respect of all affected employees and not just those individuals who have brought claims in the tribunal.

# Section one

## Executive Summary

### 3 A role for employers

Our discussions with discrimination law experts revealed that many employers do not have an adequate understanding of the standards they are required to meet in order to comply with legislation preventing discrimination. Other employers take a “wait and see” approach on the assumption that employees will be too afraid of losing their jobs or spending money on legal fees to challenge illegal or substandard working practices via litigation (currently their only means of seeking redress). Many employers have equal opportunities policies in place but do not monitor their operation, so the first time an employer’s policy may have been tested is at the tribunal.

Given that the gender pay gap remains stubbornly wide, there is clearly an urgent need for more proactive measures to end pay discrimination. We believe there must be a positive obligation on employers to take action to close the pay gap and that provisions to promote equal pay, and to prevent pay discrimination must be included in the SEA. Despite having been recommended in the EOC Code of Practice on Equal Pay as the best means of ensuring that a pay system delivers equal pay, in 2004 68% of organisations had not completed an equal pay review (and had no plans to commence one).

Our analysis suggests that positive action should also play a more central role in correcting gender inequalities in employment, as it has in other jurisdictions such as the USA. At present UK law allows positive action in restricted circumstances, but does not promote it, whereas EU law permits a wider approach and the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) places an obligation on the state, where appropriate, to adopt special measures for the purposes of guaranteeing the enjoyment of human rights and fundamental freedoms of women.

### Recommendations:

- **Extension of public sector duty:** We welcome the public sector gender duty which will come into force in April 2007, but we are concerned that this duty should be extended to the private sector with respect to employment before the gap between best practice in the public and private sectors increases further.
- **Pay audits:** Fawcett believes that if the gender pay gap is to be significantly narrowed, then equal pay audits must be mandatory for all public and private sector employers. Where discrepancies are uncovered an equal pay action plan must be prepared and published. If the DLR is not minded to introduce this requirement we ask that as a minimum, the tribunal should be required to consider recommending that any employer who loses an equal pay claim should carry out an equality pay audit and report the results, with an action plan if required, to the tribunal, any recognised union and the CEHR.
- **Procurement:** As proposed by the Women and Work Commission, government contracts and funding should only be awarded to organisations with a good track record on gender equality. A finding of discrimination in the tribunal against a contractor should mean that they are excluded from participating in Government procurement processes for a limited period.
- **Positive action:** The present permissive provisions only allow positive action in narrow circumstances. These should be widened in line with EU law and UK obligations under CEDAW.

# Section one

## Executive Summary

### 4 Support for individuals

We found that a major problem with the current anti-discrimination framework is that it places the onus on individuals to initiate legal action in order to obtain redress, rather than placing an obligation on employers to take proactive measures to prevent inequality. Our review of the evidence also suggested that, in some respects, the legislation does not go far enough to protect individuals. In particular the current system does not go far enough to support working mothers and does too little to support and protect fathers and carers, hence the number of women who exit employment when they start a large family.

There is little free or low cost legal aid or advice available in respect of employment cases which leaves individuals who have experienced discrimination bearing the costs. This is a particular barrier to women taking cases, as not only do they earn less than men on average, they also have considerably fewer savings on which to draw, meaning they tend to be more (financially) risk averse. Even if they win a case at tribunal, statistics demonstrate that it may prove difficult for an individual to enforce any award of compensation. The litigation process is also likely to have a negative effect on the individual's career prospects and health. This is likely to dissuade many women who are pregnant or recently gave birth from taking or pursuing cases related to that pregnancy.

Practitioners reported that equal pay cases are particularly tricky. Despite recent procedural reforms, it can take years and cost considerable sums before an equal pay claim is finally decided by a tribunal or appeal court. It is particularly difficult to gather the necessary evidence, making it difficult to make a case, and claims under the EqPA require specialist legal advice and representation. It is therefore unusual for litigants in person to be able to pursue equal pay claims and fewer equal pay claims are brought than other forms of discrimination.

#### Recommendations:

- **Mediation:** There is a need for third party assistance with mediation when employees are still in employment and before the tribunal is involved. The aim should be to try and keep employees in employment rather than being dismissed from employment following discrimination and/or litigation.

- **Group actions:** We support the recommendation of the Women and Work Commission that the tribunal rules must be amended to make it easier to bring class/group/representative actions. We recommend that the CEHR, organisations and unions should all be able to bring cases on behalf of a group of workers. Giving non-victims the right to take cases will enable a collective approach and reduce costs.

- **Enforcement of tribunal awards:** It should be made easier for individuals to enforce tribunal awards. The DLR should investigate the possibility of making it mandatory for tribunals to suspend proceedings (not dismiss them), pending payment of a compensation order. The claim would then only be dismissed once the claimant has confirmed receipt of the compensation. Tribunals should also be given the power to increase compensation if awards are not paid within a specified time limit.

- **Remedies:** Under the SEA, remedies currently available under the different Acts should be harmonised upwards so that for example, tribunals have the power to order that an employer must re-employ a claimant in discrimination cases. Claimants dismissed for discriminatory reasons should receive a basic award, a compensatory award and an award for breach of statutory rights in dismissal cases. Injury to feelings and aggravated damages awards should be available in equal pay cases.

- **Family status protection:** A new protected ground of discrimination on the grounds of family status and caring responsibilities should be introduced. This would assist individuals who experience discrimination in connection with for example, part time or flexible working or the demands of caring. It would also provide protection to fathers, moving away from out-dated assumptions about gender roles.

- **Ban on dismissal of pregnant women:** There should be a prohibition on dismissing a pregnant woman or new mother before, during and for a period of 6 months following maternity leave. The Pregnant Workers Directive would permit and, arguably, requires this approach.

## Section two

### Introduction

Persistent gender inequalities in pay and employment in Britain are well documented<sup>6</sup> and evidence suggests that the current system of gender equality legislation is inadequate<sup>7</sup> to protect against them. A rare window of opportunity to reform equalities legislation has opened as a result of the Discrimination Law Review (DLR) currently being carried out by the Department of Trade and Industry (DTI) in the lead up to the introduction of a Single Equality Act (SEA). However the debate is faltering because technical legal expertise and experience is not feeding into and informing policy discussions. In response Fawcett has teamed up with solicitors Palmer Wade and consulted discrimination and employment law experts to examine the gaps and failures within the current system, and to identify options and recommendations for reform to the framework for gender equalities legislation. We would like to thank the following for their contributions to this report:

Kate Allen  
*Department of Trade and Industry*

Lucy Anderson  
*Trades Union Congress*

Sue Ashtiany  
*Nabarro Nathanson*

Susan Belgrave  
*9 Gough Square*

Gary Bowker  
*Incomes Data Services*

Ulele Burnham  
*Discrimination Law Association*

Barbara Cohen  
*Equalities Legislation Expert*

Nicola Dandridge  
*Thompsons*

Tess Gill  
*Old Square Chambers*

Alice Leonard  
*Equal Opportunities Commission*

Tamara Lewis  
*Central London Law Centre*

Professor Aileen McColgan  
*Kings College*

Karon Monaghan  
*Matrix Chambers*

Camilla Palmer  
*Palmer Wade*

Baroness Margaret Prosser  
*Chair, Women's National Commission*

Joanna Wade  
*Palmer Wade*

<sup>6</sup> For a review see Bellamy, K. and Rake, K., Money, Money, Money: Is it still a rich man's world? An audit of women's economic welfare in Britain today, Fawcett Society, 2005. <http://www.fawcettsociety.org.uk/documents/£££%20Audit%20full%20report.pdf>.

<sup>7</sup> For a review of the evidence see EOC submission to the Women and Work Commission [http://www.eoc.org.uk/PDF/wwc\\_submission.pdf](http://www.eoc.org.uk/PDF/wwc_submission.pdf).

# Section two continued

## Introduction

### Focus

We recognise that inequalities and disadvantage caused by unlawful discrimination extend beyond the gender strand and beyond the labour market and urge the DLR to consider how the SEA can tackle inequalities in representation in public life, access to public services including education, housing, planning, financial provision in retirement and the delivery of goods, facilities and services in the private sector. But for the purposes of this report, due to time and resource limitations, we have focussed on gender inequality in employment and the conditions of employment, in particular, pay.

We have had the benefit of considering submissions made to the DLR by the Equal Opportunities Commission (EOC) and the Discrimination Law Association (DLA)<sup>8</sup> as well as the recent report of the Women and Work Commission<sup>9</sup> and the detailed report on international equalities law and legislation prepared for the DLR by Karon Monaghan. Where relevant, we adopt or indicate our agreement or disagreement with proposals made by these organisations or individuals. Submissions made by the DLA and Karon Monaghan in particular put many of the recommendations Fawcett supports in respect of gender in the context of the other discrimination “strands” – race, religion, sexual orientation, disability, age.

### Aims

Our over-arching aim is to present a set of clear, workable recommendations which would significantly improve the promotion and enforcement of substantive gender equality in employment and the conditions of employment. The analysis and recommendations contained in this report are concerned with this over-arching objective, and guided by the following aims:

- The simplification and harmonisation of UK discrimination law so it is internally consistent between different strands (where appropriate and possible) as well as consistent with or complementary to other employment protection provisions and EC law.

- The need for effective regulation which sets clear and achievable standards to help individuals access justice without unnecessarily increasing the burden of administration on employers.
- The use of clear, comprehensive codes of practice in all areas of discrimination law which take account of other relevant employment protection rights.
- An emphasis on outcome-focussed legal duties and a move from reliance on individual enforcement.
- The extension of positive discrimination, duties to promote equality and procurement obligations to provide substantive equality.
- The need for sufficient and effective remedies to enforce individual and collective rights.

### Report

The report addresses a range of issues in relation to reform of gender equality legislation. Each section sets out our analysis of the problems and identification of gaps in the legislation and practice, before going on to set out our recommendations for reform. Section three is concerned with fundamental principles and harmonisation of gender equality legislation within the SEA. The following two sections look at particular areas of law: Section four covers equal pay and section five addresses pregnancy, maternity, family and caring rights and protection. Section six goes on to look at employer responsibility and support and section seven is concerned with tribunal procedure and enforcement. The final two sections address more proactive gender equality measures. Section eight looks at duties to promote, and section nine covers the use of positive action measures.

<sup>8</sup> See Submissions Of The Discrimination Law Association For The Discrimination Law Review, 1 March 2006 (<http://www.discrimination-law.org.uk/response.asp>).

<sup>9</sup> Shaping a Fairer Future, Women and Work Commission, February 2006 ([http://www.womenandequalityunit.gov.uk/women\\_work\\_commission/](http://www.womenandequalityunit.gov.uk/women_work_commission/)).

## Section three

# Fundamental principles and harmonisation

The Government is committed to introducing an SEA during this Parliament. Fawcett supports reform of the current strand-based approach as the most effective method to achieve justice for victims of discrimination.

The SEA must be clear, easy to use, and expressed in gender-neutral language. It must also address the many problems identified in the current complex legislative framework, including those set out below:

### Complexity and inconsistencies

At present, legislation is unnecessarily complex and inconsistent. Discrimination in pay is treated differently (under the EqPA) to other cases of sex discrimination (covered by the SDA), and this leads to unnecessary complexity and confusion. Discrepancies between the EqPA and SDA in relation to the use of comparators, time limits for bringing claims and the remedies available to individuals, as well as inconsistencies with other sources of employment protection heighten this lack of coordination in tackling the causes of sex discrimination and the gender pay gap. Whilst this report focuses on disparities in the protection offered in relation to gender discrimination, complexity and the lack of a coherent approach are common to other discrimination strands<sup>10</sup>, making the legislative framework difficult to understand and apply for both individuals and businesses.

A major discrepancy between the SDA and EqPA is the distinction between the need for actual comparators for claims under the EqPA and for hypothetical comparators under the SDA. So a woman claiming that she has been treated less favourably in relation to non-contractual

matters on grounds of her sex (for example a recruitment process) need only point to a hypothetical comparator (or no comparator at all if the treatment is on grounds of pregnancy or maternity leave)<sup>11</sup>. However, if her complaint is about pay or another contractual matter, she must bring her claim under the EqPA, which requires an actual male comparator<sup>12</sup>. Failure to identify the correct comparator when bringing a claim in the tribunal could mean that a claimant is at risk of costs being awarded against them.

This arbitrary distinction between the EqPA and SDA, which has no basis in EC law<sup>13</sup>, means that the success of a claim may depend on whether a tribunal decides that the disputed issue concerns a contractual or non-contractual matter. A recent case which highlights this problem involved an employee who claimed that she was not paid a bonus because of her absence on maternity leave<sup>14</sup>. Her employer said the bonus was a discretionary benefit whereas the tribunal found it was a contractual right so fell within the EqPA not the SDA.

The requirement to point to an actual comparator under the EqPA is also a real obstacle for women working in gender-segregated sectors such as catering or cleaning where there may not be any male comparators. For example, even if the evidence is clear that employees in a predominantly female occupation are not entitled to a bonus for reasons related to systemic and ingrained gender inequalities, if there are no male employees doing similar work who can act as actual comparators, the female employees will be unable to take a case.

<sup>10</sup> There are 35 Acts, 52 Statutory Instruments, 13 Codes of Practice, 3 Codes of Guidance and 16 EC Directives and Recommendations dealing with discrimination law in the UK.

<sup>11</sup> See for example *Webb v EMO Air Cargo Ltd* [1994] ICR 770.

<sup>12</sup> This is a requirement of the Equal Pay Act which requires an actual male comparator (see section 1). In *Alabaster v Woolwich plc & anor* [2005] ICR 1246 the Court of Appeal held that it was necessary, to ensure equality in relation to a pay rise for a woman on maternity leave, to disapply those parts of section 1 of the Equal Pay Act which impose a requirement for a male comparator. The CA held that the applicant could then succeed in her claim for sex discrimination without the need for such a comparator, just as she would have done automatically if her claim had not related to the payment of an amount of money that was regulated by her contract of employment and had fallen within the SDA regime instead. So although the CA followed the decision in *Webb*, the EPA has not been amended properly to implement this principle and there are bound to be more 'test' cases to challenge this.

<sup>13</sup> Article 141 guarantees the right to equal pay but does not require the use of a comparator or distinguish as between contractual and non contractual provisions.

<sup>14</sup> See *Hoyland v Asda Stores Ltd* 2005 IRLR 43.

## Section three continued

### Fundamental principles and harmonisation

In another example of the arbitrary distinctions between the SDA and the EqPA, if a woman is not given a job because she is pregnant she would not need to use a comparator to establish pregnancy-related discrimination. However if she was not appointed because an interviewer suspected she might already have caring responsibilities, this would be sex discrimination, rather than pregnancy discrimination and therefore a comparator (either actual or hypothetical) would be necessary. This is inconsistent and confusing for employers and employees.

Protection for pregnant workers or workers on maternity leave is also piecemeal and differs between the various Acts. For example, ERA 1996 provides that where an employee returns to work after taking additional maternity leave (AML), and it is not reasonably practicable for a reason other than redundancy for an employer to permit her to return to her old job, the employer can offer her 'another job which is both suitable for her and appropriate for her to do in the circumstances'<sup>15</sup>. Under the SDA, by contrast, if the reason for offering the employee a different job is related to her maternity leave, the employer's actions will amount to unlawful discrimination.

Fawcett submits that the DLR must address all these anomalies so that employers and employees have a clearer understanding of their rights and obligations with respect to gender discrimination, whether it occurs in relation to pay, workplace policies and practices or pregnancy.

#### **New strands and multiple discrimination**

The current legislative framework is also failing individuals who experience discrimination on multiple grounds. Each individual has complex multiple identities and is not simply a woman or a disabled person as defined

via a legislative category. For example an Asian woman working part time who experiences less favourable treatment in the workplace will have to rely on a number of different regulations and statutes. If she brought a claim for discrimination she would be required to specify which treatment related to her sex and which to her race and which to her part time status and to prove her claim by reference to separate comparators for each ground. If the claim was for indirect discrimination she would need to establish that the policy or practice of her employer about which she was claiming had a "disparate impact" on different protected groups. If a tribunal found that she had been discriminated against, it would be required to distinguish between the elements of race, sex or part-time work discrimination and could not simply find that race and/or sex and/or her part time status were a substantial factor in her treatment<sup>16</sup>. This is a barrier to justice for many claimants.

As well as harmonising rights under legislation in relation to existing strands of discrimination, the DLR must consider extending the grounds on which discrimination claims can be brought and providing a mechanism and protection for individuals who need to bring claims on multiple grounds of discrimination. Specifically, Fawcett recommends that a new protected ground of discrimination on the grounds of family status and caring responsibilities should be introduced. This would assist individuals who experience discrimination in connection with for example, part time or flexible working or the demands of caring. At present they would be required to bring claims for indirect sex discrimination which would require them to demonstrate that they have or would suffer 'particular disadvantage', together with for example, a claim under the Part-Time Workers Regulations.

<sup>15</sup> Regulation 18(2), Maternity and Parental Leave Regulations 1999.  
<sup>16</sup> Kamlesh Bahl v Law Society [2003] IRLR 640, EAT; [2004] EWCA Civ.

## Section three continued

### Fundamental principles and harmonisation

#### Failure to implement EU law

At present there are deficiencies in the way in which the UK has implemented EU law designed to prevent discrimination. In particular, these appear in the way in which two EU directives, ETAD and the Framework Directive, have been implemented with respect to protection from direct discrimination, indirect discrimination, harassment and victimisation:

a. Direct discrimination: Under ETAD discrimination occurs where a person is treated less favourably on *grounds of sex*. The SDA however prohibits discrimination only where the less favourable treatment takes place on the *grounds of her sex*. The SDA definition is less comprehensive and does not cover discrimination based on the sex of a claimant's partner for example (discrimination by association) or the perceived sex of a claimant in transgender cases.

b. Indirect discrimination: Under ETAD this occurs where an apparently neutral provision, criterion or practice puts or would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless it could be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The SDA however provides that indirect sex discrimination occurs where a provision, criterion or practice puts persons of one sex at a particular disadvantage when compared with the other unless it can be shown that the provision, criterion or practice is a *proportionate means of achieving a legitimate aim*<sup>17</sup>. The practical effect of this difference is that under the SDA it is easier for employers to establish a justification defence. They need only show that a provision, criterion or practice is a proportionate means of achieving a legitimate aim whereas under ETAD it must also be appropriate and necessary<sup>18</sup>.

c. Comparators: Article 2(2) of ETAD sets out a definition of discrimination which does not require the use of an actual comparator (for either direct or indirect discrimination), and article 3(1)(c) applies this principle of equal treatment to pay making it clear that no actual comparator is required. Yet UK legislation, in the form of the EqPA, requires that claimants bringing equal pay claims must prove their claim by reference to an *actual comparator*.

d. Pregnancy: ETAD provides that less favourable treatment of a woman related to pregnancy or maternity leave constitutes discrimination. The SDA however, provides that the treatment has to be *on grounds of pregnancy*, not just '*related to*' pregnancy and this makes it more difficult for claimants to establish that the treatment they have received is discriminatory than if the ETAD definition was used. '*Related to*' pregnancy will cover any pregnancy-related discrimination, whether connected with the actual pregnancy or, for example, pregnancy-related sickness or absence for a health and safety reason<sup>19</sup>. This is automatic so the worker does not have to show how another worker would be treated in the circumstances. '*On grounds of*' suggests that there is a need to compare the treatment of a pregnant woman with someone who is not pregnant.

e. Harassment: The definition of harassment in the SDA is narrower than under ETAD as it refers to harassment on the *ground of her sex* instead of *related to the sex* which is used under ETAD. Adopting the ETAD definition would make it clear that no comparator is required in harassment cases for the same reasoning as set out above in relation to pregnancy.

<sup>17</sup> Section 1(2)(b) SDA.

<sup>18</sup> Using the ETAD definition would also put the approach of the tribunals in for example, *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 on a statutory footing.

<sup>19</sup> *O'Neill v Governors of St Thomas Moore RCVA Upper School* [1996] IRLR 372.

## Section three continued

### Fundamental principles and harmonisation

f. **Victimisation:** The wording currently used in the SDA should be amended to bring it into line with the wording used in ETAD. A comparator should not be required as the test (in ETAD) is whether the claimant would have been treated adversely or experienced adverse consequences (rather than treated less favourably) if they had not committed a protected act (most commonly consisting of making a complaint of discrimination). It is vital that this aspect of the law is strengthened as many employees do not dare take proceedings for fear of victimisation, one of the most common reasons being that the employer will not provide them with a good reference.

Some of these points were raised by Fawcett and other lobbying groups in response to the DTI's consultation on amendments to the SDA in 2004/5. The DTI undertook to look at these issues again as part of the DLR and Fawcett urge the DLR team to review this legislation again.

#### **Recommendations:**

i. **Harmonisation:** We support the harmonisation of UK equality enactments (including the EqPA) into the SEA, underpinned by up to date strand-specific Codes of Practice containing practical guidance.

ii. **Gender Equality Code:** The gender equality code should cover legislation and best practice related to sex discrimination, maternity rights and protection, pay, part-time and flexible working and equal value. It should bring together provisions from relevant gender equality enactments as well as employment protection and health and safety legislation such as ERA 1996 and the Management of Health and Safety at Work Regulations 1999.

iii. **Gender neutral language:** The SEA must be clear, easy to use, and expressed in gender-neutral language<sup>20</sup>.

iv. **Purpose/Preamble clause:** The SEA should use a strand based approach with a closed list of protected grounds and either a preamble or purpose clause, which sets out the Act's core aims and underpins the individual discrimination strands. Many of the appeal cases on discrimination refer to the underlying purpose of discrimination law and highlight the fundamental importance of equality, pointing out that the law should be interpreted broadly<sup>21</sup>.

The clause must make it clear that the aim of the SEA is to ameliorate both structural and individual disadvantage and challenge discrimination. It may also be of assistance to set out a general understanding of what is meant by equality and/or the right to dignity and an "anti levelling down" statement to the effect that discrimination on one protected ground should never justify discrimination on another protected ground. The clause could also acknowledge that positive action may be necessary to redress historic disadvantage experienced by some discriminated against groups and that compliance will not be achieved by the reduction or removal of any protection or benefits for an advantaged group or subjection of a group to a detriment that another group is already subject to. We agree with the submission of the DLA that such a clause could be an important "purposive interpretative tool" for the judiciary<sup>22</sup>. This proposal is also dealt with in Karon Monaghan's report<sup>23</sup>.

<sup>20</sup> Its implementation can be achieved in several complementary ways:

(1) In a surprising number of cases, it is just as clear simply to omit the pronoun; (2) References to people in the singular can be turned into the plural; (3) Non-subjective terms can be adopted, such as 'one', 'individual', 'person'; (4) The pronouns THEY, THEM, THEIR can be substituted

<sup>21</sup> See for example *Jones v Tower Boot Co Ltd* [1997] IRLR 168 in which the Court of Appeal said that the general thrust of the law was educative, persuasive and (where necessary) coercive. In *P v S and Cornwall County Council* [1996] IRLR 347 the Advocate General expressed his profound conviction that 'what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries; the irrelevance of a person's sex with regard to the rules regulating relations in society. In *Goodwin v Patent Office* 1999 IRLR 4 (a case brought under the Disability Discrimination Act 1995) the EAT said that 'A tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or natural meaning of the words.

<sup>22</sup> Paragraph 8, DLA submission to the DLR, 1 March 2006.

<sup>23</sup> Paragraphs 3.6.3-3.6.20.

## Section three continued

### Fundamental principles and harmonisation

The DLR should consult further on the scope of such a clause, perhaps using as a starting point the general principles set out in Anthony Lester's Equality Bill:

*“(a) this Act is not to be construed as permitting or requiring any step that seeks to remove or reduce inequality, or to eliminate discrimination, by levelling down;*

*(b) that, in appropriate circumstances, promoting equality may require more than treating different individuals in the same way as each other or may require the accommodation of difference;*

*(c) that the need to take steps to correct conditions of disadvantage which arise from discrimination on any of the prohibited grounds may require the taking of special measures of general application (for example, the adoption of practices that encourage participation in certain activities, the improvement of access to opportunities or benefits or the modification or abandonment of practices that restrict or impair such participation or access)”<sup>24</sup>.*

v. **Protected grounds:** “Family [or caring] status”<sup>25</sup> should be added as a new protected ground, defined very broadly along the lines of the formula used in the right to emergency time off to care for dependents<sup>26</sup> and clause 12 of the Work and Families Bill (though it should be considerably wider and free standing of the right to time off to care for dependents). For example, the Northern Ireland Employment Equality Act 1998

defines ‘family status’ status as responsibility as a parent or as a resident primary carer for a person with a disability which gives rise to the need for care or support on a continuing, regular or frequent basis<sup>27</sup>. This would mean that the caring responsibilities of both women and men would be covered, avoiding the reinforcement of outdated gender stereotypes and supporting changing gender roles.

The “marital status” ground currently contained in the SDA should be reviewed with a view to extending it to cover discrimination on the grounds of being unmarried as also recommended by the EOC<sup>28</sup>.

vi. **Reasonable adjustments:** The DLR should investigate extending the duty to make reasonable adjustments or “accommodation”<sup>29</sup> currently found under the Disability Discrimination Act 1995 to discrimination strands other than disability in order to guarantee compliance with the principle of equal treatment<sup>30</sup>. We see this approach as assisting with a key aim of shifting the burden for taking action to eliminate discrimination from the employee to the employer by encouraging positive action. It would work well with a family status strand, as the onus would be placed on the employer to accommodate an employee’s caring responsibilities and would provide a more satisfactory outcome for individuals than financial compensation following an indirect sex discrimination claim.

<sup>24</sup> Clause 2 Equality Bill ([www.publications.parliament.uk/pa/ld200203/ldbills/046/2003046.pdf](http://www.publications.parliament.uk/pa/ld200203/ldbills/046/2003046.pdf)).

<sup>25</sup> As recognised under the Canadian Charter of Rights and Freedoms (<http://laws.justice.gc.ca/en/charter/index.html>).

<sup>26</sup> S57A, Employment Rights Act 1996.

<sup>27</sup> The Canadian model defines ‘family status’ as (a) having the responsibility for part-time care or full-time care of children or other dependants; or (b) having no responsibility for the care of children or other dependants; or (c) being married to, or being in a relationship in the nature of a marriage with, a particular persons; or (d) being a relative of a particular person.

<sup>28</sup> Paragraph 92, EOC submission to DLR.

<sup>29</sup> Article 5, Framework for Equal Treatment in Employment and Occupation Directive (2000/78/EC) (Framework Directive) (<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>).

<sup>30</sup> In Canada this duty is checked by the requirement that the employer should not incur undue hardship in complying with the duty and must be linked to a history of disadvantage or discrimination. See From Equal Treatment to Appropriate Treatment: what lessons can Canadian Equality law on reasonable accommodation teach the UK? by Gay Moon (<http://www.justice.org.uk/images/pdfs/CanadaReportreasonableadjustment.pdf>).

<sup>31</sup> We agree with the reasons set out by Karon Monaghan in paragraph 3.7.16 of her report.

## Section three continued

### Fundamental principles and harmonisation

However, this duty should not replace the employee's right to bring a claim for indirect discrimination<sup>31</sup> and the DLR should consider further how it could exist alongside this right. The right would also need to complement, rather than conflict with other employment protection rights such as rights to flexible working and time off to make emergency care arrangements for dependents. For example the duty might apply where a parent needed to change working hours to accommodate a change in their partner's work or child's nursery arrangements but had already made a request for flexible working in the last 12 months. We support suggestions made by the EOC<sup>32</sup> and DLA<sup>33</sup> about such a duty.

vii. **Direct** discrimination: The definition of direct discrimination contained in the SDA-which provides that a person discriminates against a woman if on the *ground of her sex* they treat her less favourably than they treat or would treat a man-should be amended in line with ETAD so that direct discrimination is prohibited on grounds of sex. This would cover discrimination by perception and association, that is, based on the sex of a claimant's partner or child or their perceived sex<sup>34</sup>.

The Code of Practice on gender equality should include guidance on the 'but for' test used judicially for determining direct discrimination. This test requires a tribunal to determine whether 'but for' the claimant's sex, she would have been treated in the way she was. The attraction of this test is its simplicity but it will not necessarily work in every case, particularly where special protection is required for pregnant women and women on maternity leave.

viii. **Comparators:** Courts and tribunals have problems interpreting and applying the requirement that in order to make a finding of direct discrimination under the SDA, less favourable treatment must be identified by the use of an actual or hypothetical comparator. The main difficulty lies in identifying the comparator given the need for the circumstances to be similar and tribunals have a tendency to take the issue of a hypothetical comparator too literally<sup>35</sup>. As explained above, ETAD does not require less favourable treatment to be established by reference to a comparator. We recommend that the DLR should investigate permitting proof of discrimination without requiring a comparator to be identified. Comparators could still be used, but largely for evidential purposes. This would also assist claimants with cases of multiple discrimination who may have difficulties identifying or describing an appropriate comparator. If sex, race, religion, age, or sexual orientation played a significant role in the less favourable treatment the treatment would be on that ground.

Further, the DLR should consider adopting the test, also suggested by the DLA and originally proposed by Lord Lester<sup>36</sup> which would require proof of a detriment related to a prohibited ground which would provide broader protection for claimants.

It should also be noted that the EU definition<sup>37</sup> of discrimination includes the same treatment where the circumstances are different, for example when a pregnant employee is being treated the same as a non pregnant employee and we recommend that the DLR consider embedding this concept in the SEA.

<sup>32</sup> See paragraphs 35-39, and 51, EOC Submission to DLR.

<sup>33</sup> See paragraphs 35-36, DLA submission.

<sup>34</sup> This change is also required in relation to the definition of race discrimination contained in the Race Relations Act 1976 and is supported by the DLA (paragraphs 29-31).

<sup>35</sup> *Shamoon v Chief Constable of the Royal Ulster Constabulary (Respondent)* (Northern Ireland) 2003] UKHL 11

<sup>36</sup> Paragraphs 24-25, DLA submission.

<sup>37</sup> For example see *Brown v Rentokil* [1998] IRLR 445 ECJ.

## Section three continued

### Fundamental principles and harmonisation

ix. **Multiple discrimination:** The DLR should provide a definition of discrimination which provides for the possibility of discrimination on multiple grounds and/or a specific mechanism for dealing with multiple discrimination in the SEA. For example, under the Canadian Human Rights Act<sup>38</sup> a discriminatory practice includes “a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds”<sup>39</sup>.

x. **Indirect discrimination:** Fawcett supports the retention of the concept of indirect discrimination but proposes that it must be underpinned by a clearer understanding of the aim of removing structural disadvantage.

The definition of indirect discrimination should be amended in line with article 2 of ETAD to provide that indirect discrimination occurs where an apparently neutral provision, criterion or practice puts or would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless it could be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary<sup>40</sup>. Using the ETAD test for justification rather than the weaker UK test of a proportionate means of achieving a legitimate aim will make it easier for claimants to bring claims and ensure that the legislation reflects ETAD<sup>41</sup>. The same definition should be used for employment and training as for education, goods, facilities and services.

Fawcett proposes that “non-victims” (such as trade unions) should be able to bring claims of indirect discrimination on behalf of individual employees. Where a finding of indirect discrimination is made, tribunals should be obliged to consider making recommendations for the employer to take action to remedy the discriminatory practice in respect of all the employees it affects and not just the individual(s) who have brought claims in the tribunal (please see Section 8). ETAD does not require that the particular disadvantage identified be applied to particular individuals, so this proposal would, again, bring UK law in line with EC law and avoid further litigation.

xi. **Harassment:** The definition of harassment in the SDA should be amended to refer to harassment *related to sex* rather than on the *ground of her sex* so that ETAD is properly implemented.

xii. **Victimisation:** As with direct discrimination, indirect discrimination and harassment, the wording currently used in the SDA should be amended to bring it into line with the wording used in ETAD and make it clear that a comparator should not be required<sup>42</sup>. We support the DLA’s recommendation<sup>43</sup> that aggravated damages should be available for victimisation claims given that if a victimisation claim is proven, an employer will have treated an employee adversely precisely as a result of their making a claim of discrimination, that is, asserting a statutory right not to be discriminated against.

38 Section 3.1, Canadian Human Rights Act

39 This definition is also supported by the DLA in paragraphs 20 and 26 of their submission to the DLR.

40 The DLA make this recommendation in relation to the other discrimination strands at paragraph 32 of their submission.

41 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317.

42 This amendment was previously a recommendation of the Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation.

43 Paragraphs 42-44, the DLA submission to the DLR.

## Section four

### Equal pay

The Equal Pay Act was introduced in 1970, and despite modest procedural reforms, is now woefully out of date both with the needs of those experiencing pay discrimination and with European Law. It is important that the EqPA, as well as the SDA be brought into the SEA. Harmonisation is crucial given:

- The EqPA is out of step with European law (by, for example, requiring comparators).
- The differences inherent in the statutory schemes under the SDA and the EqPA, for example between comparators and time limits, create unnecessary complexity and limit effective implementation of the law.
- The need for individuals to be able to challenge pay discrimination on grounds other than and combined with gender.

Given that the gender pay gap remains stubbornly wide, there is clearly an urgent need for more proactive measures to end pay discrimination. We believe there must be a positive obligation on employers to take action to close the pay gap and that provisions to promote equal pay, and to prevent pay discrimination must be included in the SEA. Positive duties on employers are vital given the lack of progress after nearly 40 years of the EqPA. Despite having been recommended in the EOC Code of Practice on Equal Pay<sup>44</sup> as the best means of ensuring that a pay system delivers equal pay<sup>45</sup>, in 2004 68% of organisations had not completed an equal pay review (and had no plans to commence one)<sup>46</sup>. The cooperation of both employers and unions is required if change is to occur.

Despite recent procedural reforms<sup>47</sup>, it can take years and cost considerable sums before an equal pay claim is finally decided by a tribunal or appeal court. The requirement for claimants to identify *actual* comparators restricts access to justice, as they are difficult to identify in gender-segregated sectors like cleaning or catering and/or where jobs have been outsourced or contracted-out. In addition, the complexity of the expert analysis involved in assessing whether a job is of “equal value” (such as would entitle the jobholder to equal pay), means that claims under the EqPA require specialist legal advice and representation. It is therefore unusual for litigants in person to be able to pursue equal pay claims and less equal pay claims are brought than other forms of discrimination.

In recent months there have been several major public sector equal pay cases involving NHS trusts<sup>48</sup>. Unions have an important role to play in supporting such claims, and this role must be protected and supported, for example by involving unions in equality audits and facilitating representative actions to save costs and improve efficiency. However we also recognise that because equal pay claims are often supported by unions, it is therefore unusual for claims to be brought in the private sector, despite the fact that it has a larger pay gap than the public sector. More must be done to tackle the gender pay gap in the private sector, and to support private sector employees with sex discrimination and equal pay claims. One option would be for equality representatives (recommended by the Women and Work Commission) to play a role in private sector organisations. (See section 6, Employer responsibility).

The discrepancy in time limits under the different Acts must also be addressed to reduce complexity for both employers and employees. Under the SDA claims must be brought

44 Code of Practice on Equal Pay, EOC, December 2003.

45 See also Just Pay, Equal Pay Taskforce report, 2001, 5.11-5.14 and Technical Annex 1 (<http://www4.btwebworld.com/equalpaytaskforce/whatsnew/JustPayE.pdf>). The Taskforce made a strong recommendation for mandatory pay audits/reviews, suggesting a “Stage One” review required for all employers, with those who identify pay inequalities being required to proceed to a Stage Two review within a specified timescale. In 2001 it was suggested that 25-50% of the pay gap was due to discrimination but that with concerted action it would be possible to reduce the gap by 50% in 5 years and eliminate it in 8 years.

46 EOC, Equal Pay Audit statistics.

47 Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 SI 2004/2351.

48 In North Cumbria the union struck a deal on behalf of 1,500 women working at two hospitals, giving them each between £35,000 and £200,000 after an employment tribunal decided they had suffered pay discrimination since 1991.

## Section four continued

### Equal pay

within 3 months of the act of discrimination complained of and the tribunal has a discretion to extend this time limit if it considers it just and equitable to do so. However, under the EqPA, claims must be brought within 6 months of the termination of a contract of employment, and there is no discretion to extend time except in extremely limited circumstances where the employer has concealed some relevant matter from the claimant. Uncertainty over the length of this time limit can arise where a female worker has been on a succession of short-term contracts<sup>49</sup>. A further layer of complexity is added by the possibility that time limits may also be extended in some circumstances under the statutory dispute resolution procedures introduced in October 2004<sup>50</sup> (see further under section 7, Tribunal Procedure below).

Care will need to be exercised when harmonising the concept of equal pay into the SEA. It is acknowledged both in the domestic courts<sup>51</sup> and by the European Court of Justice (ECJ)<sup>52</sup> that the standard distinctions between direct and indirect discrimination do not always fit the factual circumstances of equal pay claims. In particular, in cases where as a result of job segregation there is gender disparity between two occupational groups carrying out work of equal value, and the one with a higher proportion of females is being paid less it may not be obvious that the lower pay arises from some express provision, criterion or practice as against a process of separate bargaining and historical pay arrangements which favour the predominantly male group. It has been recognised that notwithstanding such a background the employer nevertheless has to objectively justify the difference in pay.

There is also currently uncertainty<sup>53</sup> as to whether employers must objectively justify a difference in pay once a claimant has established she is employed on work of equal value or

whether this requirement only applies if there is evidence of disparate impact on female workers. If as seems most likely<sup>54</sup> it is determined that disparate impact does have to be established for there to be a duty on the employer to objectively justify the pay difference, the forms of pay discrimination that could arise would appear to be:

- Direct discrimination as in any other form of discrimination, where if the claimant makes out facts which could support discrimination the employer would be required to provide a non-discriminatory explanation for the difference in pay;
- A difference in pay between two occupational groups where an employment tribunal would have to decide whether the statistics were significant and reliable and sufficient to require the employer to objectively justify the difference;
- A “practice, provision or requirement” case (the classic example being lower pay to part-time workers) which satisfies the standard definition of indirect discrimination so that the normal rules apply.

#### Recommendations:

- Harmonisation under SEA<sup>55</sup>:** Sex discrimination on both contractual and non-contractual grounds should be covered under the SEA. This would simplify the process of bringing a claim for discrimination where both elements are included and also have the advantage of providing a remedy for individuals experiencing pay discrimination on a number of different discrimination strands (for example gender and race). It would also be in line with article 3 of ETAD which applies the amended principle of equal treatment to employment and working conditions including pay.

49 City of Newcastle upon Tyne v Allan [2005] IRLR 504.

50 New minimum procedures for employers and employees were introduced in October 2004 under the Employment Act 2002 and the Dispute Resolution Regulations 2004.

51 Home Office v Bailey [2005] EWCA Civ 327.

52 Enderby and others v Frenchay Health Authority and others (1992) IRLR 15.

53 As a result of differing judgments in the EAT as to the effect of the ECJ judgment in Brunnhofer v Bank der Osterreichischen Postsparkasse AG [2001] IRLR 571.

54 The Court of Appeal will consider this issue later in 2006 in Sharp v Caledonia Group Services, Limited, UK EAT 0041\_05\_0111.

55 Most of these proposals are mirrored in the EOC's submission to the DLR, paragraphs 30-31. However, Fawcett does not agree with the EOC's suggestion of a period of immunity from claims for employers who identify a pay gap in their workforce.

## Section four continued

### Equal pay

Under the SEA, the mechanism for bringing claims for equal pay should be harmonised with other discrimination strands in respect of time limits, remedies and damages. Fawcett recommends that the time limit for all discrimination strands should be extended to 6 months with a discretion for the tribunal to extend this period (see section 7 Tribunal Procedure). In terms of damages, injury to feelings and aggravated damages should also be available for equal pay claims. It should not be open to tribunals to reduce awards on the ground that the claimant has contributed to the discrimination in respect of any claims.

- ii. **Code of Practice:** The EOC Code of Practice on equal pay should be revised and included within the Gender Equality Code of Practice which we recommend should underpin the SEA. It should include examples of discrimination. Tribunals must be reminded that they are entitled to draw inferences from an employer's failure to follow the recommendations set down in the Code, including those found in paragraphs 70-73 regarding equal pay audits.
- iii. **Definitions:** The test of objective justification is as set out in *Bilka Kaufhaus*, namely that the employer must prove that the means chosen for the objective correspond to a real need on its part, are appropriate to achieve the objective in question and are necessary to that end. It would clarify the law if this was either given statutory force in the SEA or clearly set out in a revised gender equality code of practice<sup>56</sup>.
- iv. **Equal value:** The equal value procedure should be retained within the SEA for use in relation to claims of equal pay for work of equal value. But views should be sought on simplification of the procedure in the Green Paper to ensure it achieves justice for individuals. For example we recommend that independent experts should be brought in before stage two hearings as a matter of course (currently this is permitted but not required). Employees can claim equal pay on the basis that they perform work that is the same or broadly similar to a man; work rated as equivalent under a job evaluation study; or work of equal value in terms of the demands made on them. Where an employee has made two claims, one for work rated as equivalent and one for equal value, a tribunal should be required to determine the claim for work rated as equivalent first before scheduling stage 1 of the equal value hearing as it may not be necessary to proceed with the equal value procedure at all.
- v. **Equality clause:** We recommend that the DLR should seek views on extending the concept of the equality clause implied into employee's contracts pursuant to a successful claim under the EqPA to other strands of discrimination or into a general right to continuing equal treatment. This would be relevant to any claim which arises from continuing treatment as against a one off discriminatory act. For example, in claims under the EqPA the claimant is not only entitled to back pay but also an amendment to her contract of employment to provide that she will continue to be entitled to equal pay and benefits to that of her comparator.
- vi. **Case Management:** Tribunal Chairs dealing with equal pay cases should receive Judicial Studies Board training, in both case management and judgement writing, equivalent to that provided to High Court Judges. See Section 7, Tribunal Procedure for recommendations on representative actions.
- vii. **Hypothetical comparators:** We strongly support the Women and Work Commission's recommendation that the DLR consider removing the requirement for actual comparators in claims for equal pay<sup>57</sup>. Instead hypothetical comparators could be used as permitted under ETAD.

<sup>56</sup> The code could also allude to the House of Lords decision in *Barry v Midland Bank plc* [1997] ICR 192, EAT where it was held that the *Bilka-Kaufhaus* test does not mean that an employer can only justify indirect discrimination if the measure chosen is shown to be necessary as the only possible measure available. One must first consider whether the objective of the scheme is legitimate. If so, then one goes to consider whether the means used are appropriate to achieve that objective and are reasonably necessary for that end. Sometimes this guidance is distorted so that the test is weakened to one of reasonableness and it would therefore be helpful if the proper approach of reasonably necessary was explained.

<sup>57</sup> Paragraph 37, Chapter 5, *Shaping a Fairer Future*, Women and Work commission, February 2006.

## Section four continued

### Equal pay

Article 2.2 of ETAD, which defines direct discrimination, does not require the use of an actual comparator and Article 3 of ETAD applies this principle to cases of equal pay. The same rules should apply to equal pay claims as with other discrimination claims.

viii. **Equal Pay Audits:** Fawcett believes that if the gender pay gap is to be significantly narrowed, then equal pay audits must be mandatory for all public and private sector employers. Audits could be phased in by size of employer so that smaller employers would not be required to carry them out for a few years. However, if the DLR is not minded to introduce this requirement we ask that as a minimum, where there has been a finding of unlawful pay discrimination, tribunals should be obliged to consider making a recommendation that the employer carries out an equal pay audit (please see Section 7 for more details of this proposal). Such an audit could be limited to the category of worker(s) affected by the tribunal's finding in the individual claim(s).

Equal pay audits should be carried out in consultation with and with full disclosure to a recognised union. The results of these audits must be published and reported to a recognised union (where there is one) and to the CEHR. In order that an additional level of administration is not introduced for employers, this obligation could tie in with other reporting requirements in for example a company annual report or to the Health and Safety Executive (HSE) or be a separate return to the DTI.

We recommend that where discrepancies are uncovered an equal pay action plan must be prepared and published within a specified timeframe. The action plan is vital and will ensure that the audit remains focussed on outcomes (rather than process) and does not become a "tick box" exercise. There should be penalties for failure to publish audit results and an action plan. The unions and the

CEHR should have the right to complain to the CAC who could make orders and if necessary impose sanctions (the CAC are accustomed to dealing with collective rights and obligations and could assist with mediating a dispute between the parties).

Tribunals must be reminded that they are already entitled to draw inferences from an employer's failure to follow the recommendations set down in the Code of Practice on Equal Pay, including those found in paragraph 72 regarding equal pay audits<sup>58</sup>.

- ix. **Gender Duty:** As part of the new public sector gender duty there should be a specific duty on employers to take action necessary to promote equal pay (see Duties to promote below). This would work alongside any general duty to promote equality.
- x. **Definition of pay:** If, as we recommend, the EqPA is brought within a SEA, it is important that there should be a broad definition of pay and clarity on what is included (on both a contractual and non-contractual basis).
- xi. **Guidance for employers:** We support the recommendation made by the Women and Work Commission that the guidance for employers contained in the Equal Pay Questionnaire should be amended to make it clear that disclosing data on pay will not breach data protection law<sup>59</sup>.

<sup>58</sup> The Code states that "While employers are not required, by law, to carry out an equal pay review, this Code recommends equal pay reviews as the most appropriate method of ensuring that a pay system delivers equal pay free from sex bias" (paragraph 72, EOC code of Practice on Equal Pay.

<sup>59</sup> Paragraph 36, Chapter 5, Shaping a Fairer Future, Women and Work commission, February 2006.

## Section five

### Pregnancy, maternity, family and caring rights and protection

Nearly half of all women who become pregnant whilst at work face some form of discrimination and a fifth lose their job or miss out on pay or promotion as a result of being pregnant<sup>60</sup>. Yet 70% of pregnant women at work take no action against discrimination they suffer. In addition, the average hourly wage for female workers prior to having children is 91% of the male average but declines to 67% for working mothers with young children<sup>61</sup>. There is an urgent need to monitor and protect the pay and conditions of mothers returning to work.

The current system also does too little to support and protect fathers and carers. The fact that men work the longest hours when their children are young has a negative impact on child outcomes and perpetuates the caring divide. With an ageing population, it makes economic and social sense for both male and female family members to have the ability to take time off to care for dependants without the threat of losing income or job security.

The EOC's pregnancy General Formal Investigation found that risk assessments are very important to protect the health of mothers and babies, yet they are rarely carried out and there is no statutory remedy for an employer's failure in this regard<sup>62</sup>. This is despite the fact that the main emphasis of the Pregnant Workers Directive is to protect the health and safety of pregnant women and new mothers.

The legislation is complex because it has developed in a piecemeal fashion and is set out in numerous different Acts and regulations including:

- The Employment Rights Act 1996;
- The Maternity and Parental Leave Regulations 1999;
- The Management of Health and Safety Regulations 1999;
- The Social Security Act;
- The SDA, which now defines discrimination on grounds of pregnancy or maternity leave but only protects employees during maternity leave;
- EU law, for example the Pregnant Workers Directive, Equal Treatment Directive, Article 141.

There is currently no single code of practice setting out, in clear comprehensive terms, the rights and obligations of employers and employees with regard to pregnancy and maternity leave, maternity leave under these various Acts and regulations with the result that employers are not fully aware of their responsibilities and employees often do not understand their rights. Both individuals and employers urgently require clarity on the law and practice governing maternity, paternity and parental leave and we welcome the DTI's recent commitment to simplify guidance on maternity leave and pay and the way in which employers administer SMP<sup>63</sup>. A gender equality code of practice which covers all areas of sex discrimination including pregnancy and harassment will hopefully lead to employers and employees gaining a better (and common) understanding of their rights and duties. The code must be detailed and kept up to date when the law changes.

60 Adams, L., McAndrew, F., & Winterbotham, M. (2005) Pregnancy Discrimination at work: a survey of women, IFF Research for EOC Working Paper Series No.24 ([http://www.eoc.org.uk/PDF/wp24\\_survey\\_of\\_women.pdf](http://www.eoc.org.uk/PDF/wp24_survey_of_women.pdf)).

61 Newborns and New Schools: Critical Times in Women's Employment (report series number 308), Institute for Fiscal Studies, 19 January 2006 (<http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep308.pdf>).

62 The position under the SDA is unclear; see Madarassy v Nomura International plc [2004] UKEAT 0326105/ILB.

63 Page 15, Success at Work paper.

64 Success at Work, DTI, 30 March 2006 (<http://www.dti.gov.uk/er/successatwork.htm>).

## Section five continued

### Pregnancy, maternity, family and caring rights and protection

The DLR team must also consider how best to ensure that part-time and atypical workers are protected under the law. We note the DTI's comments in the recent Success at Work strategy paper<sup>64</sup> concerning the UK's strong labour market and the Government's reluctance to create obstacles to the creation of jobs and opportunities for participation in that market. However, nearly half of all female employees work part time, losing pay, benefits, training and promotion as a consequence. There are over four times as many women as men working part time. Long working hours limit men's involvement at home and restrict career advancement for women. Many women, especially in gender-segregated sectors like cleaning and nursing, work part time and some also on fixed-term contracts, in insecure casual work either directly or via employment agencies or contracted out services. Frequently they do not gain the necessary employment status in order to claim protection from discrimination or benefits like Statutory Maternity Pay (SMP). Although the House of Lords have recently given a broader interpretation to the Part-time Workers Regulations these are still narrowly drawn and should be considered alongside the protection from indirect discrimination and equal pay, so that there is consistency and clarity.

#### Recommendations:

- i. **Code of Practice:** A comprehensive summary of rights and guidance on pregnancy, maternity, family and caring rights and protection must be set out within a gender equality Code of Practice. The present EOC Code barely mentions pregnancy and is 20 years out of date. It would be advisable to include rights to pregnancy and caring related protection and benefits found in other employment legislation in such a code.

- ii. **Definition:** As explained in Section 3, ETAD provides that less favourable treatment of a woman related to pregnancy or maternity leave constitutes discrimination whereas the SDA provides that it has to be on *grounds of pregnancy*, not just 'related to' pregnancy. This makes it more difficult for claimants suffering, for example, less favourable treatment as a result of pregnancy-related sickness to establish that the treatment they have received is discriminatory and we therefore recommend that the ETAD definition should be adopted in the SEA.
- iii. **Pregnancy risk assessments:** Obligations of employers, the HSE and employees need to be clearly defined with clear remedies for breaches. Employers should be given advice and assistance in carrying out a risk assessment, with the possibility of imposing a statutory duty on the HSE to assist where necessary. Pregnant workers should be provided with a summary of their legal rights and obligations at their first ante-natal appointment and should give a copy to their employers (also proposed by the EOC).
- iv. **Prohibition on dismissal:** There should be a prohibition on dismissing a pregnant woman or new mother before, during and for a period of 6 months following maternity leave. The only exception would be where an employer has obtained specific permission for dismissal (for instance on the grounds of gross misconduct) from a tribunal (or other body) in advance. The Pregnant Workers Directive would permit, and arguably requires this approach<sup>65</sup>.

<sup>65</sup> 'Member States shall take the necessary measures to prohibit the dismissal of workers within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1) save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent'.

## Section five continued

### Pregnancy, maternity, family and caring rights and protection

- v. **Extension of protection:** Fawcett is disappointed by the Government's recent announcement<sup>66</sup> that it has decided not to extend explicit protection from discrimination on the grounds of maternity leave to all workers (and not just employees as defined in the ERA 1996) in line with the Pregnant Workers Directive<sup>67</sup> and case law<sup>68</sup>. The EAT has held that where a contract worker is not given work following time off to have a baby, where she would have been kept on permanently but for her absence, that will be discrimination<sup>69</sup>. Fawcett urges the Government to reconsider this decision in the context of the DLR.
- vi. **Flexible working:** The right to request flexible working should be extended to parents of children up to the age of 18 and to carers.
- vii. **Comparators:** The SEA should make it clear, in accordance with the decision in *Alabaster*<sup>70</sup>, that a woman claiming unequal pay caused by her pregnancy or maternity leave does not need to rely on a comparator.
- viii. **Returner statistics:** Employers should be required to keep and report statistics regarding rates of return to work following maternity leave. This should be part of the equality audit (see also Sections 4 and 6, Equal Pay and Employer responsibility). When an individual brings a claim they (and/or the tribunal) should be able to request statistics from the employer. If the employer has not kept statistics or does not disclose them then the burden of proof should be reversed in any subsequent claim or default judgment entered against the employer.
- ix. **Right to return to same job:** Women should be guaranteed the right to return to the same job they were performing previously at anytime during their maternity leave. It is commonly believed that a woman can be moved to a different job on her return from maternity leave even if this would not have happened but for her absence on maternity leave despite the fact that this would be sex discrimination.
- x. **Monitoring body:** The Government should consider establishing a body specifically charged with monitoring compliance with pregnancy legislation. This could be a branch of the CEHR or the HSE. The same body could also monitor other family rights such as flexible working and parental leave.
- xi. **Part-time and atypical work:** The DLR should consider protection from discrimination offered to part time and fixed term workers (the majority of whom are women earning very low wages) alongside its review of strand specific discrimination law.
- At the very least, tribunals should have the power to order that employers which lose pregnancy discrimination claims be required to keep and publish these statistics for a specified period following the claim.

66 DTI op.cit.

67 Pregnant Workers Directive, 92/85/EC.

68 *Patefield v Belfast City Council* [2000] IRLR 664.

69 *Patefield v Belfast City Council* [2000] IRLR 664 and *BP v Gillick*

70 *Michelle Alabaster v (1) Barclays Bank PLC (2) Secretary of State for Social Security* [2005] EWCA Civ 508

## Section six

# Employer responsibility and support

Many employers (especially SMEs) do not have an adequate understanding of the standards they are required to meet in order to comply with legislation preventing discrimination. This can lead to resentment and frustration on the part of those employers who take the time to investigate the legislation, and disillusionment if they are challenged over their employment practices and lose a tribunal claim on a technicality. Other employers take a “wait and see” approach on the assumption that employees will be too afraid of losing their jobs or spending money on legal fees to challenge illegal or substandard working practices via litigation (currently their only means of seeking redress). Many employers have equal opportunities policies in place but do not monitor their operation, so the first time an employer’s policy may have been tested is at the tribunal.

Employers need clear standards of conduct to which they must adhere in order to comply with duties not to discriminate and/or to promote equality<sup>71</sup>. Carrying out equality checks with a requirement to put action plans in place if unequal treatment is uncovered would provide a benchmark for employers. In *Success at Work*<sup>72</sup>, the DTI indicate that they are working on an ‘Employment Standard’ and we welcome this initiative provided there will be an ‘equalities’ aspect to the standard.

We welcome the public sector gender duty which will come into force in April 2007, but we are concerned that this duty should be extended to the private sector before the gap between best practice in the public and private sectors increases further. We agree with the Government that “inefficient regulation can impose a significant cost on business without improving regulatory outcomes”<sup>73</sup>. It is therefore vital that this opportunity is taken to consider and identify appropriate regulation and proactive steps which employers can take in order to promote substantive equality (and save themselves

ending up in the tribunal), and the kind of support they require to achieve them.

### Recommendations:

i. **Equality audits:** Employers should be required to carry out equality audits, one part of which would be an equal pay audit<sup>74</sup> (please see Section 4 for more details on Equal Pay Audits).

Where a union is recognised, it should be consulted and involved in the equality audit from the outset. The results of these audits must be published and reported to a recognised union and to the CEHR. This could tie in with other reporting requirements, for example a company annual report, to the HSE, or it could take the form of a separate return to the DTI. It would also form part of the organisation’s wider corporate social responsibility (CSR) programme.

The audit results must be monitored and an equality action plan prepared to address any inequality or bad practice uncovered via the audit<sup>75</sup>. This step is vital to ensure that the audit has ‘teeth’. We agree with the EOC’s observation that the best practice models suggested by the Women and Work Commission report and the Equalities Review Interim report lack an essential focus on outcomes. There should be sanctions for employers who fail to carry out audits and/or establish action plans, similar to penalties for non-compliance with health and safety legislation.

At the very least when an employer loses an equal pay claim, the tribunal should be required to consider recommending that the employer carry out an equality audit and report the results, with an action plan if required, to the tribunal, any recognised union and the CEHR (for more details please see Section 7, Tribunal Procedure).

71 See the EOC’s Submission to Women and Work Commission, Appendix 2, Support for small businesses ([http://www.eoc.org.uk/PDF/wwc\\_submission.pdf](http://www.eoc.org.uk/PDF/wwc_submission.pdf)). The EOC also suggested an equality kite mark for employers, advice to business start ups and to payroll and HR functions.

72 DTI op.cit.

73 DTI op.cit

74 For more details on the scope and content of Equality Audits, please refer to EOC recommendations. For example as put forward in Just Pay – Equal Pay Taskforce report, 2001

75 See section 8.10, Just Pay, Equal Pay Taskforce report, 2001 (<http://www4.btwebworld.com/equalpaytaskforce/whatsnew/JustPayE.pdf>) which recommends that unions and employees should be able to report non-compliance to the CAC who could use their expertise in arbitrating between employers and unions with the aim of resolving the disagreement without resorting to enforcement and penalties.

## Section six continued

### Employer responsibility and support

ii. **Equality representatives:** We support the suggestion from the Women and Work Commission<sup>76</sup> that equality representatives should be introduced in unionised workplaces. Research from the USA shows that equality officers and committees played a major role in reducing inequality (along with affirmative action).

However, we also recognise the need for equality representatives within non-unionised workplaces, as these organisations are least likely to have carried out equal pay audits and most likely to have a significant gender pay gap. In order to be effective, equality representatives in non-unionised workplaces must have statutory protection and paid time off for training, similar to union representatives. They will also need clear reporting lines so that they can effect change and influence within an organisation. They could, for example, form part of an employee works council<sup>77</sup>. They should also have the same powers as union representatives to access information about pay.

Both equality and union representatives should play a role in examining the adequacy of the equality check/audit carried out by an employer action plan produced as a result.

iii. **Role of Central Arbitration Committee:** Employees could complain to the Central Arbitration Committee (CAC) if the audit is not carried out and the CAC could perform arbitration with the employer and/or refer the matter to the employment tribunal if unsuccessful. This would be preferable to such claims being referred to a tribunal as the CAC has experience of assisting with negotiations between employers and staff and could intervene to encourage the employer to carry out the audit.

iv. **Internal dispute resolution:** There are many problems with the statutory dispute resolution regulations, especially

in relation to group actions and/or where continuing discrimination may require that a step 1 grievance be submitted to an employer on a number of occasions before fresh claims can be submitted to the tribunal. Raising a grievance is often seen as a 'hostile' act by employers, particularly when discrimination is alleged. It is often the first step in litigation and may well lead to the end of the employment relationship. This is the opposite of the Government's stated aim in introducing the statutory procedures and consideration should be given to replacing this somewhat confrontational grievance procedure with a more conciliatory process such as a requirement to mediate with the help of an outside independent body, such as a specialist branch of ACAS or other body. It is crucial however that any mediator is familiar with discrimination law and is a trained mediator. In addition, consideration should be given to the possibility of tribunals being involved in mediation, particularly where the claimant is still employed.

v. **Education and training:** In order for these requirements to be workable, resources must be made available for additional education and support for employers, both generally and specifically in connection with planning equality checks. In their Success at Work paper, the DTI refer to 21 specialist ACAS equality advisers. This resource is woefully inadequate for the entire country and must urgently be improved.

vi. **Procurement:** Equalities duties should be included in the selection and award criteria for tenders. A finding of discrimination in the tribunal against a contractor should mean that they are excluded from participating in Government procurement processes for a limited period unless and until they have put a corrective action plan in place. The DLR should consider how such a procedure could best be enforced and the role a tribunal would play in monitoring compliance. The DLR could draw on best practice in the Scottish Parliament, Welsh Assembly and the GLA.

<sup>76</sup> DTI op.cit

<sup>77</sup> Works Councils set up under the Information and Consultation of Employees Regulations 2004.

## Section seven

### Tribunal procedure, remedies and enforcement

A major problem with the current anti-discrimination framework is that it places the onus on individuals to initiate legal action in order to obtain redress. There is little free or low cost legal aid or advice available in respect of employment cases which leaves individuals who have experienced discrimination bearing the costs. This is a particular barrier to women taking cases, as not only do they earn less than men on average, they also have considerably fewer savings on which to draw, meaning they tend to be more (financially) risk averse. Even if they win a case at tribunal, statistics demonstrate that it may prove difficult for an individual to enforce any award of compensation<sup>78</sup>. The litigation process is also likely to have a negative effect on the individual's career prospects and health. This is likely to dissuade many women who are pregnant or recently gave birth from taking or pursuing cases related to that pregnancy. Another problem with the current procedure is that many cases settle before a hearing on a confidential basis and although the individual may receive financial compensation, the settlement will have little impact on the illegal practices which contributed to it, meaning structural gender inequalities will remain unchallenged.

Practitioners have criticized the statutory dispute resolution procedures and changes to tribunal procedure, forms and time limits which came into force in October 2004<sup>79</sup>. In an attempt to encourage internal dispute resolution, the new procedures require an employee to raise a grievance complaint with their employer before the tribunal will accept jurisdiction for certain tribunal claims. The Employment Tribunal Service (ETS) are carrying out a review of the operation of these procedures, which is due to be published in October 2006. The mandatory requirement to use ETS forms has resulted in many claims being rejected at an early stage and not presented again. Critics suggest that this gives a false impression that the number of claims has

fallen as a result of internal dispute resolution. The initial feedback (as at March 2005) from the ETS review is that an increased number of claims are being rejected because of ignorance about the requirement to fill in the new forms or failure to submit a grievance. The EAT has itself been very critical of the procedures stating that the actual meaning of the regulations may not have been intended by the Government<sup>80</sup>.

In any event, raising a formal written grievance often spells the end of the employment relationship, particularly in the private sector. For a woman already struggling to juggle work and child care, this may tip the balance, spelling an end to her career. In a discrimination claim, provided an employee has sent a written grievance to their employer within the original time limit<sup>81</sup>, there will be an automatic three-month extension of the three-month time limit to bring the relevant claim. No grievance however is required in relation to claims for less favourable treatment on the grounds of working part time or under a fixed term contract. Nor is a grievance required for a breach of the requirements for making a flexible working request. Though a grievance is required prior to an employee making a claim that they have been subjected to a detriment under s47E ERA<sup>82</sup>. So for example, if a female employee who works part time is treated less favourably than her full-time colleagues, who are mainly men she must first submit a grievance if she wishes to bring a sex discrimination claim. But if she wishes to bring a claim under the Part-Time Workers Regulations, there is no such requirement.

Some commentators support the introduction of a quasi-judicial body or ombudsman to police employment protection compliance and support employers. The DLR should consider this and other steps which could be taken to make the current system work better for individuals and

78 Empty Justice, the non-payment of Employment Tribunal Awards, Citizens Advice, September 2004, ([http://www.citizensadvice.org.uk/empty\\_justice\\_final\\_sept04.pdf](http://www.citizensadvice.org.uk/empty_justice_final_sept04.pdf)).

79 Under the Employment Act 2002 and the Dispute Resolution Regulations 2004.

80 See for example, *Arnold Clark Automobiles Ltd v Steward* 20.12.05, *Canary Wharf Management Ltd v Edebi* where the President said that the regulations can operate in a harsh way and 'it gives me no pleasure to say that I find that the Tribunal lacked jurisdiction'; and in *Madhewoo v NHS Direct* where Clark said 'I reach my conclusion in this case without enthusiasm.. I would not draft Regulation 18(a) in the terms in which it appears.'

81 The EAT have held that this original time limit is subject to the just and equitable extension of time see *Spillett v Tesco Stores Ltd* and *BUPA Care Homes Ltd v Cann* [2006] IRLR

82 As this is covered by s48 which is contained in Schedule 3 & 4.

## Section seven continued

### Tribunal procedure, remedies and enforcement

employers. It is vital that employers are given more support to deal with internal grievances appropriately so that costly and time-consuming litigation can be avoided to the benefit of both employers and employees. Improved working practices pursuant to better internal workplace procedures would benefit all employees in the workplace and not just the individuals forced to litigate.

The deficiencies inherent in individually focused remedies must also be addressed. At present, even if an individual is able to find the resources and evidence needed to bring a tribunal claim, she is likely to receive only financial compensation. Although the tribunal may make a recommendation for action it has to relate to the particular claimant and cannot address the effect of the discrimination on the workforce more generally. Whilst compensation benefits a claimant in the short term, the policy about which she complained may also have had the effect of disadvantaging other female employees, and yet it is unlikely that there will be any change in the working conditions of these employees as a result of an individual claim. The SEA must therefore provide that group disadvantage caused by structural factors or policies can be addressed and that remedies should go beyond compensation to the individual, preventing the need for future similar cases against the same employer.

#### **Recommendations:**

i. **Mediation/ third party assistance:** There is a need for third party assistance with mediation when employees are still in employment and before the tribunal is involved. The aim should be to try and keep employees in employment rather than being forced out following discrimination. Mediation may assist provided that it is at an early enough stage. The DLR should investigate the possibility of ACAS officers (or alternative, well qualified advisors) with in-depth knowledge of discrimination and mediation training being involved in the early stages of a dispute to try and resolve it without the need for a formal written grievance. Research on internal grievance procedures and how many are upheld by employers would be valuable.

ii. **Review of statutory dispute resolution procedures:**

The results of the ETS review of the statutory dispute resolution procedures due to be published in October 2006 must inform the development of the SEA.

iii. **Time limits:** The changes introduced under the Employment Act 2002 which provide for the extension of tribunal time limits in certain circumstances should be reviewed and simplified. All time limits for discrimination claims (including equal pay) should be six months from the date of an act of discrimination (or in the case of a continuing act, the last act) with a power to extend time where the tribunal considers it is just and equitable<sup>83</sup>. This would remove the very confusing inconsistency between claims covered by the statutory grievance procedure (where the 3-month time limit is extended to 6 months) and other claims (where the time limit is three months) which can cause employees to miss time limits as well as create multiple claims, thus leading to more work and costs for employees, employers and the tribunal system.

iv. **Legal aid:** Additional funding must be made available for legal aid for equality cases to be taken on by skilled advisers such as law centres and access to claimant aid must be improved.

v. **Enforcement of tribunal awards:** It should be made easier for individuals to enforce tribunal awards. The DLR should investigate the possibility of making it mandatory for tribunals to stay proceedings (not dismiss them), pending payment of a compensation order. The claim would then be dismissed only once the claimant has confirmed receipt of the compensation. If no compensation is received, the claimant could apply for enforcement to the tribunal. Tribunals should also be given the power to increase compensation if awards are not paid within a specified time limit, similar to their existing power in relation to reinstatement. This is a practice adopted by some tribunals now and could become more widespread. Moving enforcement from the county court would mean that claimants would not be required to pay court fees to enforce an award which a tribunal has already determined they are entitled to.

<sup>83</sup> The DLA also make this recommendation at paragraph 73 of their submission.

## Section seven continued

### Tribunal procedure, remedies and enforcement

vi. **Remedies:** Under the SEA remedies currently available under the SDA, EPA and ERA should be harmonised upwards so that for example, tribunals have the power to order that an employer must “reinstate” or “reengage” (reemploy) a claimant in discrimination cases. Claimants dismissed for discriminatory reasons should receive a basic award, a compensatory award and an award for breach of statutory rights in dismissal cases. Injury to feelings and aggravated damages awards should be available in equal pay cases. The DLR should also consider giving tribunals the power to grant interim relief preventing dismissal or other discriminatory actions. Aggravated damages should be available where victimisation is proven.

The power to order recommendations should be extended beyond the individual claimant so that it can be used to ameliorate, for example, a discriminatory practice that was successfully challenged by a claimant but continues to affect other employees. This is vital if litigation is to have an impact in eradicating discrimination beyond the parties involved.

It must be remembered that many claimants bring claims not only for the compensation but to influence the employer not to treat other employees in a similar discriminatory way. As detailed in Section 6, where a finding of discrimination is made, tribunals should be obliged to consider making recommendations for the employer to address the discriminatory practice as it affects other employees. For example, they could order employers to complete an equal pay or equality audit where pay inequality has been proven and to require them to report back with their action plan. Non-victim third parties must be able to take action to enforce such recommendations.

vii. **Fair Employment Commission:** There should be a dedicated employment assistance and enforcement body such as a Fair Employment Commission<sup>85</sup>. It could be a non-judicial decision-making body or an ombudsmen model<sup>86</sup>.

Vii. **Group/representative actions:** We support the recommendation of the Women and Work Commission that the tribunal rules of procedure must be amended to make it easier to bring class/group/representative actions<sup>87</sup>. The DLR should investigate the adoption of the Civil Procedure Rules on group claims in employment tribunals and how tribunals dealing with large scale equal pay claims are currently handling case management and seek views from stakeholders and especially unions in relation to for example, the procedure for defining the affected group of employees and how employees are notified of claims and able to join actions.

We recommend that the CEHR, organisations and unions should all be able to bring cases on behalf of a group of workers. Giving non-victims the right to take cases will enable a collective approach and reduce costs.

Guidance would be needed on time limits and how to organise group claims in non-unionised workforces. Consideration should also be given to providing a mechanism whereby tribunals are required to identify claims involving common questions of fact and law which affect a number of claims against an employer and consider ordering that they are joined (subject to an individual employee's right to refuse). This is likely to be easier with the new computerised tribunal system.

We also recommend exploring the role for a non-judicial body to deal with disputes in relation to the definition of groups for the purposes of group actions, such as the Central Arbitration Committee.

ix. **CEHR:** The CEHR must have the power to take proceedings in its own name.

<sup>85</sup> See Somewhere to turn: the case for a Fair Employment Commission, Citizens Advice, October 2004, (<http://www.citizensadvice.org.uk/ev-somewheretoturn>).

<sup>86</sup> Examples from Karon Monaghan and Mark Bellis DLA conference presentations, 12 December 2005.

<sup>87</sup> See 8.20-8.24 of Just Pay, the Equal Pay Taskforce report, 2001 (<http://www4.btwebworld.com/equalspaytaskforce/whatsnew/JustPayE.pdf>). And paragraph 37, chapter 5, DTI op.cit.

## Section eight

### Duties to promote

After 30 years of legislation to prevent discrimination, many women are still experiencing unlawful treatment. With such a slow pace of change a more radical approach is required to remove the current onus on the individual woman to litigate to prove that her rights have been breached. The promotion of positive equalities duties which build on and extend existing best practice in both the public and private sectors must be the cornerstone of a new legislative framework which can both set and enforce norms<sup>89</sup>.

We believe it is vital that positive duties to promote are placed on both the private and the public sector. It is not sufficient to restrict them to the public sector as the boundaries between the public and private sector are increasingly being broken down as more private and voluntary sector organisations carry out public functions or employ staff who may be carrying out public functions on a specific contract (such as through contracting out and PFI and PPP initiatives)<sup>90</sup>.

Employers will need to understand what standards of behavior and performance are required to comply with these duties and enforcement must be coherent and consistent. Standards must be informed by an understanding of the problems faced by those experiencing discrimination obtained through the Equalities Review. Training will be required to enable organisations to comply with new duties and emphasise that what is needed is appropriate as opposed to same services for women and men.

#### Recommendations:

i. **Duties to promote equality:** Fawcett supports plans for a general public sector duty to promote equality of opportunity (in employment), underpinned by strand-specific codes of practice<sup>91</sup>. We would like to see this duty extended to the private sector with respect to employment. We are however open to the possibility of the duties being framed differently for the public and private sector.

The duty must be outcome-focussed and organisations must be required to take positive steps towards securing equality, rather than merely having 'due regard' to the need. Compliance will be very important and there should be a responsibility on an inspectorate to monitor the implementation of the duty to promote and report on its progress. We support the EOC's proposal that the Secretary of State should be required to report on progress achieved at regular intervals and make proposals towards equality goals<sup>92</sup>. The new Women's Cabinet Sub Committee created following the Women and Work Commission's report<sup>93</sup> could oversee this process.

The duty must cover pay and procurement and inform employers of the specific common standards of conduct to be met<sup>94</sup>. There should be a specific positive duty in relation to equal pay and procurement.

The DLR must learn from the experience of the Greater London Authority's positive duties. Duties and any required follow-up action must be enforced consistently so that there are common standards and aims and institutional change is achieved.

89 Changing the norm: positive duties in equal treatment legislation, Sandra Freedman, Special Issue: Thirty Years of EU Sex Equality Law, 12 Maastricht Journal of European and Comparative Law 4 (2005), page 8.

90 This concern was also raised by the DLA at paragraphs 55-56 of their submission to the DLR.

91 See Taking equal opportunities seriously -the extension of positive duties to promote equality, Colm O'Connell (http://edf.org.uk/publications/ColmO'Connellssummary.pdf).

92 Paragraph 33, EOC submission to DLR.

93 Page 101, paragraph 39, DTI op.cit.

94 For example the EOC recommendation for new wording for the pay duty in the new gender duty Code of Practice is public authorities must conduct a thorough diagnostic gender equality check, in consultation with their workforce, across all the causes of the pay gap: occupational segregation, the impact of caring responsibilities and discrimination, including pay discrimination. Public authorities must take action using the results of the check to determine their priorities. If the equality check indicates evidence of pay discrimination - public authorities must undertake an equal pay review, (consistent with the Code of Practice on Equal Pay) and act on the findings."

## Section nine

### Positive action

At present UK law only provides for permissive positive action rather than mandatory. UK law is also confusing and complex. EU law in fact permits a wider approach involving the maintenance or adoption of measures to prevent or compensate for disadvantage linked to discrimination strands<sup>95</sup>. The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) places an obligation on the state, where appropriate, to adopt special measures for the purposes of guaranteeing the enjoyment of human rights and fundamental freedoms of women<sup>96</sup>. This is an opportunity to extend the positive action provisions which have proved to be effective in other jurisdictions.

The interim report of the Equalities Review stated that many employers wish to be able to set targets to address their responsibilities to promote equality of opportunity but feel restricted by the current limited ability to take positive action<sup>97</sup>.

In order that duties to promote equality are effective and outcome-focussed, employers will need the ability to take positive action to redress disadvantage identified as a result of monitoring or audit requirements (for example following equal pay audits). This would help redress the balance between the opportunities offered to members of different groups by society. There should be a statutory duty on the public and private sector to make use of positive action in certain circumstances.

#### **Recommendations:**

i. **Extend ability to take positive action:** The present permissive provisions only allow positive action in narrow circumstances and these should be widened.

For example, the positive action provisions in the religion and belief regulations do not require statistical evidence showing that a particular religious/belief group is under-represented. All that is required is that it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to religion or belief suffered by persons of that religion or belief doing that work or likely to do that work. This is a much wider definition and should be adopted in the SEA. At present, employers fear that if they take positive action but do so outside the current narrow powers, they may be challenged under the SDA.

There should be more freedom to take steps to redress historic disadvantage (as permitted by EU law)<sup>98</sup>.

ii. **Preamble clause:** The DLR should consider including a statement in a preamble clause that positive action to prevent or compensate for disadvantage may be necessary in some circumstances.

<sup>95</sup> Article 7, Framework Directive.

<sup>96</sup> Articles 3 and 4 of CEDAW.

<sup>97</sup> Equalities Review, Interim report, pages 89-90.

<sup>98</sup> [Article 7, Framework Directive, Article 141 (4), EC, See Lord Lester's equality bill, CEDAW, See also iThe Diversity Approach to achieving Equality: Some Pitfalls [2004] ILJ 274, L Barmes and S Ashtiany.

## Section ten

### Concluding remarks

Fawcett calls upon the Government to seize this opportunity for reform and to be bold in both the design and implementation of the Single Equality Act. Thirty years ago gender equality legislation transformed women's lives. It is time for another step change in equalities legislation to put right persistent gender inequalities in the context of transforming gender roles, a modern labour market and a diverse society. We urge the DLR to consider our proposals to simplify and harmonise the current framework of gender equality legislation; to ensure legislation is effective and enforced consistently to clarify and enhance the role that employers should play in tackling gender inequalities and to better support those people experiencing discrimination.

Vital to all our recommendations is the role and powers of the Commission for Equality and Human Rights. Without an adequately funded equality body with the power to make investigations and take proceedings in its own name, any Single Equality Act will lack teeth. So finally, we urge the Government to ensure that the new single equality body has the resources and power to once and for all tackle persistent gender inequalities.

