

Equality in the European Union: The European Commission's Proposals on Article 13 of the EC Treaty

Liberty Submission to the House of Lords European Union Sub-Committee F (Social Affairs, Education and Home Affairs)

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Introduction

Liberty welcomes this opportunity to make these submissions in response to the invitation from the House of Lords European Union Sub-Committee F (Social Affairs, Education and Home Affairs) to comment on three proposals published by the European Commission ("the Commission"). These submissions should be read alongside the Commission's proposals.

The Commission's proposals are based on Article 13 of the Treaty establishing the European Community ("the EC Treaty"), as added by the Treaty of Amsterdam, which provides that the Community 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' This widens the prohibition under the EC Treaty against discrimination to inequality on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation in addition to the previous prohibition against discrimination on grounds of sex. The three proposals are for:

1. a directive establishing a right to equality in employment;
2. a directive prohibiting discrimination on grounds of ethnic or racial origin;
3. a Council Decision establishing a Community Action Programme for 2001-2006.

In summary, Liberty warmly welcomes the proposals as a long-overdue extension of the principle of equality. However, Liberty does have reservations in respect of the incremental approach the Commission has taken to the issue of equality and non-discrimination and particularly the piecemeal nature of the proposed legislation under Article 13 of the EC Treaty.

Liberty does not propose to respond to all of the questions posed in the invitation from the Sub-Committee, primarily because a number of these questions deal with issues outside Liberty's remit. The following submissions are divided into three main sections:

1. The general context of the right to equality, the prohibition on discrimination in Article 13 and the current proposals;
2. The main policies of the Commission as which are intended to be implemented in the proposed directives;

3. More detailed examination of the legal mechanics employed in these proposals.

1 Article 13 of the EC Treaty and the right to equality

Liberty's concerns regarding the legislative scheme of the Commission's proposals can be more fully appreciated through a brief explanation of Liberty's policy on equality and its own proposals on the proper legislative framework for equality laws.

Liberty has consistently promoted the concept of a general principle of equality enshrined in law. In particular, Liberty has advocated an extension of current legislation against discrimination on grounds of race and sex to cover minorities who are prejudiced by inequality, especially transsexuals, gays and lesbians. Liberty therefore welcomes the new Article 13 which provides a far wider basis for anti-discriminatory legislation within the European Community.

Both domestic and Community legislation, however, have concentrated on a compartmentalised legislative programme. In the UK, this took the form of the Race Relations Act 1965, followed by the Sex Discrimination Act a decade later. To date, Community legislation has effectively been limited to sexual discrimination and the limits of Community anti-discrimination protection were recently highlighted in the case of *Grant v South West Trains* [1998] IRLR 206 considering discrimination on grounds of sexual orientation. Whilst not being a general right to equality, Liberty welcomes the new Article 13 as a constructive move towards that goal and as a remedy to existing blatant inequalities. Further, Article 13 and a wider prohibition on inequality will be welcomed by many others who view the present legislative protection as inadequate: for example, see *R v Sec of State for Defence ex p Perkins* [1997] IRLR 297 per Lightman J in the context of sexual orientation.

The new Article 13 does not go so far, however, as to provide for a general right to equality before the law. It is just such a right that Liberty has advocated as necessary to eradicate discrimination, of whatever form, and to extend equal protection of the law to all.

Liberty has proposed that a new general principle of equality should be introduced in the UK. An appropriate model for such a general principle is contained in Liberty's proposed Bill of Rights, included as an appendix. This model is based upon Articles 26, 27 and 20(2) of the UN International Covenant on Civil and Political Rights (to which the UK is a signatory), Article 15(2) of the Canadian Charter of Rights and Freedoms, the Sex Discrimination Act, Race Relations Act and the Public Order Act 1986.

Such a general principle of equality should form a right in the UK within a Bill of Rights. Indeed, all Member States have constitutional rights to equality and/or non-discrimination in various forms except the UK. Liberty is of the view that only such a general right to equality would remedy the current deficiencies of domestic non-discrimination legislation. This legislation is inadequate because it prohibits only specific forms of discrimination, such as disability, sex and race, in specific circumstances. It is not an oversimplification to suggest that current domestic non-discrimination legislation has most, if not sole, purchase on the employment relationship, the workplace and related areas. It is this piecemeal approach which Liberty has objected to and which a general equality law would tackle. Unfortunately, Article 13 and the current proposals by the Commission merely build upon this earlier framework and retain this compartmentalised approach to anti-discrimination legislation.

Liberty welcomes Article 13 as a step towards a more unified and comprehensive approach to inequality as it covers not only discrimination on grounds of sex, race and disability which already exist within our domestic legislation, but also inequality based upon ethnic origin, age, religious beliefs and sexual orientation. Nevertheless, Article 13 is not an answer to Liberty's criticisms of the current domestic legislation because:

1. this wider concept of discrimination which is to be implemented by the Commission will necessarily be constrained within the limited competence of the Commission and the European Community generally;

2. Article 13's concept of discrimination is still defective due to its omission of crucial inequalities which must be tackled. Liberty, to this end, would recommend the express inclusion of the following grounds in addition to those covered by Article 13:

language;
national or social origin;
marital, economic or other status.

We would further recommend a non-exhaustive list, capable of meeting new forms of discrimination as they arise.

3. the Commission's actions will necessarily be constrained by the principles of proportionality and subsidiarity;

4. it appears that the Commission, in implementing Article 13, is again pursuing a sectoral policy of implementation rather than an all-pervasive right to equality.

Article 13 will not, therefore, provide a remedy to the defects in existing equality legislation that Liberty has identified.

2 The Commission's Proposals in General

The Commission's proposals would establish a race discrimination law at Community level very similar to the UK Race Relations Act. In addition, there is a more general anti-discrimination law reflecting all the grounds of discrimination covered by Article 13, but covering only employment. In other words, implementation of the directive would require the UK, at the very least, to add religion / belief, age and sexual orientation to the current legislation. Both proposed directives would require some amendments to be made to existing UK discrimination laws to reflect the 'burden of proof' provisions and some other limited incremental changes. Additionally, the Disability Discrimination Act 1995 would have to be amended with the effect that direct discrimination could not be justified. It is worth noting that these provisions do not include trans people, as they are already covered by gender discrimination provisions as a matter of EU law.

Although these provisions do not meet the standards Liberty has argued for, Liberty nonetheless welcomes the measures as a significant step forward. The advantage of the close similarity between the approach taken by the directives and existing discrimination law in the UK is that the concepts and mechanisms are already understood. Therefore, these proposals are workable in the UK. Liberty also welcomes the fact that these directives are quite clearly minimum standards that would in no way inhibit the ability of the UK to legislate further, stronger anti-discrimination legislation, including the principle of equality that Liberty proposes.

The disadvantage of the similarity of the proposed directives to UK laws is that they are open to many of the criticisms that have been made of existing UK laws and their limited success in eradicating discrimination. In particular, the approach is based on taking measures to remedy discrimination once identified. This aspect of anti-discrimination law is important and necessary. Certainly, it is fundamental that individuals must have legal rights to get redress as the victims of discrimination. However, it is not the only approach. The use of positive obligations and requirements, such as monitoring, have been shown to be valuable mechanisms to combat discrimination, by guiding particularly employers towards practices that will not lead to discrimination. The model closest to home is the provisions in force in Northern Ireland. The Commission - correctly - identify that prohibitions on discrimination will not by themselves be effective to eradicate discrimination. However, the

complementary measures proposed are in the Community Action Plan and hence follow a voluntaristic approach, with the exception of the provisions for social dialogue whose implications for the UK are limited. The Community Action Programme speaks of information gathering, analysis, awareness raising and campaigning. These are important and necessary adjuncts to the directives and may well be effective in their own terms. However, in our view they are unlikely to have a significant effect on the overall problem.

The answers to many of the other questions raised by the Committee are most appropriately given in the context of a more detailed analysis of the proposals, as contained in the next section. Before turning to specifics, however, there is the question of what benefits are achieved by action at the Community level as opposed to action by Member States. In our view, there are clear advantages. The lesson of European Community legislation in the field of sex discrimination shows the Community to have been a powerful motor for combating gender discrimination. If the aim is to achieve a level of protection against discrimination throughout the EU, then the European Court of Justice has an unparalleled ability to assist that by fleshing out what those standards are across the EU.

3 The Commission's Proposals in Detail

The Community Action Plan

A further general point is that these proposals and, it appears, the Commission's approach to the application and implementation of Article 13 of the EC Treaty, ignores entirely the issue of discrimination on grounds of sex. This is apparently because sexual discrimination has already been the subject of Community legislation which is deemed to have been a success. Liberty views this approach as questionable for the following reasons:

1. by leaving untouched the current sex discrimination regime, the Commission is creating a parallel regime which eschews the benefits of a homogenous approach to discrimination legislation and opens up the possibilities for conflict and inconsistency between the two regimes;
2. the dual regime of legislation, whilst not necessarily undermining the Commission's interpretation of Article 13 as giving equal status to all forms of discrimination and not creating a hierarchy of inequality, may give rise to inconsistencies which could lead to difficulties in the case of multiple discrimination;
3. the legislative proposals and in particular the Community Action Programme place greater emphasis than hitherto on education and information to remedy inequality in society yet the proposals based upon a dual system, advanced by piecemeal legislation which is restricted to a particular form of discrimination in a specified sector, has a propensity to cause greater confusion and obfuscation rather than clarity and simplification.

Issues Raised by the Directives

The proposed directives are identical in structure, with some variation in the exact provisions. Therefore, we will deal with them by going through the provisions of both together, following the order of the Articles.

In addition to the inclusion of direct and indirect discrimination, both directives expressly deem discrimination-related harassment to be discrimination. This is a welcome clarification. The general directive would create a duty to provide reasonable accommodation to disabled people. This again mirrors our own Disability Discrimination Act. However, it is difficult to see why this should be limited to disabled people. It should have a more general application, most particularly to religion.

The provisions for the material scope of the directives raise concerns. In relation to the racial discrimination directive, we are concerned that the directives application is unnecessarily limited. Since it is clearly intended to have general application, the directive should simply state that, and provide a non-exhaustive illustrative list. Liberty is disappointed that the other directive is limited in its scope to employment. If it is to be so limited, the directive should at the least cover discrimination arising after the end of an employment relationship, for example in the provision of references. Neither does so at present.

Both directives then contain a provision for a genuine occupational qualification not to be discrimination, again close to existing UK law and hence readily workable in the UK.

Both proposed directives contain provisions entitled "Defence of Rights" which, if enacted, would oblige Member States to ensure that the judicial or administrative procedures for the enforcement of the obligations under the proposals are available to all. This is the core of the proposals for individuals who have suffered discrimination covered by the directives. Although not stated in terms, Liberty interprets these as requiring the Government to provide a system similar to our existing one where discrimination claims may be brought in Employment Tribunals and County Courts. The directives would expand domestic practice by requiring organisations, including, for example, Liberty, to be able to bring claims. Liberty welcomes this for the reasons that the High Court has allowed similar claims to be made in judicial review: organisations are often best placed to bring well-informed and well-targeted claims that can resolve issues, making the most effective use of resources. In this there is the further factor that many victims of discrimination may not want to risk bringing a discrimination claim that could result in their employment relationship breaking down.

On a similar vein, Liberty welcomes the proposal to reverse the burden of proof as a necessary step towards combatting discrimination and providing an effective implementation of the principle of equality. This is because of the inherent difficulty faced by an applicant in proving that an act was done on grounds of race, sex, age, etc whereas it is easier for a respondent to prove that it was not. Liberty has previously proposed that the burden should shift to the respondent once the applicant has shown a prima facie case of less favourable treatment. Liberty interprets the test in the proposals, namely where facts are adduced from which it may be "presumed" that there has been direct or indirect discrimination, as comparable to its proposal for prima facie evidence to be adduced before the burden is reversed. It should be noted that represents a limited step forward from the similar provisions in relation to Community gender discrimination law under the Burden of Proof Directive, by establishing a simpler test.

Both directives contain limited positive obligations to provide information. Given the recognition of the importance of information, it is not immediately apparent why they are so narrow. In the UK, codes of practice have been an important aid to the operation of discrimination legislation. Liberty interprets these provisions to be a basis for the drawing up of similar codes, but it would be preferable for the directives to state this and to set out the status of such codes.

In pursuance of its aim to promote dialogue between the two sides of industry, the proposals permit Member States to authorise agreements in respect of anti-discrimination rules in the context of collective bargaining. While this is welcome, it appears to be a missed opportunity to force industry to tackle discrimination within the collective bargaining process and in the workplace generally. Whilst not overly infringing upon the voluntary nature of collective bargaining, the Commission could simply have included such anti-discrimination rules in the topics which employers must discuss with employees within European Works Councils. Further, such topics could likewise be included within national information and consultation procedures.

In the general directive, there is the requirement of independent bodies to promote the principle of equal treatment. These appear to reflect quite closely the equality commissions

presently existing in the UK, to the extent that they appear to require only that the UK equality commissions accept responsibility for further grounds of discrimination. Without doubt, these organisations make a very significant contribution to the effectiveness of discrimination legislation and this requirement is to be warmly welcomed. Liberty is concerned however that the directive provides that these organisations must have both promotion and policing / investigatory roles. This is currently the practice in the UK and there are a number of arguments in favour of this approach. However, there are also arguments against mixing these functions and it is not necessary for Community level legislation to require these roles to be put together. By contrast, the directive specifically permits such equality commissions to be included within any Human Rights Commission set up in the UK.

Conclusion

Liberty is in favour of wider and more comprehensive anti-discrimination legislation. To that end, we welcome these measures as an important step forward. Given their close similarity to existing UK legislation, we anticipate that these proposals could be enacted in the UK without undue difficulty. Although there are some more detailed defects in these proposals, they are capable of improvement. Overall, they contain much that is valuable and are worthy of support. At the same time, they are based on an approach of a minimum common standard of protection against discrimination. That approach is necessarily a limited one which is not, and will never be, sufficient to secure equality.

Appendix: Extracts from Liberty Bill of Rights (1995)

Article 14 - The Right to Freedom from Discrimination

1. The equal protection of the law and the enjoyment of rights, whether referred to in this Bill of Rights or not, shall be secured without discrimination on any ground such as gender, race, colour, language, religion, political or other opinion, ethnic, national or social origin, nationality or citizenship, mental or physical disability or illness, sexual orientation, gender identity, age, marital, economic or other status.
2. Persons belonging to ethnic, religious, linguistic, cultural or national minorities shall not be denied the right, in community with other members of their group, to use their own language and manifest their own culture or religion subject to the limitations in Article 9(2) [restrictions that may legitimately be placed on freedom of conscience].
3. This article shall not preclude any law, programme or activity that has as its objective the amelioration of conditions of individuals or groups disadvantaged on any of the grounds listed in this Article. Neither shall it preclude any differential services or entitlements based on special needs or genuine occupational qualifications.
4. Any conduct which is threatening, abusive and insulting and which is intended or which is likely, having regard to all the circumstances, to stir up racial hatred or hatred against members of religious groups is in breach of this Bill.