



Government
Equalities Office

Putting equality at the heart of government

***Equality Bill:
Assessing the impact of a
multiple discrimination provision***

Summary of Responses

October 2009

INTRODUCTION

In its white paper *Framework for a Fairer Future – The Equality Bill*¹ and in the Government Response to the Consultation, *The Equality Bill – Government Response to the Consultation*², the Government committed to exploring further how to enable people to bring claims of multiple discrimination without making the law overly complex and without placing an undue burden on those with responsibilities under the law.

In April 2009, the Government Equalities Office (GEO) published a discussion document *Equality Bill: Assessing the impact of a multiple discrimination provision*.³ which set out a proposal for a legal provision for inclusion in the Equality Bill which would provide protection from multiple discrimination. This document described how the provision could work in practice, taking into account the available evidence of multiple discrimination, and sought views on the potential impact of the proposals. The document was used as the basis of a discussion about the proposed provision and its impact, which focussed in particular on businesses and organisations.

This document provides a summary of the discussion responses received. It contains:

- an overview of the responses;
- a textual analysis of responses according to each subject; and
- an alphabetical list of organisations that responded (Annex A).

OVERVIEW OF RESPONSES

The discussion ran from 27 April to 5 June 2009. It included a number of workshops and meetings with a wide range of stakeholders and interest groups.

53 written responses were received.

Responses from organisations

A wide range of organisations responded including 13 businesses/ employers/ business representatives, 5 trade unions, 3 public service providers, 24 equality representatives, and 8 lawyers/legal bodies.

¹ Available at www.equalities.gov.uk/PDF/FrameworkforaFairerFuture.pdf

² Available at www.equalities.gov.uk/PDF/EqBillGovResponse.pdf

³ Available at www.equalities.gov.uk/PDF/MultipleDiscriminationDiscussionDocumentFinalText.pdf

KEY FINDINGS

The discussion generated a broad range of views. Most respondents agreed with the underlying objective of ensuring protection from discrimination because of a combination of protected characteristics. There was general agreement that this gap in the law should be addressed. Equality representatives supported the proposed provision but some felt that the proposal should cover indirect discrimination and extend to combinations of more than two characteristics. Business representatives were concerned that the complexities of new provisions could create additional burdens. Some respondents suggested how potential burdens could be minimised. Many of those that responded felt that the proposals struck a sensible balance between providing a remedy for those people who are not currently protected, without imposing undue burdens on business.

Costs: There was broad agreement that businesses would not need to do anything more than they currently do to avoid liability under the proposed provision. However, it was suggested that some businesses might have a tendency to over-comply. It was generally recognised that enabling claims of multiple discrimination would add additional claims which would, in turn, increase the length of time and administration needed to process these cases. One legal respondent suggested this would not be more than a 50% increase in the time taken to deal with a case. One business respondent provided data which suggested that this could result in an additional 33% in time for these cases, which could roughly equate to a 33% increase in costs.

Process: Some respondents considered that enabling claims for multiple discrimination to be brought could make the process of decision-making within the courts and tribunals easier and more streamlined. A number pointed out that, because the cause of discrimination is not always clear at the outset, a provision for multiple discrimination could make it easier to arrive at the correct decision. Others argued that the proposed provision would make the law more complex and therefore make the process of pursuing or defending a case more difficult. It was suggested by some that tribunals should be given a power to enable them to stay the single-strand claims within a case, proceeding with the multiple discrimination claim first, or vice versa, as this could be more efficient and reduce tribunal time.

Evidence was presented that multiple discrimination would go some way to tackle the discrimination experienced by some as a consequence of stereotype and prejudice.

DETAILED RESPONSES

1. SINGLE-STRAND CLAIMS ALONGSIDE MULTIPLE CLAIMS

The discussion document proposed that multiple claims should be able to be brought simultaneously with single-strand claims. It assumed that the majority of people experiencing multiple discrimination currently separate their claims into single-strand claims. The impact assessment reflected the number of existing cases which we anticipated would include a new claim and the impact of these additional claims.

We asked (Question A): Do you agree with the conclusions set out in our Impact Assessment on the impact of multiple discrimination claims brought alongside single-strands claims? If not, please explain why.

The response

Respondents generally agreed with the assumption in the Impact Assessment that the majority of cases which would include a multiple discrimination claim are already being brought. Some business representatives thought that the total number of cases which would include a claim for multiple discrimination would be higher than estimated, but there was no evidence to support this. Equality representatives thought this number was too high but also were unable to provide supporting evidence. There was general agreement that the number of new cases would be smaller than assumed (5%) although a small number of business representatives thought it would be higher. It was broadly recognised that the total number of multiple discrimination claims was likely to be a small proportion of the existing discrimination claims brought. Three business representative respondents queried whether the cost of the policy proposed was proportionate to the small increase in the number of successful cases anticipated (c.50)..

THE COMPARATOR

The discussion document proposed that a comparator in multiple discrimination claims should be someone who does not share either of the characteristics at issue. It suggested that, while it may prove more difficult to find an actual comparator, using a hypothetical comparator should not be more difficult for businesses or organisations, or for courts and tribunals, than it is currently for single strand claims.

We asked (Question B): To what extent would you agree that the process for identifying a comparator in a multiple discrimination case would be no more onerous than in a single strand case?

The response:

Respondents generally felt that finding a real comparator was not necessarily impossible but that this would be easier in large organisations. Most respondents considered that a hypothetical comparator would more often be necessary. One view was that only having to find one comparator in a multiple discrimination claim could be easier than finding two separate comparators for two single-strand claims, so could make the process for dealing with cases

easier. However, it was recognised that the use of hypothetical comparators would be more common and that many businesses are used to using hypothetical comparators. Some respondents felt that hypothetical comparators are difficult to use already and open to challenge, but there was general agreement that the use of a comparator, once identified, would be equally as complicated or as simple for both parties, with the process not favouring either the claimant or respondent.

Many organisations collate, analyse and present equality data to courts and tribunals. This is used to demonstrate their organisation's record on equality and diversity to defend a challenge. Some business representatives felt that they would need to revise the way in which they monitor diversity within their organisation, to measure data across the protected strands.

2. COMPLYING WITH THE LAW

The discussion document argued that businesses and organisations would not need to do anything differently in relation to multiple discrimination to demonstrate the non-discriminatory reasons for their conduct will. The same considerations in protecting against liability for multiple discrimination would apply as with existing discrimination law – businesses and organisations must base their personnel or service-related decisions on legitimate and rational reasons rather than irrelevant ones to ensure they operate in a non-discriminatory way.

We asked (Question C): Do you agree that the proposed multiple discrimination provision would not require businesses or organisations to do more to avoid the risk of a multiple discrimination claim than they need to do to avoid single-strand claims? If not, please explain why. Please include what additional steps you think they would need to take.

The response:

Most respondents, including most of the employer representatives, recognised that they would not need to do anything more than they currently do to avoid liability. A few business representatives considered that businesses might over-comply with this provision, wanting to gold plate their business practices, and that this could lead to significant costs. A number of businesses suggested that the risk of over-compliance could be managed through the publication of simple and clear guidance which would reduce fear and manage perceptions. It was also suggested by businesses that reflecting the limitation on the number of combinations in the title of the legislative provision (e.g., dual, double or combined discrimination) would help to clarify the limited extent of the provision.

3. DEFENDING A CLAIM

The proposal in the discussion document would mean that the burden of proof for multiple discrimination claims operates in the same way as it does for single-strand claims. Methods which businesses and organisations currently

use to defend single grounds claims would also still apply in cases including a claim of multiple discrimination.

The document recognised that many businesses and organisations, when defending an allegation of discrimination, seek to identify someone within their organisation who shares the same characteristic as the claimant but who has not been treated less favourably, in order to demonstrate that the organisation does not discriminate and that the treatment experienced by the claimant was not because of the characteristic but for some other reason. The document suggested that identifying an individual in this way would not be significantly harder for businesses and organisations when defending an allegation of multiple discrimination.

The document also recognised that including any additional claims would lengthen the courts or tribunal process. The Impact Assessment set out estimates of the costs which would be incurred when faced with a multiple discrimination claim.

We asked (Question D): Do you agree with our assessment of how businesses and organisations will defend a claim, and the costs which will be incurred when they face a claim of multiple discrimination? If not, please set out how you think the process would differ from that described and how this would impact on the costs incurred.

The response:

The majority of respondents agreed that defending claims would not result in substantial additional costs. Those respondents who did not agree felt that there would be an increased likelihood of respondents seeking legal advice and that more complex analysis of the make up of the workforce and difficulties with the hypothetical comparator would mean additional management time which would incur costs. Some business representatives said that multiple discrimination would make it harder for businesses to rely on their preferred means of defence, namely, demonstrating that someone who has the same protected characteristics wasn't treated in the same way. This would require more cross-strand data collection. Equality representatives argued that defending multiple discrimination claims was not more difficult. They pointed to other methods a business could use, such as competency frameworks or performance appraisals which would provide evidence for their conduct. These mechanisms would remain unaffected by this provision.

We asked (Question E): Do you agree with our conclusion that multiple discrimination claims should not take significantly longer to consider than single strand claims? If not, can you describe how much longer you think these claims and cases would take to consider, and what would be the subsequent cost burden to businesses or organisations from this additional time in courts and tribunals?

The response:

One respondent thought that it would take less time to deal with a multiple claim than separate claims. Other respondents agreed extra time must be factored in, and the majority agreed that this would not be a significant amount of time. Any extra time would be due to an increase in pre-trial management for these cases, more evidence to consider, additional grounds pleaded and the likely use of hypothetical comparators. There was a general consensus that any increase in time, no matter how small, would create additional costs.

We asked (Question F): In defending claims of discrimination, do you/does your organisation rely on evidence of the treatment of similar people within your organisation? How would a multiple discrimination provision impact on this? By limiting the combination to two characteristics, we consider that this approach will still be feasible. Do you agree?

The response:

There was recognition that, in defending claims, some employers rely on identifying people in their organisation who share the characteristics at issue but who have not been treated less favourably. Business representatives said that it is always more difficult for small employers to be able to identify someone for this purpose. There was divided opinion as to whether this approach is the most effective defence in discrimination cases generally, with many responses indicating that employers are more likely to rely on demonstrating proof of the non-discriminatory reasons why they acted as they did in order to defend a claim against them. Some businesses suggested that one of the main difficulties in defending a claim of discrimination against them was being able to provide evidence or an audit trail which proves that they did not act unlawfully. They went on to suggest that it would be more difficult to gather this evidence for multiple discrimination cases.

We asked (Question G): To what extent does your business or organisation demonstrate good practice in making sure you can point to the non discriminatory reasons for the decisions your business or organisation makes?

The response:

Responses indicated that it is well recognised that a good diversity practice is integral to preventing discrimination but that it can be difficult for organisations to produce evidence that they have non-discriminatory practices.

We asked (Question H): Do you consider there would be any other costs involved in defending a claim of multiple discrimination which we have not addressed in these questions? Can you please describe what these costs might be?

The response:

Respondents generally thought that there are no other costs which had not been addressed in the discussion document. Two respondents suggested that we should consider costly legal advice and costs associated with implementing the provisions such as new monitoring systems and reviewing diversity training.

4. PREPARING FOR A CHANGE IN THE LAW

The document set out the Government's intention to ensure that businesses and organisations have time to familiarise themselves with clear guidance on any new multiple discrimination provision.

We asked (Question I): What would guidance need to cover to ensure that businesses and organisations are clear about what they do and do not need to do? What do you consider to be the best way to communicate this guidance? Where would you normally go for guidance on discrimination law?

The response:

Respondents suggested that good guidance should focus on good practice and include case examples to make it clear what a provision for multiple discrimination would mean and clarify that if an organisation is already applying good practice then there is no need to be concerned about equality processes. Guidance on multiple discrimination should also include guidance on other aspects of equality legislation. It was suggested that the Code of Practice on data protection was a good example of helpful guidance. The majority of responses cited the Equality and Human Rights Commission (EHRC) and the Advisory, Conciliation and Arbitration Service (Acas) as the best resources for producing and disseminating guidance.

We asked (Question J): Do you think our estimation of up to two hours for familiarisation time is correct? If not, how much time do you think would be needed to familiarise your business or organisation with this provision? Can you please describe the size of your business or organisation?

The response:

There was a clear division of opinion on whether two hours was sufficient time for businesses and organisations to become familiar with the proposed provision. One suggestion was made that it should be reflected as two hours per person to reflect the filtering of information, particularly in larger organisations. Those who disagreed were generally concerned that two hours

was an underestimation for large organisations. A few responses suggested that less time would be needed as good employers already have the right processes in place.

5. COSTS AND BENEFITS

The Impact Assessment set out how many cases it was anticipated would be brought which would include a multiple discrimination claim and what the financial impact of this would be.

We asked (Question K): *We think that the large majority of people who have experienced multiple discrimination are already bringing cases relying on single-strand claims and if a provision for multiple discrimination were introduced, that approximately 7.5% of the existing caseload would include a claim for multiple discrimination. From your business or organisation's perspective, do you agree with this conclusion? If not, please explain why.*

The response:

There was a divided response regarding the accuracy of the estimate that 7.5% claims already brought would include a multiple discrimination claim if such a provision were available. Generally, those who believed that there would be more than this indicated that they thought multiple discrimination claims would be brought just because people hoped that this would increase their chances of settlement. There was some question whether comparison with Irish Tribunals was an appropriate basis from which to assess the impact of a multiple discrimination provision in Great Britain.

6. NEW CASES

The discussion document explained that, even though it was assumed that the vast majority of cases which would include a multiple discrimination claim are already being brought as single strand claims, a small increase in the number of new cases was anticipated. Account was also taken of the fact that some multiple discrimination cases would be settled and of the potential for unmeritorious claims.

The document sought views on whether the proposals would fill the gap in protection and how any burdens or unintended consequences imposed by a new multiple discrimination provision could be minimised.

We asked (Question L): *Were protection from multiple discrimination to be introduced, we estimate that there would be a 10% increase in the number of cases brought. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.*

The response:

Generally, responses indicated that the estimate of a 10% increase in the number of cases could be either too high or too low. Those who thought the increase would exceed 10% thought that the provision would encourage more claims because people would believe that obtaining settlement would be easier. There was recognition that, as with any new provision, there could be a surge in claims until there was a better understanding of how courts and tribunals would interpret the provision.

We asked (Question M): *We conclude that there is likely to be a 20% increase in the number of cases that include a multiple discrimination claim which businesses or organisations choose to settle. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.*

The response:

Some of those who responded considered that the estimate of the number of cases likely to settle was too low, as they considered employers would be less certain of their chance of success and would settle rather than take the risk of proceeding. One response suggested businesses were likely to consider the financial benefits of settling low-value multiple discrimination cases rather than spend time and money on proceeding, particularly if multiple discrimination cases took longer and were more costly. A similar number of responses suggested that the estimate of the increase in cases which would settle was too high. A number of respondents suggested that organisations choose not to settle discrimination cases, preferring on principle to defend an allegation in court or tribunal and therefore there would not be any increase in cases settling.

We asked (Question N): *How can we work with businesses and organisations to discourage unmeritorious claims of multiple discrimination?*

The response:

A large number of responses said that unmeritorious claims are a tiny proportion of cases that should not be a priority concern. Responses suggested that the existing tribunal system already deals with unmeritorious claims effectively, but that stronger costs rules could help further. Publicity and guidance, through channels such as employee representatives and Citizens Advice, were also suggested as ways of preventing such claims.

We asked (Question O): What can Government do, either through guidance or other means, to help individuals to understand their rights in relation to multiple discrimination?

The response:

Responses stated that guidance should be tested and shared with trade unions and representative organisations. It was noted by the majority of respondents that the EHRC and Acas have a key role to play. It was suggested that there should be training through local government and organisations such as Business link. Respondents also suggested that there should be increased funding provided to legal advice services and an increase in the availability of legal educational material.

We asked (Question P): Can you please describe how you think a multiple discrimination provision would affect your business or organisation? Please indicate the size of your business or organisation when answering this question.

The response:

A number of respondents, mainly those working in equality arena, supported the introduction of the proposed provision which they believed would help them in raising awareness of discrimination and assist them in providing support to those who experience this type of discrimination. Employers considered that the greatest impact of such a provision for them would be for their Human Resources departments which would need to review and adapt existing policies, change data monitoring systems and would likely face an increase workload through the increase in claims.

We asked (Question Q): Do you consider that the proposed provision could have unintended consequences? If so, please explain what they are and how the risk could be reduced.

The response:

Respondents were equally split between those who thought there would be no unintended consequence and those that thought that unintended consequences could include:

- individuals finding it harder to prove discrimination;
- less self-representation due to the increasing complexity of discrimination law;
- increase in claims brought by claimants attempting to strengthen otherwise weak claims;
- attempts by claimants to seek double recovery;
- a chilling effect on free speech;
- creation of a hierarchy of rights because the provision is limited to certain protected characteristics;

- employers being less likely to appoint an individual who has a number of protected characteristics for fear of facing future claims.

We asked (Question R): *What benefits could the proposed provision have for you or your organisation?*

The response:

There was a general consensus that individuals would benefit from the provision. Few business representatives identified benefits to their organisations. Generally, it was recognised that equality in the workplace was beneficial, increasing motivation and improving morale leading to better staff retention rates and reducing staff absence rates.

We asked (Question S): *Do you think the provision we are proposing would fill the gap we have described?*

The response:

The majority of responses welcomed the provision. Many of the equality representatives considered it over-cautious and thought it should go further to include claims of indirect discrimination and harassment and extend beyond combinations of two protected characteristics. A number of the business representatives believed that the provision was not a proportionate response to the small number of people affected by multiple discrimination.

ANNEX A ORGANISATION RESPONDENTS

1. Age Concern/Help the Aged
2. Association of Convenience Stores
3. Association of Educational Psychologists
4. British Chamber of Commerce
5. British Humanist Association
6. British Insurance Brokers Association
7. British Retail Consortium
8. Bupa
9. Business in the Community (BITC)
10. Carers UK
11. CBI
12. Children's Law Centre
13. Christian Concern for our Nation and the Christian Legal Centre
14. Citizens Advice
15. Discrimination Law Association
16. EEF
17. Employers Forum On Age
18. Employers' Forum on Disability
19. Employment Law Committee Of Birmingham Law Society
20. Employment Lawyers Association
21. Engender
22. Equality and Diversity Forum
23. Equality and Human Rights Commission
24. Eversheds LLP
25. Fawcett Society
26. Greater London Authority
27. Institute of Directors
28. Law Society
29. Liberty
30. Local Government Employers
31. London Chamber of Commerce and Industry
32. Lovells LLP
33. Medical Women's Federation
34. Mind
35. National Aids Trust
36. Press for Change
37. Prospect
38. Public Sector People Managers Association (PPMA) Diversity Network
39. RNID
40. ROTA – Race on the Agenda
41. Scope
42. Scottish Trades Union Congress
43. South East Employers
44. Stonewall
45. The Equal Rights Trust

46. Thompson Solicitors
47. TUC
48. UK Partners of EU GendeRace Project
49. Unison
50. University and College Union
51. Women's National Commission
52. Women's Resource Centre
53. Equality Commission for Northern Ireland

In addition information was provided to and meetings were held with:

1. London City Airport
2. Frama (UK) Ltd
3. Business Link in London
4. Robin Allen QC
5. Local Government Employers
6. Homes and Communities Agency
7. Association of School and College Leaders
8. English Tribunal Service
9. Acas
10. NHS Employers
11. NHS Litigation Authority
12. Asda
13. John Lewis Partnership