The impact of migration related diversity upon anti-discrimination measures in Britain

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EMILIE
A European Approach to Multicultural Citizenship.
Legal, Political and Educational Challenges

EMILIE examines the migration and integration experiences of nine EU Member States and attempts to respond to the so-called ‘crisis of multiculturalism’ currently affecting Europe. EMILIE studies the challenges posed by migration-related diversity in three important areas: Education; Discrimination in the workplace; Voting rights and civic participation, in Belgium, Denmark, France, Germany, Greece, Latvia, Poland, Spain and the UK. EMILIE aims to track the relationship between post-immigration diversity and citizenship, i.e. multicultural citizenship, across these EU countries, and to identify what kind(s) of, if any, multicultural citizenship is emerging and whether there is/are distinctive European pattern(s).

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Introduction

It may come as some surprise to learn that possession of British citizenship has never conferred a formal or constitutional right to non-discrimination. What has been amassed instead is a body of legislation that is overseen by the judiciary and which protects citizens from discrimination on specific grounds. Since the introduction of Human Rights Act (1998) created provisions compatible with the European Convention on Human Rights (ECHR), non-citizens too have been afforded a basic level of protection from discrimination. It nevertheless remains the case, however, that it is specific anti-discrimination measures that have traditionally offered the most robust protections.

Previous work-packages have explained how some of these measures were developed in response to migration related diversity, in a way that gave specific emphasis to managing group relations. In so doing Britain has perhaps borrowed something from an American approach. If this is so, then it has also gone further in focusing upon how society can achieve fair treatment for different groups, something that reaches beyond how these groups could blend into society. This means that British anti-discrimination frameworks have tried to address the rights of distinct groups as well as their modes of interaction, and so are not merely concerned with the rights of individuals. This is how previous work-packages have characterised what we describe as the specificity of British multiculturalism.

Legislative traditions concerned with non-discrimination have of course developed incrementally within particular political climates, and it is through this framing that we should understand the incorporation and implementation of recent EC Directives derived from Article 13 of the treaty of Amsterdam. This is because their implementation is party to important changes in – and perhaps even a reorientation of – established legal responses to migration related diversity in Britain. As such, these new directives have provided an impetus to review the operation of anti-discrimination legislation in Britain.

In this work-package we will trace the imposition of these directives by considering their antecedents in current anti-discrimination legislation, focusing particularly upon the extent to which they are informed by the types of racial equality formulations outlined in earlier work packages. This will allow us to assess the material capacity and limitations of these EC directives, as well as their broader implications in helping to shape the present equalities and non-discrimination approach.

By drawing upon original fieldwork, this work package will explore these issues through the use of primary interviews with stake-holders, including legislators, legal practitioners and journalists, alongside other case study instruments including documentary and discourse analysis (see appendix I).

In section one we detail the contrast and interaction between the specific British approach and generic EC directives, before assessing the impact and scope of new legislation that, for the first time, directly addresses religious discrimination. In section two we will consider what broader approaches these directives may be tied to politically, as well as legally, with respect to Human Rights discourses, a new Equalities and Human Rights Commission (EHRC), and a potential Single Equalities
Act (SEA). Finally, in section three we consider whether Britain is being Europeanised before ending with some conclusions.

Section One – current legislation and application

The chair of the now defunct Equal Opportunities Commission (EOC), Julie Mellor, has previously complained that “Britain’s equality laws are a mess. Inconsistent and incomplete, they offer different levels of protection for different groups and none at all for others”.1 Her conclusion is supported by Barbara Cohen, Chair of the Discrimination Law Association (DLA), who maintains that “for various reasons successive governments have introduced legislation on one ground that is inconsistent with the legislation they have passed on another… for example, in the RRA [Race Relations Act] we have two different definitions of indirect discrimination and harassment, different rules regarding where the burden of proof will lie, and gender and race equality legislation are completely out of sync” (interview).2

It is not surprising then to learn that commentators and public policy analysts long concerned with the welfare of Britain’s migration related minorities (Parekh, 1990; Modood, 1992; 1994; CBMI 1997, 2004; CMEB, 2000) have each argued that the broad development of Britain’s anti-discrimination legislation has sometimes been piecemeal and is often inconsistent. That this is acutely and disproportionately felt by some minorities more than others is a complaint frequently made by a number of Muslim organisations (UKACIA, 1993; MCB, 1997; FAIR, 2002; IHRC, 2004). This requires some elaboration.

Previous work-packages have established that British anti-discrimination legislation has taken a largely gradualist approach that has proceeded through group specific instruments in outlawing discrimination based upon race and ethnicity, gender, disability, age, sexual orientation and so forth, as well as the institutional monitoring of under-representation amongst such groups. In Squires (2004: 75) we find a useful catalogue of these developments:


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1 Quoted in The Guardian, 16 May, 2002
2 Eight years ago Hepple, Coussey and Choudhury (2000) calculated that a comprehensive picture of Britain’s discrimination legislation would need to consult at least thirty Acts, thirty-eight Statutory Instruments, eleven Codes of Practice and twelve EC Directives and Recommendations.
Each of this substantial legislation has been moderated through legal precedent and introduced sequentially according to the political climate of the day, and what is perhaps most significant for this work-package is the Race Relations legislation which prohibits direct and indirect forms of discrimination and imposes a statutory duty of care. This means that under section 71(1) of the Race Relations Act 1976 (as amended in 2000) all public authorities have a general duty to promote race equality, which requires them to eliminate racial discrimination, ensure equality of opportunity, and promote good ‘race relations’ through such things as outreach work and diversity awareness training.

There are also specific duties such as the implementation of a written policy on race equality, perhaps as part of an overall policy; an assessment of the impact of new and current policies on ethnic minority staff, students and other service users, the monitoring of recruitment and progression of ethnic minority staff and students, and monitoring grievance, disciplinary, appraisal, staff development and termination procedures by ethnicity. The Secretary of State is also empowered to impose specific duties on key, listed public authorities. Broadly, these selected authorities must publish a Race Equalities Scheme and meet specific employment duties (the scheme is effectively a strategy and action plan).

By any measure, therefore, this is a potentially robust body of legislation that applies to all ethnic and racial minorities categorised according to “race, colour, nationality (including citizenship) or ethnic or national origins. All racial groups are protected from unlawful racial discrimination under the RRA.”

For some religious minorities, namely Sikhs and Jews, case law has cumulatively established precedents in the application of this legislation to protect them in a way that has not been extended to Muslim minorities. This is despite the fact that in its application the courts have tried to operationalize an understanding of the law that functions in a wide sense. Thus in the case of Mandla v. Dowell Lee (1983) the House of Lords set out several characteristics that could warrant minority inclusion in possessing: (i) a long shared history the group is conscious of as distinguishing it from other groups, (ii) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance, and (iii) either a common geographical origin, or descent from a small number of common ancestors - which is one of the main criterion for identifying group membership, including ‘perceived’ group membership. These criteria emerged from

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6 There were also four other, arguably lesser, criteria in addition to those identified above including: (iv) a common language, not necessarily peculiar to the group, (v) a common literature peculiar to the group, (vi) a common religion different from that of neighbouring groups or from the general community surrounding it, and (vii) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups). See Mandla v. Dowell Lee House of Lords Transcript available at: [http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm](http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm)
Lord Fraser’s ruling in favour of Sikh inclusion under the RRA in which he stated that

[I]t would be absurd to assume that Parliament can have intended that membership of a particular racial group should depend on scientific proof that a person possessed the relevant distinctive biological characteristics… it is clear that parliament must have used the word in some more popular sense.7

With his emphasis upon the use of race in some ‘popular sense’, Fraser’s adjudication led the Liverpool Law Review in 1983 to conclude that ‘a major consequence of the judgment is the protection which will be afforded to other groups. For example, Muslims will be a racial group for the purposes of the Act.’8 That this prediction has not materialized in the twenty three years since points to a number of factors that have informed an active denial to legislative recourse in making “it clear that direct discrimination against Muslims (as opposed to, say, Pakistanis) is not unlawful” (Modood, 2005: 215 footnote 2). For example, in the case of Nyazi v. Rymans Ltd9 the industrial tribunal settled in favour of the employer after it held that “Muslims include people of many nations and colours, who speak many languages and whose only common denominator is religion and religious culture”10.

The decisive rationale common to this and further rulings is that Muslim heterogeneity disqualifies their inclusion as an ethnic or racial grouping.11 This means that the very helpful comments of Lord Fraser, with regards to the ‘popular’ meaning of race do not apply. Neither does the idea that an ethnic grouping can be premised upon subjectively defined attributes of conscious value. Thus Arzu Merali of the Islamic Human Rights Commission (IHRC) protests that the level of anti-discrimination legislation protecting Muslims in Britain has been getting worse, not just with regards to legislation but with the lack of political will to deal with it […] It’s difficult to say that there was a point that it was ok; the last fifteen years have been quite turbulent with the development of Islamophobia being quite distinct (interview).

Merali, the IHRC, and organizations like it argue that there is both a legislative and political deficit in addressing issues of religious discrimination. We are perhaps fortunate, therefore, in having just such legislation with which to evaluate not only this complaint but the how British anti-discrimination measures do indeed contrast with their European counterparts.

The incorporation of EC Directives

Across the EU there has been no consistent level of protection against racial discrimination and, like the UK, little legislation that consistently protects people from discrimination that takes place on grounds of religion, disability, age or sexual orientation.12 In recognition of this, and following proposals set out in November

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7 Ibid.
9 EAT 10 May, 1988 unreported
10 Quoted in Dobe and Chhokar (2000: 382).
12 Sex discrimination is covered by existing European Union legislation under Article 141 EC (Ex. Art. 119 EEC). See also Equal Pay Directive Dir. 75/117 EEC; Equal Treatment Directive 1976 Dir. 76/207
1999, the European Commission proposed the following, under Article 13 of the Treaty of Amsterdam, in December 2003:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Office Journal of European Communities C325/33 pp: 11 and Council Directive 2000/78/EC).

It is perhaps worth summarising the three broad directives issued to member states:

- The first established a general framework for equal treatment in employment and occupation (the Employment Directive), which would require member states to make discrimination unlawful on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation in the areas of employment and training.
- The second directive implemented the principle of equal treatment irrespective of racial or ethnic origin (the Race Directive). Like the Employment Directive, the Race Directive requires member states to make discrimination on grounds of racial or ethnic origin unlawful in employment and training. Unlike the employment directive, it goes further in requiring member states to provide protection against discrimination in non-employment areas, such as education, access to social welfare, and the provision of goods and services.
- The final directive sought to establish an ‘Action Programme’, with an allocated budget of one hundred million euros over six years, to fund practical action by member states in promoting equality in all the areas covered by the two directives; effectively mirroring the approach of the RRA in pursuing proactive initiatives in combating discrimination in member states. Key objectives include a promotion of ‘transnational co-operation’ between organisations in member states, as well as encouragement to tackle discrimination throughout the European Union, and to ‘exchange’ ideas and information.

In a similar manner to the way in which the RRA has operated, the scope of the Employment Directive is not limited to an employee’s actual religion or belief; it is simply that they are treated less favourably on the grounds of religion or belief.

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Cohen provides an interesting contextual insight when she recounts that “the Race Directive was approved in Europe very quickly – this was when Haider had been elected in Austria and there were too many racist incidents across Europe so no Member State would want to be seen to be voting against an anti-racism measure. For the next directive there was much more politicking going on. The Catholic Church used its influence so protection for religious organisations is particularly good. The conflicts between the grounds covered by the Framework Employment Directive are now coming out - especially conflicts between religion or belief and sexual orientation. If it were not for the EU Directives I do not think we would have legislation on religious discrimination or sexual orientation discrimination and very definitely would not be expecting legislation on age discrimination” (interview).

The Action Programme is administered by the EC, assisted by an advisory committee made up of representatives from all the member states.
Hence, “the discriminator’s perception (whether accurate or erroneous) of the religion or belief of the person discriminated against will therefore suffice” (Ahdar and Leigh, 2005: 305). The *Race Equality Directive*, meanwhile, requires member states to establish bodies as an institutional support for equal treatment provisions, but it is arguable whether it endorses proactive measures to promote equality within institutions. For example, the positive action clause in the Directives, which is phrased as an exception rather than as an explicit means to achieve equal treatment, “offers an insufficient basis for such an approach [because] the Directives remain focused upon individual litigation against specific acts of discrimination once they have occurred (Rudiger, 2007: 49).

Since the directives are concerned with laying down broad objectives to ensure that discrimination is prohibited and that victims are entitled to a minimum level of redress, they do not prohibit the introduction of greater degrees of protection. Thus where higher levels of protection already exist, member states will be required to uphold these so that in theory, at least, anybody working or simply travelling within the European Union will enjoy the same minimum level of protection from discrimination in all the member states.\(^\text{15}\)

This begs the question, however, over what contribution these directives can make where they do not *increase* the levels of protection that are already available in Britain. As such, according to Claude Moraes MEP, a former trade unionist and equalities lawyer, they have made an uneven contribution to the British legal landscape:

...the race equality directive was not a huge advance because we already had a fairly comprehensive Race Relations Act. But it did improve it in the area of burden of proof and it also showed the UK that this was the right way to go and stopped any kind of regression or going backwards in terms of race equality legislation. The key areas which are still to be fully developed in the UK are disability and age, and in both these areas the employment directive has been helpful in pushing the UK further than we were going, as well as religion of course (interview).

Thus for Moraes the impact has mainly been political, which is not to be understated in his view, in shoring up a particular approach, while in practical terms it has moved the burden of proof away from the claimant onto the organisation or party against

\(^\text{15}\) It is worth noting, however, that some countries are proving better than others at incorporating these directives into national legislative frameworks (see Dhami, Squire and Modood, 2006). Indeed, according to Claude Moraes MEP “there is plenty of evidence to show that the Race Equality Directive has not been implemented in countries like Greece and Germany, even now. Countries who say they’ve implemented it, France is a big example, have simply not done it. The quality of legislation is low, the understanding that you would have a national body that would promote positive action and promote a comprehensive race equality idea is meaningless in France, where the concept isn’t even advanced, so how major countries like France can say they’ve implemented the Race Equalities Directive is beyond me. I think the Commission have overall been quite good in enforcing the implementation of the Race Directive but it’s very difficult for the Commission to get into the area of equality of legislation because, on race, virtually no member has taken it seriously apart from countries like the UK and one or two other exceptions” (interview). Indeed, this has led the EC to initiate legal infringement proceedings against six countries (news release issued by the Commission in Brussels on 19 July 2004: “Commission goes to European Court of Justice to enforce EU anti-discrimination law” (IP/04/947)).
whom a charge of discrimination is made. This is also true of the Employment Directive, perhaps the most important addition for the purposes of our discussion, and which has been invoked in a number of occasions of which the following two examples are typical.

Text Box A - Khan v. NIC Hygiene Ltd, (2005) [ET 1803250/04].

- Having worked for a cleaning company in Leeds for nine years, Mr. Khan used his annual 25-day holiday entitlement and another weeks’ unpaid leave to make a pilgrimage to Mecca to perform the Hajj. It later transpired that although he had requested this leave in good time he had received no response from his employer and was advised by his trade union (Transport & General Workers Union) that if he had not heard anything he could assume his request for leave would be granted. Upon his return he was suspended without pay and later had his contract terminated. Upon taking his complaint to an employment tribunal in January 2005, it was ruled that he had been unfairly dismissed in contravention of the employment directive, specifically because his employers had not made a reasonable accommodation of his religious requirements even though they had

Text Box B - Mohammed v Virgin Trains (2005) [ET 2201814/04].

- In his capacity as a Virgin trains rail worker Mr Mohammed claimed that he had been dismissed because he had refused to trim his beard shorter than the ten centimetres that he argued was required by his faith, and that his requests to wear a religious skullcap had repeatedly been refused. The employer argued that Mr Mohammed had been offered the job after agreeing to trim his beard to comply with the company’s “neat and tidy” facial hair policy, and that he had been told that he could wear a skullcap if it was in the corporate colours. In this case the employment tribunal found that there was no religious discrimination because Mr. Mohammed’s dismissal was based purely upon poor performance.

Muslims in Britain since as far back as the 1970s. Typical of such examples is the case of Ahmed v. ILEA (1976) [1QB36CA], where it was deemed not unlawful to deny a Muslim teacher the time to observe prayers for an hour on Friday afternoons. Nevertheless, it may appear that Huang and Kleiner’s analysis may be correct in so far as that episodes of discrimination are rarely discussed in public and media discourse unless the facts of a case are especially newsworthy. This is particularly the case where the complainant is Muslim, an analysis supported by Cohen’s view
that discrimination cases involving Muslims “will continue to be prominent because of the continuing anti-terrorism measures that fuels Islamophobia” (interview). This analysis is endorsed by Paul Johnson, Deputy Editor of one the leading national newspapers, The Guardian, who maintains:

Some of the issues surrounding discrimination are very difficult. Sometimes in some newspapers they aren’t interested in understanding these… I think it’s an easy thing to slide into this characterisation of one particular community…as having one approach to life in Britain but not of Britain (interview).  

The Race Equality Directive shares with the RRA the criterion of racial and ethnic groupings that exclude religious minorities which may result from the assumption that religion would be covered by the parallel Employment Directive. This invites the criticism that, although encompassing the important arena of employment, it will continue to deny Muslims in Britain broader legal protections in the areas of social welfare, including health care, and public services, education and housing, amongst others. This is a point made by Arzu Merali when she notes:

...the application that is afforded in employment doesn’t go across the board so again we’re in that position again where some communities are covered from religious discrimination because they are accepted as racial minorities while others are not. And again, Muslims are out of that loop… (interview).

This is of particular concern given the levels of disadvantage experienced by Muslim minorities in these very areas (Abrams and Houston, 2006; Performance Innovation Unit (PIU), 2001; Modood et al 1997), and is further undermined by the fact that there is no legal aid available for people to bring their cases. Crucially, this legislation does not as yet stipulate regulatory or enforcement functions as in the case of RRA. The head of legal policy at the now defunct CRE (see section two), Razia Karim, states that the inclusion of religious discrimination “was discussed at the time [of the implementation of the Employment Directives] but rejected…by both parties, the CRE and the Home Office, that we wouldn’t venture into religious discrimination cases”. Indeed, she concedes that:

….there’s no one place where a person can go to for advice if they felt they’ve suffered religious discrimination [outside the work place]. There are very few advice agencies with the funding to represent people…and I think that remains a big issue for victims of discrimination on religious grounds (interview).

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16 Prof. Francesca Klug shares this view in arguing that “[The] media perhaps isn’t the vehicle that is necessarily able to tease out these kinds of issues. They're complicated and they're difficult and they're full of misunderstandings and once people start from there they just carry on because there isn’t the immediate, you know, comeback to help people out of their confusions (interview)".

17 For example, Abrams and Houston (2006) found that Muslims have disproportionately lower incomes and higher rates of unemployment. They have comparatively lower skills both in education and in vocational training. They are more likely to reside in deprived housing situations and disproportionately suffer from bad health. The PIU (2001) report on ethnic minorities found that those who are also Muslims are generally more likely to say that they feel unsafe at night both in their homes and walking alone in their neighborhoods, and that more than half of all Pakistanis and Bangladeshis, who are a significant part of the Muslim community in Britain, live in the 10 percent of the most deprived wards in England and Scotland. Around one third of these Pakistanis and Bangladeshis live in properties that are deemed ‘unfit’ within the private sector, and around 30 percent live in the most deprived neighbourhoods.
There is also an issue of how this legislation has been implemented, since the government initially adopted it via secondary legislation by transposing it onto existing legislative instruments, rather than introducing it through a new Parliamentary Act. This is, according to Cohen, because “the government felt that after the Stephen Lawrence Inquiry18 and the Race Relations (Amendment) Act 2000 they had spent enough time dealing with race and that their priorities and parliamentary schedules wouldn’t allow for another race bill” (interview).

A new Single Equalities Act was advocated both by the Commission on the Future of Multi-Ethnic Britain (CMEB) (2000) as well as the Forum of Action against Islamophobia and Racism (FAIR). The latter argued that it would show “the indivisibility of the principle of equality and...place all grounds of discrimination on an equal footing... More importantly, the amalgamation would rid the area of anti-discrimination law from the confusion, complexities and inconsistencies that currently exist (FAIR, 2002: Section 4, Paragraph 20). These arguments are evaluated in the next section but is worth noting how some of the issues highlighted by FAIR were perhaps already been raised when Human Rights Act (1998) came into effect in October 2000 and required the British government to make legislative provisions compatible with the ECHR. Of course, this legislation is not suited to addressing more subtle or low-level religious discrimination for the reasons outlined by Prof. Francesca Klug, a Human Rights advocate who advised the government on the introduction of this legislation:

The way to understand the introduction of the Human Rights Act is in the context of a debate about the Bill of Rights rather than as specifically about equality and discrimination although that was certainly part of it. [...] However, it's not particularly helpful at dealing with all the details of discrimination in everyday life, which is why you also need specific equalities legislation... for example, the Human Rights Act cannot be used directly against private bodies, although all law must comply with it, while specific discrimination legislation directly impacts on the private sphere (interview).

Indeed, the HRA promotes a more individualistic approach which considers the majority of people in need of protection from some form of discrimination, and perhaps risks de-emphasising specific experiences of historically disadvantaged minorities. The implication for policy making purposes is that uniform rights for individual citizens could take precedence over recognising the situation of diverse and disadvantaged groups in society. In so doing this may facilitate a shift from a group-based equality approach to a focus on individual rights.

While such a move might assist the principled operation of human rights legislation in promoting, for example, the right to religious freedom, it may be less sensitive to promoting specific anti-discrimination measures. For example, while the former might protect the right to practise religion in accordance with religious beliefs, as is exemplified by provisions including Article 9 of the ECHR and the Human Rights

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18 The Stephen Lawrence inquiry into the police handling of the murder of black British teenager living in London found that the Metropolitan Police Service was ‘institutionally racist’ (see MacPherson Report, 1999). One of the recommendations of the public inquiry was that all public authorities should be required to adhere to a statutory duty of care in the manner outlined earlier. To operationalize this, the government needed to spend time amending the legislation through the introduction of a parliamentary amendment act.
Act (1998), the latter approach might be concerned with how discrimination against religious minorities picks out individuals on the basis of discernible characteristics, and attributes to them an alleged group tendency, or emphasizes those features that are used to stigmatize or that reflect pejorative or negative assumptions based on the individual’s real or perceived membership of that group (Meer, 2008).

As Klug suggests, an increasing focus upon the former risks ignoring how different minorities are disadvantaged in different ways, and moves the emphasis away from a more specific recognition of diversity. Indeed, Rudiger (2007: 52) argues that this is perceptible at the EU policy making level where a new focus upon human rights has informed the plan to turn the European Centre on Monitoring Racism and Xenophobia into an EU human rights agency. It is to these issues that we now turn through examples of recent changes to longstanding British approaches that have historically recognised diversity in their promotion of equality.

Section two – harmonising different commissions and legislation

On 30 October 2003, the Government announced its intention to establish a single Equality and Human Rights Commission (EHRC). This announcement followed the consultation - Equality and Diversity: Making It Happen - which launched the most significant review of UK equality institutions in a generation. The review stated

We [the government] want to see a Britain where there is increasing empowerment of all groups, with economic empowerment a key goal; where attitudes and biases that hinder the progress of individuals and groups are tackled; where cultural, racial, and social diversity is respected and celebrated; where communities live together in mutual respect and tolerance; and where discrimination against individuals is tackled robustly (Equality and Diversity, 2003: part 1 section 2).

The Government then issued a White Paper entitled Fairness for All: A New Commission for Equality and Human Rights. The enabling legislation, the Equality Bill, was considered by Parliament and introduced as The Equality Act (2006), and is assumed to be a precursor to the promised Single Equality Act (SEA) which is expected to combine all UK equality enactments and so to provide comparable protections across all equality strands.

Those explicitly mentioned in The Equality Act (2006) include age; disability; gender; proposed; commenced or completed gender reassignment; race; religion or

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19 While this Act named the new body the Commission for Equality and Human Rights, this is not how it has come to be known. According to one commentator, during the early stages of drawing up communications plans it was decided that the term Commission would play less favourably with the public than the term Equality, so that the latter was given precedence over the former (Lovenduski, 2008).

20 The Discrimination Law Review (DLR) was set up alongside the independent Equalities Review, chaired by the incumbent chair of the CRE, Trevor Phillips, to look at the underlying societal and cultural causes of disadvantage and inequality. The Equalities Review published an interim report for consultation in March 2006 and its final report, Fairness and Freedom, in February 2007. According to Cohen, “[a] review of discrimination law is unlikely to happen again for a long while” and that this presented the opportunity “as a bare minimum to harmonise some quite disparate pieces of legislation” (interview).
belief and sexual orientation. This act is also particularly noteworthy because it is probably the first occasion on which equality and diversity have been expressly linked in an anti-discrimination act,\textsuperscript{21} and are presented as a blend of traditional non-discrimination obligations, substantive equality goals around equal participation, and statutory duties to promote respect for diversity, human dignity and human rights.\textsuperscript{22} It remains the case, however, that as yet there is no proposed statutory duty on religion (described on pg. 5), and because Muslims are omitted from the statutory duty required by Race Relations legislation, there is a concern that public authorities in which Muslims reside will not be required to proactively take the needs of Muslim communities into account.

Nevertheless, it would appear that in reflecting a complementary relation between non-discrimination and equality of opportunity, there are enough grounds in the Equality Act (2006) to allow the EHRC to conceive non-discrimination in a substantive sense.\textsuperscript{23}

\textit{Equality and Human Rights Commission (EHRC)}

During 2004 the government consulted widely on its proposals for the role and structure of a new equalities body that would simultaneously monitor the implementation and application of the different anti-discrimination strands. This body has only very recently become operative, in October 2007, which of course makes it far too soon to assess its progress in any meaningful way, not least because it has planned for a six-month setting up period in which its final agenda will be set, and organisational issues of staffing and structure completed.

As the Director of the Runnymede Trust, Michelynn Lafleche, describes: “it will take a lot of time for them to bed down and be able to rebuild networks in a way that make them capable of interacting across the different strands. I think they are moving towards that successfully, at least on paper; I don’t know how that will work out when it’s real people involved (interview).”

Indeed, with an annual budget of £57m that will make it “one of Europe’s largest human rights bodies” (Birt, 2006: 4), and having amalgamated the powers of the CRE, Equal Opportunities Commission (EOC) and Disability Rights Commission (DRC), as well as assuming a similar role overseeing other equality strands with respect to sexual orientation, religion or belief, and age that have emerged from the EU Employment Directive, it is perhaps unsurprising to learn that some equality advocates anticipate that the new commission will face difficulties.

\textsuperscript{21} See especially s.8(1) & (2) of the Equality Act 2006.
\textsuperscript{22} See in particular s3 of the Equality Act 2006.
\textsuperscript{23} The Act specifically enables the Commission to seek to ensure that (i) people’s ability to achieve their potential is not limited by prejudice or discrimination, (ii) there is respect for and protection of each individual's human rights, (iii) there is respect for the dignity and worth of each individual, (iv) each individual has an equal opportunity to participate in society, and (v) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights. This has led its chair to refer to the EHRC as “changing the weather, not simply protecting people from its effects” (quoted in Niven, 2008: 17).
A new approach — a single equality body

1. The consultation document Towards Equality and Diversity stated that the government saw arguments in favour of a single statutory equality commission that would offer integrated guidance and support to individuals and businesses and help ensure a coherent approach to equality issues across the board.

2. Any body that delivered the benefits of coherence and integration would need capability to:

   o Promote equality on an integrated basis, taking account of the full range of barriers to equality and the needs of all groups covered by equality legislation; to engage with government, public service providers and business and catalyse change — and be heard by the public; to understand the commonalities of discrimination and develop and promote strategies for addressing them across the board.

   o Promote good practice to business, service providers and others in mainstreaming equality across the breadth of their operations. Businesses are increasingly addressing all facets of diversity in their people management and broader business strategies. Support from equality machinery needs to match this integrated approach and play a strong role in driving cultural change.

   o Serve clients through providing:
     - A single point of contact for individuals, providing information, advice and guidance across the full breadth of their equality rights — reflecting their real life experience.
     - A single point of advice to employers and service providers covering all discrimination grounds; and support and partnership to other organisations providing advice
     - More effective support for individuals facing discrimination, especially discrimination on multiple grounds
     - A better basis for fostering local networks focused on the issues on the ground.

   o Become a centre of comprehensive knowledge and expertise, making best use of specialist research and legal capabilities; be a learning organisation, able to innovate, pilot, transfer success and be flexible in responding to new challenges.

   o Have the ability to engage with all stakeholders and NGOs, dealing with the full range of issues of concern; and make partnership working a key tool.

It should be noted, however, that the EHRC has no powers to assist individuals in cases under other legislation, for example discrimination on one of the protected grounds that falls outside the scope of anti-discrimination legislation but is within the scope of the HRA (1998) and Article 14 of the ECHR. Indeed, a related issue that was first raised in the original white paper, Fairness for All: A New Commission for Equality and Human Rights, concerns how very few of the EHRC’s resources will be allocated to assisting individual victims of discrimination. As Peter Herbert, chair of the Society of Black Lawyers (SBL), complains: “they are not going to take legal challenges… [T]he CRE used to take cutting edge decisions and that used to be
reasonably effective and it’s virtually stopped so I cannot see the, I don’t care what you call it, if it doesn’t have the political will to take significant cases….it almost ceases to be relevant” (interview).

Moreover, and despite its name, the EHRC will have a policy role in promoting understanding and encouraging good practice but no enforcement powers in relation to human rights legislation. This is surprising given the extent to which that Human Rights legislation is described by Klug – an advisor to government on the HRA as well as a Commissioner on the EHRC - as having been the catalyst for the new amalgamated body:

The Government’s position, as I recall, was that either there wouldn't be commissions for the new areas covered by anti-discrimination legislation or there would be a single equality body to cover all anti-discrimination law. There was never realistically going to be 6 commissions. In the course of that consultation… I think many stakeholders became converted to the idea that if you're going to have a single equality body, let it be a human rights commission because it gives it a new perspective, a new framework; one that is potentially capable of addressing the conflicts and tensions between the different groups. And so as the interest in the new body becoming more than a commission for ‘6 strands’ but a human rights commission grew as time went on (interview).

Like the bodies it would replace, members of the new Commission would be appointed by a Secretary of State to serve for a fixed term. Funding will be designated by the Secretary of State out of their departmental budget, and the EHRC will report annually to them. Hence there is nothing to suggest that the EHRC will have any greater independence than the equality bodies it has amalgamated and, as its remit will also include basic human rights; there is a concern that some real independence from government may be essential.

As such, during the consultation there were strong representations that the EHRC should report directly to parliament or a committee of parliament instead of to the executive. As Herbert maintains: “you can’t have a body which is clearly independent and cutting edge if it’s part of the Home Office, you can’t do it” (interview), though it is worth noting that this was exactly the relationship between the earlier commissions, including the CRE, and various governments. And it is also worth noting the how this exact charge has previously been made against how the CRE has dealt with complaints of anti-Muslim discrimination, not least surrounding the imposition of anti-terrorism legislation. For example, Merali argues “it [the CRE] positioned itself very much in the government camp, dictating from the top down on what it is to be a minority; what we can get and what we should expect, rather than actually looking at their experiences…and how to redress that (Merali, interview).

More specifically, and as the D2 report outlined, the current Chair of the EHRC, previously chair of the CRE, Trevor Phillips, is an outspoken critic of multiculturalism and has already stated that Muslim faith schools pose a threat to the coherence of British society, and that British Muslims seeking to abide by principles of the shari’ a should leave the country (Bowcott, 2006). According to one Muslim commentator this “propensity to rhetoric has arguably helped to isolate and stereotype Muslims rather…than understand, support and help them” (Birt, 2006: 4). What it also suggests is that the delivery of anti-discriminatory and equality policy on the
basis of religion “is in the hands of someone who has such little sympathy or liking for Muslims” (ibid). Whilst this may be a little strong, there certainly appears to be a dissonance between the head of the EHRC and Muslim communities on a number of key issues concerning the public recognition of Muslim identities, not least over the lack in desire for this new body to address issues of anti-Muslim discrimination. Indeed, some Muslim organisations were already pointing to a loss of confidence in the CRE specifically along these lines:

[W]hat has traditionally been understood as the race-relations mandate seems to be regressing rather than being taken further, so that in itself is a hugely worrying development and we’re finding it quite difficult to see how that situation has come about, but I think it reflects the lack of willingness of government to engage with the grass roots, including Muslim organisations, with regards to discrimination on these topics (Merali, Interview).

This complaint was situated in a general picture of CRE operational withdrawal described by Cohen24 and supported by Karim25. While the latter rationalised this withdrawal in terms of a broader CRE strategy, the former lamented the practice as politically motivated.

The view amongst some Muslim organisations that established equality bodies had proven ineffectual was not easily explained away by stressing operational imperatives, however, and there is evidence that Muslim bodies such as the Islamic Human Rights Commission (IHRC) are increasingly materially supporting cases where the claimant is not otherwise assisted because the complaint concerns anti-Muslim discrimination outside the sphere of employment.

However, these are not compelling reasons against amalgamating different equality commissions per se, as much as a critique of the lack of a body to take up religious discrimination in the ways that ethnic and racial minorities are protected. A more specific and critical issue facing the new commission concerns that of a dilution in its enforcement powers, and it is worth quoting MEP Claude Moraes on this point:

[B]ecause of the nature of the political struggle which created equalities legislation and because those political struggles were at different stages26, what a single equalities commission then does is dilute areas that were very strong… you are no longer talking about any minority because you are putting gender, disability, age – in fact I would suggest that today you are talking about the majority of the British population when you are talking about who is covered by the single Equalities

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24 “The CRE itself seems to be disengaging from frontline community work and links.... The current mantra is ‘integration not litigation’ and…the not unsurprising result has been to dissuade applicants from pursuing their cases. It’s absolutely ridiculous – there’s no point in having good laws if the people the laws should benefit can’t use them” (Cohen, Interview).

25 “The Muslim community may feel that we’re not taking their cases and litigating on their behalf, but I think many other groups would feel the same because our litigating strategy had changed in that we were taking fewer cases and the cases are more strategic. […] It’s partly a general trend where we felt that after many years of doing high volume case work and litigation, there was a genuine need to move towards a strategy that would last across a sector or a group with one case rather than the 10 or 20 cases” (Karim, interview).

26 Something supported by Francesca Klug: “I think that the disadvantages, which I always personally shared in the early days, is obviously you lose the focus and you lose some of the heritage and history inevitably and struggle in something like the CRE in particular, to some extent the DRC [Disability Rights Commission] which had only just been set up” (interview)
Commission. The people excluded are the minority that would be white male heterosexuals, if you are young of course, not old, which is a tiny group, or a small group.

The risks associated with de-emphasising historically disadvantaged minorities in institutionalizing a more generic approach returns us to the earlier discussion surrounding Human Rights legislation. Yet these are met with some very important counter arguments in favour of amalgamating the different equality commissions. One is the long held view that individual commissions are “perceived to be too partisan” and that where there is “a potential for that to be overcome” the opportunity should not be ignored (Lafleche, interview).

This is particularly relevant to redressing the issue of multiple discrimination where a single equalities commission is not only able to arbitrate with greater even-handedness, but can pursue several issues of discrimination simultaneously. Moreover, fitting the enforcement of these strands together could perhaps deepen the public policy understanding of equality and non-discrimination, so that by drawing upon examples of ‘best practice’ from each commission, an amalgamated body might craft a better method of implementing and monitoring both the old and newly formulated anti-discrimination protections that have emerged from Article 13.

Another argument in favour of a single commission concerns economies of scale and the use of limited funds in achieving the maximum impact in exactly the sorts of ways Peter Herbert of the Society of Black Lawyers conceives that cutting edge anti-discrimination litigation should proceed. In addition, the political context in which the EHRC was itself conceived should not, of course, be ignored. As Klug maintains:

…there wasn't going to then be any other kind of vehicle for moving forward the agenda and I suppose I have come to the conclusion and did along the way, that if what is being created is able to live up to its vision then that would be a wholly progressive development even though we say goodbye to the old commissions with regret (interview).

It is thus widely accepted that this commission will face a significant task in establishing itself across different equality issues, and there is a view that it would be much better served if it were supported by a dedicated single equality enactment unifying the different strands. This could also, it is argued by its advocates, address the inconsistencies, conflict and confusion arising from the many different places in which anti-discrimination and equality laws are to be found, a particular problem for equality practitioners and public and private organisations alike. Whilst there is hope in the fact that Britain’s complex anti-discrimination framework is under review, as discussed in the next section, there is no immediate prospect of a resolution to this, which means that in the meantime the status quo must prevail through an “associated government machinery that is awkward, divided among different government departments and ministers” (Lovenduski, 2008: 4)

Single Equalities Act (SEA)

A government bill to introduce a Single Equalities Act will not be tabled this year, and the Runnymede director, Michelyne Lafleche, remains “pessimistic” over whether it will ever be introduced and particularly over “and what negotiations will
have to take place” 27 - even if, in her view, “that it is the only way we have to go” (interview). One method of approaching such an act is elaborated in the advocacy of equalities solicitor Robin Allen QC (2003: 8), and consists of taking the texts of the existing legislation and other provisions as the raw material with which to create a single more serviceable piece of legislation. This is characterised as a “patchwork” approach which consists of three elements: (i) the choice of material, (ii) the care in construction, and (iii) the harmony achieved by the overall design.

Taking each in turn, (i) materially this would include legislation summarised earlier by Squires, specifically the Equal Pay Act (1970), the Sex Discrimination Act (1975), and the Race Relations Act (1976); (ii) in construction there would be a basic unity across definitions of discrimination including indirect discrimination and burdens of proof, so that (iii) its design would be more comprehensible but not simply a compilation of a large number of discrimination rights without any added purpose. In sum this should seek to achieve:

- A simple and accessible code which will promote real equality, since otherwise equality law will be an easy target for the cynics and detractors and an unjustifiable burden on those who have to administer it. It must be flexible allowing for change as it happens…and it must be universal else it cannot claim the title of a Single Equality Act (Allen, 2003: 15).

Genuine harmonisation, however, would entail extending protection from discrimination in goods, facilities and services to the grounds of age, sexual orientation and, of course, religion and belief. Indeed, full parity would require mapping the race equality duty discussed earlier onto each of the other grounds.

After grappling with these sorts of issues during two years of consultation and debate, the Discrimination Law Review’s feedback culminated in a Green Paper in June 2007 that provided the basis for a Single Equality Act but which was “widely criticised as rowing back on existing provisions” (Spencer, 2008: 10) and is understood to have been discarded. Specific concerns focused upon the way in which such bill, if enacted, could “permit regression…without it appearing as regression” (Lafleche, interview), and which may only be realised through test cases by which time it would be very difficult to correct.

This concern shares something with others, delineated earlier, and which focus upon a potential dilution of powers in an amalgamated body. These not a universally shared concerns, however, and according to Klug the arguments against a single equalities act “are much weaker than the arguments that existed against a single commission to be honest. Its effectiveness will be a question of political will. There's no inevitability about losing focus because of a single Act” (interview). Moreover, while different equality strands provide different levels of protection, it will compound Merali’s sense of an equality hierarchy in which some groups are better protected than others.

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27 Something that is disputed by Klug who maintains that it has not been abandoned.
Text Box D - From the Equalities Review

There needs to be a dramatic reduction in the use of process-based legal requirements: this is not the place for bureaucratic prescription. The methods used to achieve equality are of course important, but there are many means to this end and the law should focus on the results achieved. And the new framework needs to build in recognition of the differences between the many organisations covered by equality law: small, large, public, private and voluntary. The current legal framework is also inconsistent and complex. So an excellent starting point for creating a better framework for achieving equality is simpler law: namely, a single Equality Act.

The Government’s Discrimination Law Review (DLR) provides a once only opportunity to develop a legislative package that promotes equality effectively in the 21st century. It will be essential that the single Equality Act that results:

- focuses on a simpler, more coherent framework; and
- facilitates action to help groups as well as individuals (the latter having been the traditional focus of discrimination law and other relevant legislation). The more recent ‘positive duties’ have begun a move away from that focus, and we believe there is a need to reinforce that trend.

As such, we welcome the DLR’s intended focus on both simplification and harmonisation: the latter because we have found, despite the unevenness of data availability, severe inequalities facing all groups, and therefore see no reason why the legislative framework should not cover all those groups. Specifically, the Act should cover equality on the basis of sexual orientation, gender, disability, ethnicity, religion and belief, transgender, and age.

There is thus optimism in Moraes’ assessment that “there is no need for anyone to be levelled down” and, indeed, the clear advantage rests in the prospect of ‘levelling-up’ equality protections. This of course requires both a political as well as legislative dimension that is dynamic enough to span civil society. Is this, then, where Britain is headed?

Section Three – Britain and Europe in the ways forward?

The original legal approach to anti-discrimination in Britain was the statutory tort of unlawful discrimination (created by the SDA 1975 and RRA 1976). This technique grafted an important collective value (non-discrimination on the grounds of sex and race) on to the existing private law structure. Yet although private law and individual rights were chosen as the preferred paradigm, there was also recognition in the White Papers that preceded the SDA 1975 and RRA 1976 that discrimination law serves important collective interests. Subsequent developments, especially through European developments, have meant that this ‘public function’ of discrimination law has become more explicit. Most importantly, UK discrimination law has to accommodate the provisions of the ECHR, e.g. the equality provision in Article 14 or the right to privacy in Article 8. This has created a body of constitutional discrimination law which is now incorporated into domestic law through the Human Rights Act (1998). These developments have led to what is sometimes described as the ‘constitutionalising’ of discrimination law. In other words the incorporation of the ECHR through the HRA has proven to be catalyst in shaping recent changes to anti-discrimination measures. This is perhaps most evident in the decision to name the
new commission entrusted with the task of monitoring the implementation and practice of all previous anti-discrimination legislation, as well as the two most recent EC Directives, as an Equality and Human Rights Commission (EHRC).

If this is read in conjunction with the findings of earlier work-packages, specifically the ‘re-balancing’ of broader policies of multiculturalism described in our D2 report, as well as the introduction of Citizenship Education examined in the D3 report, it may lend support to the perception that Britain is moving away from diversity friendly policies in favour of more unitary European-like approaches (Joppke, 2004).

Yet a competing reading may view these particular changes as part of an incorporation of broader trends that subsume the EU. It could, for example, be argued that the ECHR and the European Court of Human Rights are themselves a regional manifestation of a global idea of universal human rights set out in the United Nations Declaration of Human Rights. This is indeed the view of Lafleche who maintains that rather than being Europeanised, “we are being internationalised”.

With respect to the specific directives meanwhile, there is a view that because Britain has already had a particular history of substantive Equality enactments, the recent directives are an addition to it and would not in themselves constitute a “big enough social advance for anyone to make the assumption that...Europe showing us what to do, I don’t think they reach that level of social significance (interview)”. This is particularly the case when other leading EU countries have not incorporated these measures or even made provisions to incorporate these measures. A less diplomatic analysis is offered by the Chair of the Society of Black Lawyers, Peter Herbert, who is of the view that:

[W]e’re not taking on board lessons for Europe…if you are starving, beaten, whipped and in a boat, then they might just send a rescue boat out for you so they don’t embarrass them and die on their beach but apart from that I don’t see the legislation as being particularly strong anywhere else in Europe (interview).

Although this is a flippant comment that conflates a range of issues concerning attitudes toward economic migrants and refugees, as well as other minorities, it is a comment that is implicitly informed by a concern with attitudes toward conceiving the treatment of minorities within a race-equality framework, and so is helpful in drawing our attention back to important and continuing differences that can be found in the British approach.

Principally, the harmonisation of different equality strands that has been prompted by the incorporation of recent EC directives has not led to an abandonment of non-discrimination traditions that are sensitive ethnic and racial particularity. While it is true that the Race Equality Directive has not substantially strengthened existing legislation, the Employment Directive has begun to address an anomaly that may result in a reformulation of anti-discrimination measures that are able to level upward in the protections they confer.

There is then a great hope for the harmonisation of different protections across different strands, but whether this materialises in a progressive form remains subject
to debate. Michelynnne Lafleche, Director of the Runneymede Trust offers the following appraisal:

In policy terms I think we are going to see, in the next five years, a funny kind of imbalance between actual policies directed at specific groups and an overall policy approach that mixes and melds issues without understanding difference anymore.

Perhaps inevitably, this can only be overcome through a willingness on the part of public authorities, and the wider public, to remain vigilant on matters of difference and non-discrimination, which in turn requires conditions in civil society that cannot be created through legal regulation alone (Modood, 2007).
Bibliography


News release issued by the Commission in Brussels on 19 July 2004: “Commission goes to European Court of Justice to enforce EU anti-discrimination law” (IP/04/947


Appendix I

List of interviewees

1. Barbara Cohen (Chair of the Discrimination Law Association)
2. Mark Easton (Home Affairs Editor for BBC)
3. Peter Herbert (Society of Black Lawyers)
4. Paul Johnson (Deputy Editor of the Guardian)
5. Phillip Johnston (Assistant Editor of the The Daily Telegraph)
6. Razia Karim (Head of legal policy at the Commission for Racial Equality)
7. Professor Francesca Klug (Human Rights Advocate and former advisor on the HRA)
8. Michelynn Lafleche (Director of the Runneymede Trust)
9. Arzu Merali (Islamic Human Rights Commission)
10. Claude Morres (MEP)
11. Rosa Prince (Former Political Correspondent at the Daily Mirror)