

Public Bill Committees – Scrutiny Unity

House of Commons

Race on the Agenda - Memorandum

02/06/2009 – Dr. Theo Gavrielides, CEO

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1. About this memorandum

1.1. ROTA is one of Britain's leading social policy think-tanks focusing exclusively on issues that affect Black, Asian and minority ethnic (BAME) communities. ROTA aims to increase the capacity of BAME organisations and strengthen the voice of BAME communities through increased civic engagement and participation in society.

1.2. As part of ROTA's work on the Bill, we have formed a national coalition of BAME and other third sector organisations that are generally supportive of our views. The 36 Winning the Race Coalition members can be found at <http://www.rota.org.uk/pages/WTRC.aspx>

1.3. This memorandum is submitted by Dr. Theo Gavrielides, Chief Executive of Race on the Agenda, tel 020 7902 1966, mobile: 07720057750, theo@rota.org.uk Waterloo Business Centre, Unit 217 & 208 117 Waterloo Road, London SE1 8UL.

2. Opening Statement

2.1. Race on the Agenda (ROTA) warmly welcomes the Single Equality Bill, and hopes that it can provide the legislative tools to tackle persistent inequalities such as those faced by Britain's Black, Asian and minority ethnic (BAME) communities. ROTA also hopes that through the Bill a culture of respect for equality and dignity is created and mainstreamed in providers of public services (whether public, private or voluntary) and in society.

2.2. We were particularly pleased to see that Clause 9 extends the protection of race under the Race Relations Act (RRA) to cover colour, nationality, ethnic or national origin and that the issue of multiple discrimination is being considered. Provisions such as these clearly demonstrate commitment in both tackling some of the most hidden dimensions of discrimination against BAME groups and removing long-standing anomalies in legislation.

2.3. Based on our experience in race equality, we would like to propose several amendments, which we believe will strengthen the Bill so that it delivers its two main objectives: "to harmonise discrimination law, and to strengthen the law to support progress on equality".

3. Scope of the Bill

3.1. ROTA was disappointed with the limited scope of the Bill and of the Public Sector Equality Duty (Clause 143) in particular. The duty applies to the listed 'core public authorities' and to an ambiguous list of 'hybrid public authorities'. The former has some obvious omissions such as the Police. The latter is defined as those authorities exercising 'public functions' as this is developed under the Human Rights Act 1998.

3.2. After five leading cases¹, a proposed Private Members Bill, pressure from the Parliamentary Joint Committee on Human Rights² (JCHR) and several promises by government that the legislative confusion and misinterpretation of Section 6(1) of the Human Rights Act will be addressed, the Bill presents a unique opportunity that should not be missed.

3.3. In 2004, the JCHR concluded that the test being applied by the courts was “highly problematic” as in many cases it resulted in an organisation “standing in the shoes of the State”, but without the State’s legal responsibilities under the Human Rights Act. That had led to a “serious gap” in the protection that the Act was intended to offer.

3.4. Cases such as the latest *YL v Birmingham* (2007) suggest that if the Bill inherits the confusion caused by Section 6(1) of the 1998 Act, some of the most vulnerable sections of British society will remain unprotected. This is not in line with the Equalities Review.

3.5 The YL case involved an 84-year old lady with Alzheimer’s who remained unprotected due to the limited definition of “public functions” under the 1998 Act. 300,000 older people in care were affected by this case. The numbers of BAME elders receiving social care services that are contracted out by local authorities are rather significant particularly when compared to the White British population. In addition, BAME elders have additional needs which if ignored might run the risk of having their dignity and respect breached (e.g. cultural, language, dietary, health and lack of family support and friends networks). This also applies to children in care and children and young people in academies. Again the numbers of Black boys and girls in these services are proportionately higher than the White British population.

3.6 We propose an amendment to include the JCHR definition of “public functions” (29th Report 2008).

3.7 We understand that the Equality Bill is a Public Bill and that there is intention to consult about how to use procurement as an equality tool. This is welcomed. The amendment in the Health and Social Care Bill was also welcomed. However, the gap created through the Human Rights Act is still not addressed.

3.7 We do not believe that consistency can be achieved through guidance or secondary legislation. We are not proposing to list hybrid public authorities, but to provide a clear definition of public functions which is in line with the recommendation of the JCHR.

3.8. We strongly agree with the Chair of the JCHR, Andrew Dismore, who said to the House: “Guidance alone cannot solve the problem; in reality it has proved utterly useless ... Guidance can never be a substitute for the direct application of the Act to service providers” (18 Dec 2007: Column 739).

¹ *Poplar Housing v Donoghue* (2001), *Heather v Leonard Cheshire Foundation* (2002), *Hampshire v Beer* (2003), *Aston Cantlow* (2003) and *YL v Birmingham* (2007).

² JCHR (2004) *The Meaning of Public Authority under the Human Rights Act*, Session 2003-4.

4. Purpose clause

4.1 We believe that the Bill would benefit from a purpose clause that will allow courts to easily identify the overriding objective of the statute. The applicability of several provisions of the Act will be seen through test cases, and we are concerned that without purposive interpretation that is based on a clear overriding objective of the statute, the letter of the law might be narrowly applied. There are numerous examples of UK legislation that can be provided as examples.

4.2 We propose an amendment to include a purpose clause in the Bill.

5. Enforcement

5.1 Several provisions of the Bill are reliant on secondary legislation and non-statutory guidance. The Equality and Human Rights Commission (EHRC) is mentioned as one of the bodies tasked with enforcement responsibilities. This is welcomed. From our RRA experience, in order to move away from the process focused approach to race equality and equality, and ensure consistency of application, bodies such as the regulators, inspectorates and auditors need also to be clearly identified by the Act. This should include the Audit Commission, the Healthcare Commission, the Commission on Social Care Inspection and OfSted.

5.2 We proposed an amendment to include the regulators and inspectorates.

5.3 Moreover, the (Regulatory) Impact Assessment breaks down the estimated costs and benefits of the Bill according to the type of measure and the sector. We believe that the third sector has been overlooked in the assessment. This refers to: (a) the costs the third sector will have to meet to support and deal with cases under the new Act (b) the costs the third sector will have to meet to enable its employees to use the new Act (c) the benefits and savings the third sector offers to the public and private sectors. All our coalition members are third sector organisations that are keen to be involved in the mainstreaming of the Act. The third sector, however, is reliant on grants and cannot generate income through profit making activities. This has been missed by the Impact Assessment.

5.4 We recommend that a comprehensive impact assessment is carried out that includes the costs and benefits of the Bill for the third sector.

6. Positive Action

6. ROTA is pleased to see provisions which aim to align EU legislation with domestic law. The proposed provisions are modest and could be strengthened. Ten years on from the St Lawrence Inquiry, and ROTA has evidence to suggest that the recruitment, retention and promotion of BAME staff particularly within certain sectors is neither proportionate nor within the letter and spirit of equality legislation.

7. Multiple discrimination

7.1 We support the inclusion of provisions to address multiple discrimination. Looking at case law pre 2004 it was possible for someone to bring a case on multiple discrimination grounds. After *Bahl v Law Society* (2004), cases that could only be brought as multiple discrimination claims were turned down.

7.2 For example, in 2003 an Indian woman was able to bring a case against her employer who was discriminating against her due to her gender and race (*Mackie v G & N*). The discrimination referred to her being an Indian woman and would not have been successful if it was brought on a single ground. In fact, the court compared what would have happened if the same case was brought by an Indian man and concluded that the employer's discriminatory action referred to Indian women only.

7.3 We would argue that limiting the combination to two characteristics is not the best way forward. However, we understand that there are concerns that case law will increase. We agree with the Equality and Diversity Forum that we should not expect an increase of more than 5% of the number of cases brought. We would argue that the limitation to two grounds only should be revisited within two years of this provision being introduced to consider whether the number of grounds should be extended.

8. Concluding remarks

8.1. It is important that any amendments of existing protections are considered as part of a democratic dialogue and within the spirit of the Bill. That is to tackle persistent inequalities, protect the vulnerable, "harmonise discrimination law, and strengthen the law to support progress on equality".

8.2 As a coalition of BAME and third sector organisations, we acknowledge that factors that do not relate to our missions, such as profit, will have to be considered. We acknowledge that issues of practicality might need to be addressed. However, we strongly believe that any Act of Parliament that prioritises factors such as profit over a person's equality and dignity will lack the foundations of its very existence.

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