

Discrimination Law Review: A Framework for Fairness

**Proposals for a Single Equality Bill for Great Britain
– A consultation paper**

Response by the Mayor of London

CONTENTS

This paper is in five sections:

- 1. Executive Summary**
- 2. Introduction, including the wider context and the equality challenge**
- 3. Response to the specific proposals and questions as set out in the consultation on the Green Paper**
- 4. Implementing the Gender Directive**
- 5. Appendices (attached as three separate documents)**

Executive Summary

The Discrimination Law Review is an important opportunity to address the inadequacies in current anti-discrimination law and to ensure that a Single Equality Act – the objective of the review – is adequate to ensure comprehensive legal protection against discrimination, sanctions that meaningfully deter and, when necessary, punish discrimination and that the law can be efficiently and properly enforced. The Mayor is seriously concerned that the content of the Green Paper fails to achieve these fundamental objectives. The consultation is an opportunity to ensure that this is corrected.

The last decade has witnessed some important advances in equality legislation – for example, protection against sexual orientation, age and religious discrimination. While these are not comprehensive in protection, they were important steps forward.

Most notable were the public sector positive equality duties. Fundamentally these originated in the Macpherson Inquiry into the racist murder of Stephen Lawrence. This inquiry highlighted the reality of institutional racism, which it defined as, *'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people'*.¹ The inquiry registered an acknowledgement, by police, government and wider society, of the reality of institutional racism. It raised the level of public awareness as to the pernicious nature of racism and the damage that flowed from it. It signalled a renewed determination to eradicate racism, based on a more informed understanding. It represented a fundamental step forward in official understanding of the operation of discriminatory processes – in this case, of racism.

The duty to promote race equality, and in turn the duties to promote disability and gender equality, built on this recognition of institutional discrimination by developing proactive, positive equality duties on public authorities. The way in which these require consideration to be given to promoting equality in all areas of work and provide for specific steps, such as consultation, action plans and public accountability, led to a sea-change in public sector awareness of discriminatory processes, and in practices and outcomes to help secure greater equality. With regard to London, the results are tangible and powerful, as evidence in this submission illustrates. This is an ongoing process – the duties on disability and gender in particular have only recently come into force. Positive duties do not yet apply to other areas of discrimination.

The Mayor is deeply concerned about proposals in the Green Paper which would weaken the public sector duties and has noted carefully the concerns of the three equality commissions and a broad range of other stakeholders who have criticised these proposals²: Razia Karim, Head of Legal Policy at the Commission for Racial Equality, has said that *'The proposals in the Green Paper on the public sector duty with regard to race equality are a repudiation of the Stephen Lawrence Inquiry'*, while Disability Rights Commission Chair, Sir Bert Massie said it would *'virtually destroy the Disability Equality Duty'*. This submission stresses the value that the positive duties have had and supports the need not only not to weaken them but indeed – in line with the widespread expectation that stakeholders had of the review – to extend their coverage and strengthen their content in terms of powers, enforcement and accountability. It is

¹ The Stephen Lawrence Inquiry Report, presented to parliament by the Home Secretary, February 1999

² A consultation event held at City Hall on 27 June 2007 heard concerns to this effect from representatives across equality strands including the Commission for Racial Equality and Disability Rights Commission.

critical of proposals currently in the Green Paper that would weaken the content, enforcement and impact of the duties.

The lack of any proposals to improve equality in the private sector is a second critical weakness of the Green Paper. This must be addressed. Most people in employment work in the private sector and the private sector is also an increasingly important source of service delivery. For example, in London 69 per cent of women and 73 per cent of Black and minority ethnic workers are employed in the private sector. It will not be possible to close the gender pay gap, for example, without more robustly tackling the causes of pay inequality in the private sector. The Green Paper even rejects workforce monitoring in the private sector, which would provide the clarity needed as a basis for tackling discrimination. In principle, as the editor of Equal Opportunities Review, Michael Rubenstein, noted at the Mayor's consultation event in June, providing rights in the public but not in the private sector renders employees in the latter second-class citizens and serves to discourage more progressive private sector employers from fear that they may place themselves at a competitive disadvantage. Ultimately a lower equality bar in such a weighty section of employment risks acting to drag down standards in the rest. This indeed may be what we are witnessing now in terms of the proposal to weaken the public sector equality duties.

The Mayor believes that equality and a modern, productive, successful economy go hand in hand; London's economic future depends on access to the widest selection of talent and a strong skills base and therefore business can only benefit from robust and comprehensive equality law. The most far-sighted and equality-minded private sector employers will be supported not by the Green Paper's approach of voluntarism – which at worst allows for bad practice – but by giving their leading equality practice the full support of the law. By doing so, a Single Equality Act will fulfil one of the remits of the Discrimination Law Review, that of investigating 'new models for incentivising compliance'. As it stands, there are no firm proposals to improve such incentives in the private sector.

The third major area of weakness in the Green Paper is its lack of any proposals to improve enforcement of the law. This is particularly striking as enforcement is one of the main terms of reference of the Review. The Green Paper summarily rejects some important changes (for example, representative actions; hearing all discrimination cases in Tribunals) and avoids consideration of other issues (for example, the sanctions available to deter and punish discrimination), saying they have been relegated to the DTI's (now the Department for Business, Enterprise and Regulatory Reform) consultation 'Success at work: resolving disputes in the workplace'. The latter has already concluded.³ Problems of enforcement would actually get worse if the proposals for undermining the public sector duties were taken forward. The lack of proposals for better enforcement is a major weakness: better enforcement – and access to justice – is critical to ensure that, whatever the law is on paper, it can actually lead to improvement in people's lives. Too often legitimate cases cannot get a hearing at all, are tied up in litigation for years, apply only to one individual or attract sanctions that are too weak to deter discrimination. It is important that later stages of discussion reinstate consideration of improved enforcement.

Fourth, as indicated above, the Green Paper does not propose the change needed in a number of important specific areas. The Mayor believes that legislation needs to be comprehensive and contain effective tools to tackle well-known injustices. It fails to seriously consider the case for a non-discrimination right for carers and does not consult on this. It gives no consideration to changing the definition of disability to one based on the social model and misrepresents the case for protection against genetic discrimination, concluding that protection is not required. It proposes to maintain major exceptions from the coverage of anti-discrimination law such as in

³ See Appendices for the Mayor's submission to that consultation.

immigration, thereby proposing effectively to continue to legalise discrimination. With regards to tools to tackle discrimination, the Green Paper dismisses the case for mandatory pay reviews. As the consultation process on the Green Paper came to a close, new data underlined the case for mandatory pay reviews: a survey of managers showed that women managers were likely to be paid 12 per cent less than their male equivalent⁴. This adds to a wealth of evidence: research by the Mayor into the gender pay gap in London, for example, shows that the average gap is wider than in the UK as a whole and that little progress is being made in closing it⁵. The next stage of discussion should provide for consultation on such important matters: this will allow for a more inclusive measure of opinion.

Fifth, as a result of these and other omissions or weaknesses, the Green Paper does not meet the terms of reference set for the Discrimination Law Review. By barely considering enforcement, proposing no incentives to compliance, ignoring many basic concepts and principles of equality, failing to provide consistency in protection – for example, between the public and private sectors – it fails to meet its remit. This is unreasonable and should be addressed by taking on board the responses in this submission – which the Mayor is confident will on many points find an echo in other submissions.

Problems arise throughout the Green Paper as a consequence of the failure to speak to the remit of considering ‘the fundamental principles of discrimination legislation and its underlying concepts’. Such consideration would have prompted a more coherent structure. The need to repeatedly consider exemptions or the problems in dealing with positive action are linked to the failure to address the more fundamental issues that arise from a symmetrical legal model. Many problems arise from the necessity inherent in this to ensure likeness in treatment rather than address disadvantage or discrimination. One positive alternative represented in ‘reasonable adjustment’ has been ruled out in the Green Paper as something that could be built upon. The Discrimination Law Review’s remit to consider these principles and concepts was logical: to start with the basics in order to help build a more coherent, effective and streamlined body of law. Later stages in the consultation on changes in discrimination law should address this omission.

In summary, the Mayor believes that a Single Equality Act must:

- **Have a clear purpose:** explicitly aim to prevent structural discrimination and disadvantage. This can be done through a ‘purpose clause’ – a proposal that is widely supported, would aid public understanding and provide an important interpretative statement of basic principles.
- **Be comprehensive:** ensure protection against discrimination covers all grounds and all areas of people’s lives, within both public and private sectors, at work and in wider life. In employment, access to goods, facilities and services, and protection from harassment, there should be comprehensive legal protection for all groups, with no difference in the legal standard.
- **Level upwards:** the most effective models of protection should be built upon. For example, the concept of ‘reasonable adjustment’ in disability discrimination law is based on understanding that barriers to equality need to be tackled and that merely aiming to treat people alike will not always achieve substantive equality. Such a concept could be applied to the needs of carers when interacting with service providers and employers, and could assist with the law on positive action. The review can also learn from other countries where effective legal models exist and which can overcome the weaknesses in the UK’s over-reliance on a symmetrical legal approach. Examples of specific laws as well as models that the UK could draw

⁴ ‘In a survey of more than 42,000 managers in every sector, it found women averaged £43,571 last year, while the men averaged £49,647’, Guardian 5 September 2007, research by the Chartered Management Institute.

⁵ Women in London’s Economy, 2007, Mayor of London and GLA Economics

upon exist both within the EU and more widely: for example, the application of contract compliance in the US, or the use of positive action in Norway and Spain, or the approach of 'reasonable accommodation' in Canada.

- **Promote equality as a positive duty:** extending the current public sector duties to cover all communities facing discrimination without undermining the content as it presently stands. Practical, measurable, change-focused and accountable public sector duties should apply. The DLR should propose how these values can apply in other sectors.
- **Extend protection:** providing carers with rights against discrimination, making age discrimination illegal, providing protection to vulnerable workers and improving rights to flexible working.
- **Take precedence:** by removing or reducing areas currently exempted from anti-discrimination law or where equality comes second, such as with regard to race and religious discrimination in immigration.
- **Have meaningful tools to ensure change:** such as mandatory equal pay audits, workforce monitoring linked to intervention, such as meaningful positive action, to correct discrimination and patterns of under-representation.
- **Ensure equality in procurement:** through a new statutory obligation placing anti-discrimination measures at the heart of public sector procurement and thereby ensuring the public money and equality standards are upheld in all the work of public services, directly or indirectly.
- **Deliver an improved framework of enforcement:** allowing for representative legal actions, a workable tribunal system for all types of discrimination cases and improving penalties so that they deter discrimination and provide for a wider range of sanctions against repeat discriminators.
- **Ensure that people can access justice and effectively uphold rights through the legal process:** by improving access to legal support.

Unfortunately many of these improvements are *not* proposed in the Green Paper – despite wide support for them. The Green Paper at the moment therefore lacks the comprehensive proposals needed to produce a coherent, effective body of anti-discrimination law, backed by firm enforcement powers. The consultation is the opportunity to remedy this problem.

Issues omitted or rejected in the Green Paper include:

- a purpose clause
- extension of the concept of reasonable adjustment
- mandatory equal pay reviews
- a duty on public authorities to include equality in procurement
- private sector equality duties
- a non-discrimination right for carers
- ending the many exceptions to anti-discrimination law such as in immigration
- representative legal actions
- equality tribunals
- improved remedies that deter discrimination

- better access to justice
- strong positive action measures linked to incentives and/or legal requirements
- workforce equality monitoring
- allowing 'hypothetical comparators' in equal pay claims
- more powerful positive equality duties in the public sector
- the needs of vulnerable workers
- social model of disability
- protection against genetic discrimination

This paper sets out the case for inclusion of legal improvements in these areas under the response to the most appropriate questions.

The statistics of inequality reflect the inadequacies of current law and make the case for the sorts of improvements outlined in this submission. The Mayor believes that discrimination is wrong wherever it happens, and the law must be fit to deter discrimination, deal with it robustly when it occurs and uphold effective positive equality legal duties. Doing so would not only be socially just, it would be tremendously popular and beneficial for society. Discrimination and inequality deny justice to individuals and communities and deprive society from benefiting from all the talents of all people.

To achieve these goals the proposals in the Green Paper need a major rethink: more ambition is required and the remit set for the review must be met. This submission sets out the necessary kinds of change required. The Mayor urges the Discrimination Law Review to take them on board. This will not be achieved by a 'tick-box' approach to the questions asked in the Green Paper, as there are no 'boxes' on several key matters. The Mayor looks forward to a wider and stronger range of proposals for improving anti-discrimination law in future stages of this discussion, as we move towards a Single Equality Act. This should include presentation of proposals in a Draft Single Equality Bill, providing the opportunity for parliamentary scrutiny and a further level of stakeholder consultation.

Introduction

The Mayor welcomes the recognition reflected in the government's establishment of the Discrimination Law Review and the manifesto pledge to introduce a Single Equality Act: that anti-discrimination law as it currently stands is too often failing to tackle discrimination and deliver a more equal society. The Discrimination Law Review is an important opportunity to radically improve anti-discrimination legislation so that it is fit for the purpose of promoting and upholding equality and rooting out discrimination. This is the Mayor's general approach. This submission sets out the legislative changes that the Mayor believes should be delivered through a Single Equality Act.

As it stands, the law does not comprehensively or equally protect against discrimination and is inadequately enforced with remedies that are not proving adequate to deter discrimination. Access to justice is poor. It remains legal to discriminate on grounds of age in the provision of goods and services, or against carers, who have no right to non-discrimination. Harassment on the basis of religion is not clearly covered. Discrimination in immigration and nationality services is exempt from the law. The approach to equality is different between public and private sectors. Important developments in the approach to equality in parts of the law – for example, in relation to discrimination against disabled people – are not reflected in other parts of the law. A Single Equality Act must systematically address these and other weaknesses, aiming to level upwards from the most effective specific models to ensure protection against discrimination and the promotion of equality are comprehensive, and that the law is enforced.

London is one of the most diverse cities in the world. It is a supremely international capital. Effective equality law and firm enforcement of it are essential to ensure that all Londoners are able to contribute to London's economic and social progress and also share equally in London's prosperity.

- 40 per cent of London's total population is from an ethnic minority group other than white British, with 29 per cent from a black, Asian or other minority ethnic group.
- London contains 50 communities of more than 10,000 people born abroad. London's population encompasses 300 hundred languages and 14 major faith groups.
- There are 3.8 million women resident in London, with a bigger proportion of them of working age than in Britain as a whole.
- 27 per cent of Londoners live in income poverty after housing costs are taken into account, with 41 per cent of all London children, 51 per cent of black and 69 per cent of Bangladeshi and Pakistani children living in income poverty.
- More than 607,000 Londoners are Muslim.
- Disabled Londoners comprise 16 per cent of London's working age population, around 800,000 people.
- London is home to the largest lesbian and gay population of any city in Europe.
- Nearly 1.2 million people are aged 60 or over.
- Nearly 11 per cent of London's population are carers and 58 per cent of them women.

A Single Equality Act is needed to speak to the equality needs of these and many other Londoners.

Unfortunately, the Green Paper has provoked widespread disappointment and concern. Stakeholders have criticised its timidity and pointed out that it even threatens regression in the law in some areas, notably in the public sector positive equality duties. The Mayor shares these concerns. The consultation is an opportunity for government to listen to these opinions of communities facing discrimination, equality organisations, legal experts and others and broaden its proposals accordingly. This will allow a return to the vision implicit in its original manifesto commitment.

To help ensure that the broadest range of opinion may be heard during the development of legislative proposals the Mayor supports the Single Equality Bill being published in draft. This will allow for parliamentary scrutiny and stakeholder consultation, and has become even more appropriate given the tight consultation timescale set for the Green Paper.⁶

The Green Paper fails to consider or consult on the case for important improvements in a number of areas, and it has been necessary for the Mayor to set out a view on such issues. He believes this will be the approach taken by a number of organisations, due to the range of omissions from the Green Paper. The Mayor urges the Review to take such points into account by ensuring the scope of subsequent proposals more accurately fits the range of improvements in law and enforcement needed and under active discussion by stakeholders.

Terms of Reference of the Discrimination Law Review

The Review's terms of reference include:

- 'considering the fundamental principles of discrimination legislation and its underlying concepts'

The failure to give a substantive consideration to issues such as a purpose clause or to extending the concept of reasonable adjustment are examples of where the DLR has not properly considered the '*fundamental principles*' and '*underlying concepts*' of discrimination legislation. They also reflect the failure to properly consider the value of moving to a less symmetrical legal model.

- 'creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage'

The proposals will not streamline the legislative framework as they threaten to leave many inconsistencies: for example, between the public and private sectors and between people depending on the basis on which they are discriminated against. The goal of producing better outcomes will not be met: for example, the proposals for the public sector duty threaten worse, not better, outcomes.

- 'investigation of new models for incentivising compliance'

The failure to accept the case for an equality duty on procurement or meaningful sanctions when the law is breached means not giving '*incentives to compliance*'. Or to take the example of the proposals to allow greater provision for positive action (called '*balancing measures*' in the report), which the Mayor supports – the Green Paper proposes no incentives to encourage the use of positive action. This should be addressed.

⁶ Code of Conduct from the Cabinet Office states that a minimum of 12 weeks should be allowed for consultation and consideration should be given by departments to 'the specific circumstances of their stakeholders and consider longer consultation periods at certain times, for example during the summer holiday period.' The consultation period also coincided with the prime ministerial hand-over and government reshuffle, creating inevitable gaps in communication as ministerial and departmental responsibilities were decided, implemented and communicated. <http://www.cabinetoffice.gov.uk/regulation/documents/consultation/pdf/code.pdf>

- considering ‘a spectrum of enforcement options’

No improvements in enforcement are proposed.

- creating a ‘fairer’ legislative framework with ‘consistency in protection afforded to different groups’

There will not be ‘*consistency in protection*’ as a result of the Green Paper as it stands. For example, if you work in the public sector you will have one set of rights but different ones in the private sector. The Green Paper is very hesitant on the creation of consistent rights against discrimination. For example, it is very tentative as to whether age discrimination in goods, facilities and services should be unlawful, on the same basis as for other groups. Similarly, it questions providing consistent protection against religious harassment compared to harassment on other grounds. Exceptions to the law would permit discrimination on the grounds of race by the immigration service to continue. As the terms of reference indicate: there should be consistency in protection.

Wider Context

The Mayor has strongly welcomed the increased investigation into inequality that has taken place under this government over the last decade and many of the specific steps that have been taken to address discrimination and inequality by legislation providing legal protection against discrimination. However, the Mayor has specific concern over the abolition of the three statutory equality commissions and establishment of the Commission for Equality and Human Rights (CEHR) on the model adopted. The Mayor’s concern was that this would have the effect of cutting the CEHR off from specific communities facing discrimination, weakening its policy-focus and effectiveness in enforcing the law. The CEHR lacks representative structures (save for a time-limited disability committee). Its structure represents a set-back in the approach to discrimination.

The Mayor has also expressed disagreement with the analytical approach of the report of the Equalities Review. This largely ignored institutional discrimination in favour of a focus on ‘choice’ and ‘culture’. As both of these projects were linked together at the point of their formation, by government, with that of the Discrimination Law Review, they set a worrying context. The Equalities Review’s remit included that it would inform ‘*the modernization of equality legislation, towards a Single Equality Act*’. As its basic approach is mistaken, it is a matter of regret that it does so: the Equalities Review’s analysis has its echo in the failure of the Green Paper to propose legislative improvement in many areas⁷, but is most evident when the Green Paper proposes to throw into reverse the approach that has been established in law to proactively tackle institutional discrimination.⁸ The Mayor completely rejects this: indeed, this approach should be extended across currently unprotected groups and more widely across society.

⁷ For example, the Equalities Review Report did not support workforce monitoring in the private sector, equal pay reviews, extending carers legal rights, reducing exceptions such as race and religious discrimination in immigration or better enforcement: *Fairness and Freedom – Final Report of the Equalities Review*, February 2007.

⁸ The Report stressed the need for a simpler public sector equality duties, with less ‘regulatory burden’, saying that ‘the CEHR should manage a system of enforcing the new public duty which is more flexible and proportionate than that currently available to the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission’, *Fairness and Freedom – Final Report of the Equalities Review*, February 2007

The Equality Challenge

The realities of inequality show why anti-discrimination law must be radically improved and backed by powerful enforcement powers. To give just a few examples:

- Pay and employment discrimination against women remains a firm reality. The average gender pay gap is wider in London: women working full-time in London are on average paid 23 per cent less per hour than men. The UK average gender pay gap is 17 per cent. This reflects the fact that many more men than women occupy higher paid jobs in London, with men outnumbering women as pay rises. Recent research into women's presence in the boardroom has underlined the scale of under-representation: a Guardian survey reported there were only 16 women executives out of 527 in the top 100 companies (an increase in only four from 12 months earlier). As the same report highlighted when it looked at pay, the gender pay gap is not just due to the glass ceiling: the earnings of the highest paid female executive, Marjorie Scardino, were 25 per cent below the average for FTSE 100 executives⁹ and the Green Paper avoids consideration of the kind of firm positive action measures that have been introduced in other countries, such as Norway, to address under-representation of women in business. Research for the Mayor has revealed the same pattern. The gender pay gap is widest among high earners: a 32 per cent gap between men and women in the top 10 per cent of earners.¹⁰ Of course, few women make it to the highest pay grades: women outnumber men among the low paid, whereas men increasingly outnumber women as the pay scale rises. The gap in average hourly pay between men working full-time and women working part-time in London is 44 per cent.
- The need for improved anti-race discrimination law, better enforcement and much stronger tools to monitor and intervene is reflected in the statistics of inequality. Black and minority ethnic men in London are less likely to be in employment than white British males: the employment rate for black, Asian and minority ethnic (BAME) Londoners is 58 per cent, compared to 75 per cent of white Londoners.¹¹ There is a marked pay gap by ethnicity: in London on average BAME employees earn £9.43 per hour, compared with £11.93 per hour for white groups. Overall 30 per cent of BAME employees earn less than £7 per hour, compared with less than 18 per cent of white groups.¹² Nationally, a recent review¹³ identified that risks of poverty are highest for Bangladeshis, Pakistanis and black Africans, but are also above average for Caribbean, Indian and Chinese people. Muslims face much higher poverty risks than other faith groups. In London, certain groups of children are at particular risk of living in poverty, such as black, Pakistani and Bangladeshi children, those in families with a disabled parent and refugee and asylum-seeking children. Forty-one per cent of children in London – over 650,000 children – live under the poverty line (after taking housing costs into account) compared with 28 per cent of children in the UK as a whole. But this rises to 69 per cent of Pakistani and Bangladeshi groups.¹⁴
- Discrimination in education needs to be better tackled and communities empowered to act against unfair treatment. Young black people in London are more likely than the general population to have a history of poor educational outcomes. In London, in 2003, 32.2 per cent of black Caribbean pupils, 34.5 per cent of 'black other' pupils and 43.6 per cent of black African pupils achieved 5 or more GCSE Grades A*-C compared with an average for all pupils of 50.2 per cent. Evidence suggests that inequalities in attainment by black Caribbean

⁹ Women bosses left behind by men's pay, Guardian, 29 August 2007

¹⁰ Women in London's Economy, 2007, Mayor of London and GLA Economics

¹¹ Londoners and the labour market: key facts, GLA DMAG, October 2006

¹² Annual Population Survey 2004

¹³ Poverty and ethnicity in the UK, L. Platt, Joseph Rowntree Foundation/The Policy Press, April 2007

¹⁴ State of London Children report 2007, GLA

pupils increase as they move through the school system. Young black people are more likely than other ethnic groups to be permanently excluded: while London has lower exclusion rates for black pupils than most other regions, its black pupils are still twice as likely as its white pupils to be excluded. Contributory factors – which can be addressed by the Discrimination Law Review – are teacher expectation, institutional racism, socio-economic disadvantage and the low proportion of black teachers: seven per cent of teachers in London are black.¹⁵

- A recent parliamentary report confirmed that young black people are also over-represented in the criminal justice system, representing 2.7 per cent of the population aged 10–17, but 8.5 per cent of those of that age group arrested in England and Wales. As a group, they are more likely to be stopped and searched by the police, less likely to be given unconditional bail, more likely to be remanded in custody than white young offenders and likely to receive more punitive sentences than young white people.¹⁶ Adult black Londoners make up 10 per cent of London’s population but are 36 per cent of stop and searches, 32 per cent of arrests, 35 per cent of those in prison.
- Disabled people continue to face significant discrimination and inequality. Coverage of disability discrimination legislation is not comprehensive and disabled people find considerable difficulty in enforcing the legal rights that do exist. Disabled children continue to face severe discrimination: only 60 per cent of pupils with Special Educational Needs statements are placed in mainstream schools but in English special schools 61 per cent of pupils are not entered for any GCSE/GNVQs compared to four per cent of children in mainstream schools.¹⁷ Forty-five per cent of disabled people are in employment in London compared to 74 per cent of non-disabled people. Disabled people are under-represented in managerial, professional and technical occupations and over-represented in routine and elementary occupations.¹⁸
- The serious inequality that affects Muslim communities highlights the need for more comprehensive anti-discrimination protection on grounds of religion and belief. A significantly larger proportion of Muslim residents live in a socially deprived area than any other faith¹⁹ and Muslims have the lowest rates of employment and economic activity and the highest unemployment rates of all faith groups. Muslims aged 16–24 are achieving higher qualifications than older Muslims, yet younger Muslims in London still have lower levels of qualifications compared to their peers in the general population²⁰. Discrimination and hostility against Muslims – Islamophobia – has grown in recent years. Following the attacks of 9/11, in May 2002, the European Union Monitoring Centre for Racism and Xenophobia published a comprehensive study of Islamophobia in EU member states, which confirmed the scale of verbal and other forms of abuse and attacks experienced by Muslims. This is an issue that directly impacts on the lives of a large section of London’s population: 607,000 people in London (8.5 per cent), identified as Muslim at the time of the last Census. Sections of the media spread prejudicial attitudes about religious or ethnic minority groups with apparent impunity. Peaks in anti-Muslim prejudice have been reflected in rises in reported faith hate crimes.²¹

¹⁵ Black Teachers in London, Mayor of London, September 2006

¹⁶ Young Black People and the Criminal Justice System, Home Affairs Select Committee, June 2007

¹⁷ cited in *Disablist Britain*, Demos/Scope, 2006

¹⁸ Disabled people and the labour market in London: Key facts, Analysis of the 2005 Annual Population Survey DMAG Briefing 2007–05 March 2007

¹⁹ Home Office Citizenship Survey 2001

²⁰ Muslims in London, GLA, October 2006

²¹ Muslims in London, GLA, October 2006

Protection from the law against discrimination on the grounds of religion and belief is more limited than on certain other grounds and the criminal law on religious hatred contains a higher standard of proof than similar law on race hatred.²² The Discrimination Law Review is an important opportunity to improve the deficiencies in anti-discrimination protection on grounds of religion and belief. In order to defend the right to freedom of religious and cultural expression and assert the value of multiculturalism, in June 2007 the Mayor, with others, established a 'Coalition to defend freedom of religious and cultural expression'. The Mayor asserted the importance of multiculturalism and noted that media and other claims that different communities and faith groups openly expressing their culture or faith threaten community relations in Britain, had most recently been directed at the Muslim community, but was also directed at other faiths.²³

- Despite important positive changes in recent years, equality law still does not adequately protect against lesbian and gay people against discrimination. Research carried out by the University of Cardiff (for Stonewall) in 2004 found that one in five workers still felt unable to reveal their sexual orientation, despite the introduction of the Employment Equality (Sexual Orientation) Regulations 2003. Trade unions such as Unison point out that members still report high levels of workplace discrimination. Research for Stonewall also showed homophobic bullying to be widespread in schools, including significant bullying by teachers and other adults and a widespread failure to combat homophobia.²⁴ Few service providers consider the needs of lesbian, gay and bisexual service users. The positive duties to promote equality in the public sector do not extend to sexual orientation (or to religion and age).
- Research suggests there are 5,000 trans people in Britain. Individual daily experience can include extreme prejudice and discrimination, taking many forms. Anti-discrimination is not comprehensive. Furthermore, research indicates that the restrictive and medically based legal definition excludes 38 per cent of this community from having such rights as do exist.²⁵
- Age discrimination legislation does not cover provision of goods and services, allowing ageism in the provision of health care, insurance and other parts of life to persist. Research published in June 2007 drew attention to the scale of elder abuse and the need for action. Age Concern believe that people over 55 are almost twice as likely to suffer age discrimination more than other forms of discrimination and one-third of people thought that those over 70 are typically viewed as 'incompetent and incapable'.²⁶ The Mayor believes that protection against age discrimination must be comprehensive, including through extension of the public sector duty and protection against discrimination in goods, services and facilities.
- Discrimination legislation does not cover carers as such, yet the disadvantage they experience is systemic. From April 2007 the DTI Regulation on Flexible Working extends the right to request flexible working to carers – but only of close relatives or people living in the same house, not for wider family members, friends and neighbours. Many carers continue to have difficulty combining caring with employment and need to work part-time: even if rights to request flexible working were extended, they may not 'fit' carers needs, which often involve having flexibility to change or organize time off at short notice. If employers were required to consider 'reasonable adjustments' for carers it may result in arrangements that

²² Racial and Religious Hatred Act 2006

²³ www.london.gov.uk

²⁴ The School Report: experiences of young gay people in Britain's schools, Stonewall, 2007.

²⁵ Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination, research for the Equalities Review

²⁶ How Ageist is Britain?, 2005.

www.ageconcern.org.uk/AgeConcern/3DE4E64AB5874330A11C1AB7790587BC.asp

would avoid carers being forced out of employment, losing income and potentially becoming socially isolated, and would involve the loss of their contribution to the economy. In London there are also fewer part-time job opportunities in general, meaning that the right to flexible working rights and other ways of adjusting economic and social demands to carers' needs can be even more important. While carers on low incomes can claim a carer's allowance (which is less than £49 per week) if providing care for 35 hours or more, this is set against any other income related benefits and London's higher living costs are not reflected.

Response to the consultation questions as set out in the Green Paper, A Framework for Fairness

Chapter 1: Simplifying Definitions, Tests and Exceptions and promoting compliance

Q1: Do you have any comments on our intention to keep the existing requirement for a comparator in direct discrimination claims?

- 1.1 The Mayor regards the requirement that there be an identified (real or hypothetical) comparator in direct discrimination claims to be unnecessarily burdensome and does not support the proposal to retain this requirement. The formal requirement implicit in the test of direct discrimination, that a comparator be identified (or in the case of a hypothetical comparator that it be constructed) is confusing and complex.²⁷ The comparator requirement has resulted in a voluminous quantity of complex case law much of which, in the end, recognises that the key test required for direct discrimination is that the treatment complained of be on the prohibited ground. For example in the case of pregnancy discrimination, and in the case of *Shamoon v RUC*. In the latter case, the House of Lords sought to clarify that finding a real or hypothetical comparator is not a necessary pre-condition for establishing less favourable treatment, since in some cases where no such comparator can be identified there is other evidence pointing to why the person received less favourable treatment. A hypothetical comparator can then be developed as further evidence of the less favourable treatment on the particular ground or combination of grounds.
- 1.2 The requirement fails to address grounds-specific treatment – that is where the treatment is solely connected to and specific to one protected class, such as in the case of gender or race specific discrimination – and militates against a just result where one is faced with an all female workforce or a workforce that is primarily composed of one of the protected classes. The consultation paper is contradictory on this point as it elsewhere proposes (1.62) that the comparator requirement which presently exists for complaints of victimisation be repealed. The Mayor considers that direct discrimination should be based on the harm to the person concerned on one or more of the protected grounds and thus believes that the comparator requirement for direct discrimination should be removed.
- 1.3 If the comparator requirement was to be retained, the consultation paper is unclear regarding the form in which it would be stated in the Single Equality Bill. Existing UK legislation includes varying formulations in respect of a comparator. The Mayor would want UK legislation to be consistent with the European anti-discrimination directives as a minimum. These define direct discrimination as occurring when one person is treated less favourably than another is, has been or would be treated in a comparable situation on the

²⁷ Currently the Race Relations Act 1976 (RRA), Sex Discrimination Act 1975 (SDA) A, the Employment Equality (Religion or Belief) Regulations 2003 (RB Regulations), the Employment Equality (Sexual Orientation) Regulations 2003 (SO Regulations) and the Employment Equality (Age) Regulations 2006 (Age Regulations) define direct discrimination as that a person A treats another B 'less favourably' on one of the protected grounds or, in the SDA, 'on grounds of her sex' and in the Age Regulations 'on grounds of his age'. A further provision in each of the above ties 'less favourable treatment' to a strict actual comparison. For example s.3(4) of the RRA states that a comparison of the cases of persons of different racial groups "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other". However, in the Equality Act 2006 direct discrimination on grounds of religion or belief outside the field of employment is defined as "A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances)".

relevant ground. The requirement for a comparator should not make it difficult or impossible for a victim of direct multiple/intersectional discrimination to bring her/his experience within the definition of direct discrimination in a Single Equality Act.

- 1.4 The Mayor is concerned that complaints of direct discrimination on multiple/intersectional grounds are not excluded by too rigid a requirement for a comparator. In the absence of a clearly stated proposal in the Green Paper, the GLA submits that the definition of direct discrimination as '*less favourable treatment on ...[the specified ground(s)]*' is sufficient to indicate to all parties what is at issue. There is no need for further amplification of 'comparison' in a Single Equality Act, as is currently found, for example, in s 3(4) RRA and s.5(3) SDA.
- 1.5 The Mayor recommends that the emphasis on finding a comparator can be further reduced – in order to focus on the entirety of the evidence – and the definition of direct discrimination made more obviously amenable to multiple/intersectional discrimination, by removing the words 'treats or' so that the definition would read '*on, [the specified ground or combination of grounds] a person A treats another person B less favourably than A would treat other persons*'. Of course, where B could show an actual comparator that would be compelling evidence of direct discrimination.

Q2: Do you have any comments on our proposal to replace the separate definitions of discrimination in Part 3 of the Disability Discrimination Act with a single definition?

- 2.1 The Mayor supports the proposal as far as it goes. However, the Mayor also believes that more could usefully be done to simplify the definition of disability discrimination. At present direct disability discrimination is only prohibited in relation to employment and vocational training. The Mayor supports the proposal of the Disability Rights Commission that direct disability discrimination outside the employment area should be a stand-alone unlawful act, with a single definition. The Mayor agrees that this would make the Disability Discrimination Act much simpler to understand, and the principle that direct discrimination in any field should not be acceptable is an important one.
- 2.2 The Mayor supports the social model of disability and believes that it would have been more productive for the Discrimination Law Review to include a consultation on a more substantive legal shift than that proposed here. The Mayor's view on this is set out in section 1.

Q3: Do you agree that we should largely keep the existing approach in relation to discrimination on the basis of perception and association, except for an extension to protection against discrimination on the grounds of association with transsexual people?

- 3.1 No. The Mayor believes the proposal is too limited and that the Discrimination Law Review should reconsider the case for extending rights against discrimination on the basis of perception and association more widely.
- 3.2 Protection against discrimination on the basis of perception and association currently applies in relation to the grounds of race, religion and belief and sexual orientation, as well as perceived age.
- 3.3 However, protection against disability discrimination is limited to people who are 'disabled' – that is, who can bring themselves within the definition of 'disabled person' in

the Disability Discrimination Act. Question 3 proposes to retain this more limited protection. This means that people who suffer discrimination because they are perceived to be disabled and friends, family or carers of disabled people who are discriminated against because of their association with a disabled person have no legal protection. The Mayor considers this to be unjustified and is in favour of extending to the law on perception and association so that all these people are protected.

- 3.4 The Green Paper argues that extending such protection is not ‘a proportionate approach’, although it offers no evidence to substantiate this view nor does it explain why protection is considered proportionate on all the other grounds already existing as well as the proposed extension to cover transsexual people, yet not on the grounds of disability. The protection for people who are perceived to be disabled or who associate with disabled people should be in line with that under other grounds and would provide for equal treatment and protection against harassment, not reasonable adjustments. The Mayor believes that in any case such a change is required under the European Employment Framework Directive, since it requires protection against any discrimination ‘on the grounds of’ disability. The Green Paper says it will take into account the outcome of a referral that has been made to the European Court of Justice on this issue²⁸, but the clear suggestion is that there will be no action if the outcome does not favour the carer, in this case, who alleges discrimination because of her association with a disabled child.
- 3.5 The Mayor disagrees with the proposal not to extend protection to people on grounds of association with age. The Green Paper (1.25) states that, ‘*extending the definition to include association could potentially bring in parents, carers, teachers, dependents... taking the legislation*’²⁹ beyond its intended scope. Of course, the Green Paper (in Chapter 8) opposes a non-discrimination right for carers. Yet it provides no substantial argument here as to why those discriminated against on the basis of their association with older people should not have the protection of the law.
- 3.6 The Mayor notes that major organisations lobbying for the rights of older people (e.g. Help the Aged) support the extension of protection against discrimination to cover age (as well as disability). Older carers themselves are likely to suffer multiple disadvantage, on grounds of their own age and because of their association with older people and disabled people. One third of carers are aged over 65 and carers are more likely to find themselves having to give up paid employment early – particularly just before retirement – because of caring demands. The Mayor’s views with regard to carers are further set out in response to question 55 (8.55).
- 3.7 With regard to transsexual people, the Mayor welcomes the proposal to extend protection to prohibit discrimination on the basis of association with transsexual people but strongly opposes the proposal not to extend protection to extend protection on the basis of perceived gender reassignment. The Green Paper is gratuitously offensive, saying that such protection would ‘*have the effect of extending protection to people who choose to adopt the appearance of the opposite sex on a temporary basis as a matter of a lifestyle choice*’ (1.24). As barrister Karon Monaghan explained at a consultation event hosted by the Mayor,³⁰ this amounts to, ‘*So long as you conform to your socially determined gender stereotype the law will protect you. If you depart from that, our equality laws won’t.*’ A speaker from the audience at the same event stated, ‘*40 per cent of transsexuals attempt suicide. That’s the extent of lifestyle choice.*’

²⁸ Coleman v Attridge Law, Disability Rights Commission supported case currently before the ECJ

²⁹ The Employment Equality (Age) Regulations

³⁰ Mayor of London consultation event on the Discrimination Law Review Green Paper, 27 June 2007

- 3.8 This opposition to extending protection against discrimination to those perceived to be transsexual stems from problems inherent in the current legal definition of 'transsexual'. This definition is strictly medically rooted. It means that only those trans people undergoing or have undergone gender reassignment, defined as 'medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex' are legally protected. All other trans people are unprotected, such as people who choose not to have gender reassignment thus defined or anyone who experiences discrimination on the basis of their actual or perceived gender expression. An adequate definition would protect those who experienced discrimination – putting the focus rightly on the discrimination rather than conformity with a particular form of medical and surgical treatment. Research undertaken for the Equalities Review stated that 38 per cent of the sample fell outside of the current restrictive legal definition.³¹
- 3.9 In essence, the Green Paper proposes on the issue of discrimination on the basis of perception and association to legislate for continued inequality and discrimination.
- 3.10 Therefore the Mayor does not agree with Question 3 and instead proposes the approach be strengthened by incorporating the changes set out above.

Q4: Do you agree with our proposal to extend indirect discrimination to cover gender reassignment but not explicitly introduce it to disability discrimination law?

- 4.1 No. The Mayor instead believes that the absence of protection against indirect discrimination for disabled people is not adequately covered by the existing provision for reasonable adjustments and proposes that the Discrimination Law Review reconsiders this issue. The Mayor supports the current legislation against disability discrimination and the requirement for reasonable adjustments but argues that this provision is too individualised to deal with, and indeed proactively address, systemic discrimination. The Green Paper is correct to say that 'reasonable adjustments' requirements 'can' help to address group disadvantage – but often they do not do so and also do not lead employers to pre-empt the barriers that may exist to groups of disabled people. The effect of indirect discrimination provisions in law is to encourage employers to examine their practices to ensure they do not inadvertently discriminate against particular groups. Such provision does not exist with regard to disability and is not covered by the institutional, often after the fact, requirement for reasonable adjustments. The Mayor notes the Disability Rights Commission's proposal for a new 'proactive duty on employers to consider reasonable adjustments that may be required by disabled applicants or employees, similar to that which already applies in relation to service delivery and education'.³² The latter requires service providers to think in advance about what reasonable adjustments could be made to remove barriers that may confront disabled customers: this is needed in relation to employment.
- 4.2 If the Discrimination Law Review does not adopt this proposal for a 'proactive duty' then another method for the same result would be to ensure that in any response to question 5, there is inclusion of indirect discrimination on grounds of disability within the legal framework. The Mayor considers these two alternative ways to the same end of ensuring that practices and policies do not inadvertently discriminate against groups of people. Indirect discrimination on grounds of disability could apply to provisions, criteria or practices that are likely to disadvantage people with particular disabilities, for example a

³¹ Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination

³² Briefing on Discrimination Law Review, Disability Rights Commission, 2007

new requirement that all staff recruited or promoted to senior grades in the future must hold a valid driving licence.

- 4.3 With regard to extending indirect discrimination to cover gender reassignment, the Mayor supports this proposal but believes its impact will be limited as a result of the overly narrow legal definition.

Q5: Do you agree with our proposal to harmonise the definition of indirect discrimination where this applies across the protected grounds?

- 5.1 The Mayor agrees that the same definition of indirect discrimination should apply across all of the protected grounds, but it is essential that the definition should be one that fully conforms with the definition of indirect discrimination in the European Directives. The proposals in the consultation document would achieve harmonisation but would still leave the legislation in the UK deficient in terms of giving full effect to the relevant European Directives.
- 5.2 The Race Directive, the Employment Framework Directive, the Amended Equal Treatment Directive and the Gender Goods and Services Directive define indirect discrimination as occurring *‘where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin/having a particular religion or belief, particular disability, a particular age or a particular sexual orientation/one sex at a particular disadvantage compared with other persons/persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’*.
- 5.3 As is very plain, the definition in the Directives can be applied prospectively – a new rule or policy that has been announced but not yet applied could, with relevant evidence, be challenged *before* it comes into operation.
- 5.4 It is not clear, however, what definition the Government is recommending for all grounds and all areas as recent legislation includes two different definitions. The following definition is now contained in the RRA, SDA, RB Regulations, SO Regulations and Age Regulations:

‘A discriminates against B if A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same ... As B, but
(a) which puts or would put persons of the same ... as B at a particular disadvantage when compared with other persons, and
(b) which puts B at that disadvantage, and
(c) which A cannot show to be a proportionate means of achieving a legitimate aim.’

- 5.5 In Part 2 of the Equality Act 2006 (s.45(3)) and in the Equality Act (Sexual Orientation) Regulations 2007(Reg. 3(3)) indirect discrimination is defined as follows:

‘A person (‘A’) discriminates against another (‘B’) if A applies to B a provision, criterion or practice –
(a) which he applies or would apply equally to persons not of B’s ...
(b) which puts persons of B’s ... at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances)
(c) which puts B at a disadvantage compared to some or all persons who are not of his ... (where there is no material difference in the relevant circumstances), and
(d) which A cannot reasonably justify by reference to matters other than B’s ...’

5.6 As stated above, the definition in the Directives would enable individuals or groups of individuals to challenge a potentially discriminatory policy when it was announced rather than wait until s/he or they had been adversely affected. For example, if a local authority announced new criteria for allocation of social housing that will disadvantage families with more than 3 children, and a disproportionate number of such families in the authority's area are from ethnic minority communities, under the Directive's definition this policy could be challenged when it was announced. Under either of the current UK definitions it could only be challenged when it came into operation and one or more ethnic minority families with more than 3 children were informed of their new lower priority – and longer wait – for social housing. Similarly, if a large company announced that it was intending to recruit all senior staff from recent Oxbridge graduates – which would disadvantage older people and very probably people from ethnic minorities – the definition of indirect discrimination in the Single Equality Act should enable such a selection criterion to be challenged before affected groups are denied these employment opportunities.

Q6: Do you agree with our proposal to harmonise the objective justification test?

- 6.1 Yes. The Mayor agrees that the test for objective justification for indirect discrimination should be harmonised for all grounds and all activities within the scope of the Single Equality Act. However, the issue again is that the test must be of an appropriate standard, particularly by ensuring that the requirements of the European anti-discrimination are met.
- 6.2 Currently there are at least three different tests in British law:
- a. The RRA and the SDA, before being partially amended to comply with relevant European Directives, provided that an indirectly discriminatory requirement or condition is unlawful if the discriminator cannot show it is '*... justifiable irrespective of the colour, race, nationality or ethnic or national origins/sex of the person to whom it is applied*'.
 - b. Amendments to the RRA and SDA and the RB Regulations, SO Regulations and Age Regulations, giving effect to European directives, make the objective justification test that the provision, criterion or practice is '*a proportionate means of achieving a legitimate aim*'.
 - c. A different test is used in Part 2 of the Equality Act in relation to religion or belief, and the Equality Act (Sexual Orientation) Regulations 2007 which provide protection against discrimination in access to goods, facilities and services, education, disposal of premises and functions of public authorities. Under these measures an indirectly discriminatory provision, criterion or practice is unlawful if it the alleged discriminator A '*cannot reasonably justify [it] by reference to matters other than B's religion or belief/sexual orientation*'.
- 6.3 The Mayor would wish to see the test more fully reflect the test set out in the European anti-discrimination directives: '*unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*'.
- 6.4 The Green Paper restates the view expressed during the introduction of secondary legislation to transpose the Directives that the words '*proportionate means of achieving a legitimate aim*' carry the same meaning as the above words in the Directives. If this is the

case there should be no difficulty in simply making what would be a technical change and using the wording as in the Directives. The Mayor considers that the words in the Directives convey a clearer message both to potential discriminators and to those who will seek to challenge a provision, criterion or practice. It requires the alleged discriminator firstly to show that the provision, criterion or practice has a legitimate aim; if it does not it would be unlawful. If it does, then the alleged discriminator must show that it is appropriate in the particular circumstances. If not, then it would be unlawful. And if it is an appropriate means of achieving a legitimate aim, s/he must then show that it is necessary, that is, are there other means of achieving that aim that do not disadvantage the group in question?

- 6.5 The Mayor submits that the formulation in the Directives accurately puts into statutory form the approach of the European Court of Justice and UK courts in cases of indirect discrimination. Additionally, this formulation is likely to be more helpful to employers, public authorities and public and private providers of goods and services who would seek to avoid practices that are discriminatory. Using dress codes as a simple example, a dress code requiring all staff to wear standard form of headgear would disadvantage members of particular racial and religious groups, for example Sikh men and Muslim women. A uniform could be justified as having a legitimate aim in terms of identification by customers, creating sense of staff unity, etc. and depending on the nature of the enterprise it may be said to be appropriate to have a uniform including headgear. However, the aim could equally well be achieved by modifying the standard headgear requirement permitting Sikh men to wear a turban of the same colour with the same insignia and Muslim women to wear a hijab of the same colour and insignia.

Q7: Do you agree that there should be a single test of objective justification for disability discrimination in employment and vocational training, goods, facilities and services, housing, education, private clubs and public functions?

- 7.1 Yes. This change will increase consistency between grounds and between law covering employment and services. Not providing for a single test of objective justification would continue to allow room for confusion and allow service providers to technically justify discrimination even where a court judges differently.
- 7.2 Currently less favourable treatment in the areas of employment and education can be justified if the reason for the treatment is 'material to the circumstances of the particular case and substantial'. In the areas of goods and services, housing, private clubs, public functions and transport, the law allows justifications both for less favourable treatment and for failure to make a reasonable adjustment where a reasonable opinion is held that one of the justifications applies. This is the case even if it can be shown that the belief was mistaken at the time. The proposal in the Green Paper is to replace the different justification tests that currently apply in relation to disability discrimination with the one that applies to indirect discrimination in relation to other grounds. Therefore, the conduct in question is a proportionate means of achieving a legitimate aim. In employment, education and vocational training, an objective justification test would provide a higher threshold than the current test, under which it is too easy for employers to evade responsibility for what would otherwise constitute discriminatory actions.

Q8: Do you have any comments on our proposal to establish a single threshold for the point at which the duty to make adjustments is triggered?

8.1 The Mayor supports the proposal for a single threshold at which the duty to make reasonable adjustments is triggered. There is no good reason for any difference to exist. When a disabled person experiences ‘substantial disadvantage’ there should be a duty to make an adjustment and this should be consistent across the equality strands. A single threshold will make it clearer to all what rights and duties pertain under legislation.

Q9: Do you agree that the approach to victimisation in discrimination law should be aligned with the employment law approach?

9.1 Yes. The Mayor believes the approach to victimisation should be aligned with the employment law approach and welcomes the proposal to remove the requirement for a comparator for victimisation in discrimination law. The need to identify an appropriate comparator in a victimisation complaint has been a major barrier. The Mayor further submits that a new definition should apply across the full scope of the Single Equality Act, not simply to victimisation in employment complaints.

9.2 The need to identify an appropriate comparator in a victimisation complaint has been a major barrier, leading to fewer claims and even fewer successful claims. Surveys have consistently shown that victims of discrimination and harassment do not complain because they are not prepared to risk the victimisation that they (reasonably) anticipate will follow. They fear that the discrimination or harassment will become worse or that they will lose prospects of promotion or lose their jobs altogether. Without effective protection against victimisation, whereby victims feel able to complain and seek redress, even the best anti-discrimination legislation has little value.

9.3 The Mayor notes that the DLR appears not to have considered whether there are further ways in which a complainant or a person supporting a complainant can be protected against victimisation before it occurs. Again this is what is envisaged in the European Directives. For example Article 9 of the Race Directive, which requires Member States to *‘introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment’*.

9.4 One way of realising this would be for Employment Tribunals to have powers to issue injunctions at the commencement of proceedings, preventing any adverse treatment of complainants and/or any other persons needing such protection. However, this is not raised or consulted on by the Green Paper. The Mayor believes this simple but powerful measure should be considered in future stages towards a Single Equality Act.

Q10: Do you agree that a genuine occupational requirement test should be introduced for all grounds of discrimination, with the exception of disability (where it is not necessary)?

10.1 Yes the Mayor agrees with this proposal. The UK introduced a Genuine Occupational Requirement (GOR) test into some, but not all, anti-discrimination legislation to comply with European directives. This limited the scope for discrimination in employment to instances that met a GOR test (or, in the Employment Framework Directive, a second test that applies to occupation within religious organisations or organisations whose ethos is

based on religion or belief). The CRE, in its Third Review of the RRA in 1998, recommended a form of GOR to replace the list of 4 specific types of occupation within s.5 RRA. The RRA (Amendment) Regulations 2003 have achieved this for grounds of race and ethnic or national origins. Because of the way in which the Race Directive was transposed, leaving the RRA almost incomprehensible to most people, the four exceptions in s.5(2) continue to apply for grounds of colour and nationality. There is no rationale for this anomaly to be continued.

- 10.2 A similar GOR is contained in the European Amended Equal Treatment Directive. However, in transposing that Directive the Government appears not to have seen the need to make many significant changes to s.7, 7A and 7B of the SDA which provide categories of occupations in which discrimination on grounds of sex or gender reassignment is lawful. The Mayor recommends that these exceptions should be replaced by a GOR.

Q11: Do you think there is a need to retain any of the genuine occupational qualifications listed in the Sex Discrimination and Race Relations Acts?

- 11.1 No. As stated above (reply to Q10), the genuine occupational qualifications (GOQs) within s.5(2) of the RRA remain in place, permitting discrimination on grounds of colour and nationality, solely because the RRA (Amendment) Regulations 2003 applied only to grounds of race and ethnic and national origins. There is no reason for these exceptions to be retained.
- 11.2 The GOQs within the SDA permit jobs to be restricted to persons of one sex, including for reasons of physiology, authenticity, decency or privacy, or jobs involving physical or social contact, living or working in single sex institutions, providing personal services or being one of two jobs to be held by a married couple. Supplementary GOQs permit jobs to be restricted to persons not undergoing or not having undergone gender reassignment.
- 11.3 The Mayor submits that if any of the existing GOQs in the RRA or SDA cannot meet the rigorous test of the GOR – that having regard to the nature of the employment or the context in which it is being carried out, being of a particular race, colour, nationality, ethnic or national origins or sex, or not being a person who intends to undergo gender reassignment, is undergoing or has undergone gender reassignment, is a genuine and determining occupational requirement and it is proportionate to apply that requirement in the particular case – then it should not continue to form part of anti-discrimination legislation; and if it does meet this test then it can properly be replaced by the GOR. The GOR has the advantage of being able to meet new types of occupational situations without the need for amendment to the legislation.

Q12: Do you support or oppose the introduction of a genuine service requirement test for differentiation in the provision of goods, facilities or services, housing and the exercise of public functions?

- 12.1 No. The Mayor does not agree with the introduction of a genuine service requirement (GSR) as proposed in the Green Paper.
- 12.2 The Mayor rejects the possibility suggested in the Green Paper that the Single Equality Act should contain a combination of a genuine services requirement (GSR) and a list of specific statutory exceptions. This could be seen as an ever-widening door to discrimination, which would be contrary to the important principle that new legislation must not be used to reduce existing protections against discrimination.

- 12.3 The main argument against a GSR in the form proposed in the Green Paper is that, in effect, it would operate as a means to justify direct discrimination, which, other than for age discrimination, has never been part of UK legislation. By permitting discrimination which until now has been outlawed, or which has more recently been outlawed to comply with European law, it could put the UK in breach of the European Race Directive which does not allow any justification for direct discrimination outside the field of employment.
- 12.4 As this submission sets out in greater detail later (in response to questions in Chapter 4), the Single Equality Act should contain a new wider scope for positive action measures: that is, measures to prevent or compensate for disadvantage or to meet special needs linked to one or more of the protected grounds. A strong commitment to positive action to help achieve substantive equality is a second pre-condition for the Mayor's proposal in response to this question.
- 12.5 The Mayor's response to this issue is predicated on there being a clear purpose clause in the Single Equality Act which could clearly state the purpose and principles that underpin the legislation as a whole. Such a purpose clause – spelling out the equality and anti-discrimination purposes of the legislation – could potentially provide a base for a generic formula in the Act which, like the GOR for employment, could define the circumstances in which discrimination outside the field of employment would be lawful.
- 12.6 The Mayor proposes that there should be a generic justification test for an exception to the principle of non-discrimination which is based on positive action objectives – to prevent or compensate for disadvantages or to meet special needs linked to one or more of the protected grounds – or to protect human dignity, derived from the purpose clause. This test could remove the need for a list of statutory exceptions, leaving only those such as national security or judicial functions or competitive sport – that is, those that have a legitimate aim going beyond the scope of anti-discrimination laws. In all other circumstances, any person who considers that differential treatment should be applied could only do so if the discrimination met this test: will it, for one or more protected groups, prevent or compensate for disadvantage, meet special needs or protect human dignity. In contrast to the GSR proposed in the Green Paper, this approach would not permit any reduction in protection and would avoid maintaining specific exceptions that cease to be appropriate.
- 12.7 A benefit of this proposed generic exception is that it would reduce the potential length and complexity of the Single Equality Act, since the current very long list of proposed exceptions would no longer be required. It would also improve the flexibility of legislation and reduce need for subsequent amendment by reducing the need to update a list of specific exceptions which will inevitably become out of date at some future date.
- 12.8 The Mayor notes that the European Gender Goods and Services Directive does include a GSR, with a test that would be easier to satisfy than the model described above. Under Article 4(5) differences of treatment could be permitted 'if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The Mayor is concerned that this would permit direct discrimination on grounds of sex, in the provision of goods and services to the public, to be justified. The Mayor notes that the draft regulations intended to transpose this directive – the draft SDA 1975 (Amendment) Regulations 2007 – do not include a GSR. In fact, to give effect to the Directive, the Government has needed to remove or modify some of the existing specific exceptions in the SDA that apply to goods and services.

- 12.9 Legislation outlawing discrimination on grounds of religion or belief and sexual orientation in access to or provision of goods, facilities and services, housing, education and public functions is very new. A GSR along the lines suggested in the Green Paper could be interpreted (and used) as an invitation to find a way to justify discrimination. It is therefore essential that a generic formula along the lines described above – which strictly limits exceptions to those that overcome, rather than perpetuate, discrimination – should be adopted.
- 12.10 Should the Government fail to agree to a purpose clause to be in the Single Equality Act and/or fail to provide a wide scope for positive action, then the scheme for a generic justification test for exceptions described above would be at risk of becoming a shorthand for permitting justification of direct discrimination and therefore the proposed scheme should not be pursued. If the primary legislation lacks a purpose clause, then the more appropriate course will be to continue to have a list of specific exceptions that have been rigorously screened to ensure that each meets a legitimate aim and is appropriate and necessary.
- 12.11 The GLA's response to questions 13, 14 and 15 are based on the continuation of selected specific exceptions.

Q13: Do you agree with the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate?

- 13.1 Yes. The Mayor agrees that where an exception applies to more than one protected ground a 'unified approach' should be applied. This is consistent with the general aim of greater simplicity in a Single Equality Act.
- 13.2 The Mayor notes that the Green Paper omits any reference to exceptions relating to enforcement and remedies. The Mayor recommends removal of the exception that prevents members of the armed forces to have direct access to the Employment Tribunal if they have a complaint of unlawful discrimination or harassment as currently contained in the RRA, SDA, SO Regulations and RB Regulations. The Mayor accepts that wherever possible an employee in the public or private sector should first raise her/his complaint internally. However, very often in cases of discrimination, and especially cases of harassment, the victim does not feel able to do so. The hierarchical structure of the armed forces can make an internal complaint of discrimination or harassment by a person of higher rank almost impossible to contemplate. The current restriction is likely therefore to operate as a significant deterrent to real access to justice for members of the armed forces. The Mayor welcomed the protection against discrimination in the armed forces on grounds of sexual orientation, after many years of struggle, and recommends that the Government should now remove any unnecessary barriers to challenging such discrimination if it occurs. The Mayor recommends that the similar exception in relation to qualifying bodies should also be removed.

Q14: Do you have any comments on our proposals for retaining the specific exceptions set out in Table 1 in Annex A?

- 14.1 The Mayor supports the basic aim of the DLR to simplify anti-discrimination legislation. Simplification will help everyone to understand their rights and obligations and will make it easier for the law to operate as it should. If legislation is to provide effective protection against discrimination, then any exceptions must be strictly limited and narrowly drawn.

The vast array of specific exceptions that currently apply are a daunting spectacle for all parties. Other than vague 'public policy reasons' and 'recent legislative exceptions' (1.80) the Green Paper does not indicate how the Government decided on the 51 categories of exceptions (many containing a number of specific provisions) listed in Annex A that they are proposing to retain nor the nine categories of exceptions they consider should be removed.

14.2 The Mayor submits that before an existing exception is included in proposed legislation the Government must test it to be satisfied that it is still relevant and, if so, whether its current form continues to be an appropriate and necessary exception to the principle of non-discrimination. Any exception that does not meet this test should not be retained. For any exception that is retained, the Mayor recommends that the Single Equality Act should require that on each occasion it is proposed to be used it is shown to be a proportionate means of achieving a legitimate aim. This test will in future apply to various exceptions in the SDA under the Draft SDA 1975 (Amendment) Regulations 2007.

14.3 Further, the Mayor submits the following points:

a) **The ending of the situation whereby anti-discrimination law takes second place to many other laws, regulations and ministerial order:** The Mayor submits that as a general principle equality should come first. Only in entirely exceptional circumstances should other law take precedence over law against discrimination. This legalised discrimination is made possible by the fact that in each of the existing anti-discrimination laws (other than the Sexual Orientation Regulations and the Religion and Belief Regulations) there are provisions that permit acts of discrimination which are committed 'under statutory authority'. Amendments to s.41 RRA (required to comply with the Race Directive) have the effect of disapplying this exception in certain circumstances; however it continues to permit discrimination where bodies such as the police, prison service, local authorities are carrying out enforcement or control functions. The Draft SDA (Amendment) Regulations 2007 (to comply with the European Gender Goods and Services Directive) include amendment of the parallel provision in the SDA (s.51A) that will disapply this exception for the areas covered by the Directive. The European anti-discrimination directives require Member States to take necessary measures '*to ensure that...any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished*'. The Single Equality Act should be used to honour this obligation, removing these sweeping exceptions.

b) **Removing the exception in s.19D RRA that permits discrimination on grounds of ethnic or national origins or nationality in relation to important immigration control functions where this is carried out by a Minister of the Crown acting personally or by any other person acting under a relevant authorisation:** This significant exception was strongly criticised during all of the parliamentary debates on the Race Relations (Amendment) Act 2000, and, as a concession to those MPs and Peers who took great exception to what was seen as a licence to discriminate, the Government provided for a Race Monitor (s.19E) who was to monitor the effect of any authorisation on the operation of this exception. A number of successful legal challenges have somewhat narrowed the scope of ministerial authorisations.

Currently, the main ministerial authorisation is the Race Relations (Immigration and Asylum) Authorisation 2004 which permits discrimination on grounds of nationality in subjecting a person to more rigorous examination or detention, refusing leave to enter or imposing conditions or restrictions on temporary admission. The nationalities that may be discriminated against are set out in lists that are updated periodically and approved personally by the relevant minister. The authorisation provides as a condition for inclusion

on the list of nationalities that the minister is satisfied, on the basis of statistical evidence or intelligence or other information, that persons of the nationality in question are more likely to breach immigration laws or to receive adverse decisions.

As the Race Monitor observed over several reporting periods, there was a risk that officials were becoming case-hardened against nationalities on the minister's list. Once a ministerial authorisation had identified a particular nationality or ethnic group as warranting discriminatory treatment, then immigration officers and asylum caseworkers tended to find more reasons to be suspicious, leading to further authorisations permitting continued discrimination against certain nationalities. These forms of differential treatment are not the special humanitarian measures that were given as examples to MPs and Peers in support of this scheme of permitted discrimination when it was being debated. The Mayor is not aware of any evidence to support the need for this exception. If immigration officials were not permitted to discriminate but instead required to perform their functions carefully and professionally in relation to persons of all nationalities seeking to enter the UK the Mayor considers that the outcomes would be fairer and more rigorously and appropriately serve the objectives of immigration legislation. The Mayor supports removing this exception.

c) Removing exceptions in the Equality Act that permit discrimination on the grounds of religion or belief: The Equality Act 2006 was drafted and approved during periods of growing Islamophobia in the UK and it is therefore not surprising that the Equality Act 2006 reflected this negative trend. As an exception to the prohibition of discrimination by public authorities (in Part 2, s54 (4)(f) of the 2006 Act), there are detailed provisions permitting discrimination on grounds of religion or belief in decisions on entry clearance, leave to enter or remain in the UK or to cancel such leave on grounds that exclusion of the person from the UK is conducive to the public good. Discrimination on grounds of religion or belief is also permitted under s. 52(4)(g) in relation to decisions on entry clearance or leave to enter or remain in respect of a person holding a position in connection with a religion or belief, and that some religions or beliefs are not to be treated in the same way as certain other religions or beliefs or that the exclusion of the person from the UK is conducive to the public good. The Mayor submits that a decision as to whether the entry or presence of an individual in the UK is conducive to the public good should be based on the merits of his or her case and should not be tainted by permitted discrimination on grounds of his or her membership or lack of membership of a particular religion or belief. The Mayor recommends that this exception should be removed.

d) Removing exceptions in Reg. 3 of the Age Regulations that permit direct age discrimination to be justified subject to the same test – a proportionate means of achieving a legitimate aim – that is used to justify indirect discrimination: It is understood that the European Court of Justice (ECJ) will be asked to consider whether a more rigorous test should be required to justify direct age discrimination in the case of *Heyday v Secretary of State for Trade and Industry*, referred to the ECJ by the High Court. While this issue waits to be decided the definition of direct age discrimination in a new legislation should not be finalised. The Mayor believes that direct age discrimination should only be permitted extremely rarely, and the law should make clear that it is only capable of justification in exceptional circumstances, by means of a test that is more rigorous than that for indirect discrimination.

e) The removal of the exclusion of employment in the armed forces in the Disability Discrimination Act and the Age Regulations: The European Employment Framework Directive (Art. 3(4)) permits, but does not require, exemption of the armed forces on grounds of disability and age. However in the preamble (recital 18) it confirms that the principle of equal treatment under the Directive does not require the armed force,

police, prison or emergency services to recruit or retain persons 'who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services'. The Mayor is not persuaded that a blanket exclusion of protection against discrimination on grounds of disability and age would meet the GOR test. The Report of the Joint Parliamentary Committee on the Draft Disability Discrimination Bill, May 2004, recommended that legislation should provide for this exception to be removed. With regard to age, other than a minimum age for recruitment, the GLA can see no basis for legitimising age discrimination in the armed forces, assuming successful completion of recruitment and selection tests.

f) The removal of the current exemption of all air and maritime services from the provisions of the Disability Discrimination Act: This exemption permits significant discrimination against disabled people. According to the Disability Rights Commission (DRC) roughly 30 per cent of all transport related calls to the DRC Helpline involve air services. The vast majority cannot be tackled because they are out of the scope of the legislation. A survey of disabled travellers showed that that:

- 67 per cent of disabled people experienced difficulties with seating on board their flights;
- 61 per cent had difficulty boarding the flight;
- 37 per cent experienced negative attitudes from staff on board flights and at airports;
- 25 per cent said that booking was a problem; and
- 11 per cent had to cancel or delay a trip because of problems accessing a flight.³³

The introduction of an EU regulation on the rights of passengers with reduced mobility will only address some of these problems: however, for example, it will not provide for 'reasonable adjustment'. The Single Equality Act should ensure that disability discrimination on air and sea transportation is covered by the DDA.

g) Reviewing the large number of exceptions that permit discrimination on grounds of sex, gender re-assignment, sexual orientation as well as religion or belief in order to 'avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers': These should be separately reviewed to determine if they have a legitimate objective and, if so, if the means of achieving that objective are appropriate and necessary. Any which do not satisfy such a test should be removed, if necessary to be replaced with an exception that does meet this test.

h) Reviewing and amending the two exceptions within the RRA that treats the ground of colour differently from race, nationality, ethnicity or national origins: s.34 enables charities to confer benefits on a class of person defined otherwise than by reference to colour; s.26 enables an organisation whose main object is to enable the benefits of membership to be enjoyed by persons of a particular racial group defined otherwise than by reference to colour to discriminate on grounds other than colour in admitting or rejecting members, in affording access to benefits, facilities or services, or subjecting a member to any detriment. The Mayor recommends that in the Single Equality Act the exceptions in s.34 and s.26 RRA should be amended to remove the exclusion of 'colour' where reference to colour (i.e. 'black') includes reference to the positive action provisions in the Bill. This would allow an association to select members based on colour where the main object of the association was to prevent or compensate for disadvantage

³³ Now Boarding: disabled people's experiences of air travel, Leonard Cheshire, July 2007

or to meet special needs linked to colour. It could also mean that if one aim of a charity is to compensate for disadvantages or to meet appropriate special needs then it could define its beneficiaries by reference to colour. By linking any reference to colour to positive action only, it would be possible to permit charities and associations to benefit black people without opening the door to all-white organisations, such as white racist organisations that have nothing to do with addressing disadvantage.

i) Where specific exceptions have been removed from the RRA or SDA or DDA to comply with European Directives but remain in legislation that applies to other grounds, the Mayor recommends that such exceptions should be removed for all grounds.

j) **Seamen recruited abroad:** The exception in s.9 RRA now applies only to discrimination on grounds of nationality in relation to pay. It permits the continuing exploitation of non-EEA nationals. The Mayor considers this should be reviewed.

k) **Removal of the exception in s.75 (5)(a) RRA which applies to rules restricting employment in the civil service or prescribed public bodies to persons of particular birth, nationality, descent or residence:** Following the recent European Communities (Employment in the Civil Service) Order 2007 it is estimated that only 5 per cent of civil service posts will be reserved and limited to posts in the security and intelligence services, diplomatic service, posts whose functions involve access to intelligence or information from the security and intelligence service or other highly sensitive information and border and immigration control. The Mayor submits that the current scheme could be covered by the national security exception or a GOR, and recommends that this exception should be removed.

l) Comments on 'exceptions' for positive action and for measures to meet special needs are referred to in response to questions in Chapter 4.

Q15: Do you agree that the exceptions listed in Table 2 in Annex A should be removed?

15.1 The Mayor agrees that all but two of the exceptions in Table 2 should be removed, together with the additional other exceptions referred to above. These two are contained in the RRA s.6, 7(4) and 36 which are concerned with employment, where the purpose of the employment is to provide a person with skills *'which he appears to the employer to intend to exercise wholly outside Great Britain'* and the provision of education or training for persons not normally resident in Great Britain *'where it appears to [the provider] that the persons in question do not intend to remain in Great Britain after their period of education or training there'*. There are valid arguments in terms of foreign policy and international development to retain these exceptions on grounds of nationality. For example, this would enable a scheme to provide technical skills training for citizens of specified countries where there is reliable evidence that such skills are urgently needed in those countries.

Q16: Is there any need to return an exception to allow insurers to treat people differently on the grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008?

16.1 No. The Mayor opposes retaining the opt-out allowing insurers to treat people differently purely on the basis of their sexual orientation. It is highly objectionable that such

discrimination is still permitted; it should not be extended. The actuarial assessments referred to are based on stereotypes and would normally be considered contrary to non-discrimination: it is the essence of discrimination that people are penalised for their membership of a group of persons. The Green Paper notes that good practice from within the insurance industry does not favour such discrimination, with guidance from the Association of British Insurers (ABI) stating that insurers should not ask about an applicant's sexual orientation and HIV negative tests. The ABI argue that insurers should instead focus on assessing the risks that individuals are actually taking. It is also unclear why discrimination on the basis of sexual orientation (and gender) may be permissible when similar discrimination on the basis of race or religion are not allowed: there are health and life expectancy differences between certain ethnic or religious groups if a comparison is drawn. However, it is illegal for insurers to treat people differently purely on the basis of their race. Such generalised comparisons conceal root causes and contributory factors, such as of economic status, employment, nutrition, housing. Insurers should not be permitted to use membership of a social group in this way. This is as much the case with regard to sexual orientation (and gender) as on other grounds. The Mayor opposes any exception.

Chapter 2: Public Functions

Q17: Do you agree that there would be benefits in adopting a harmonised approach to the way goods, facilities and services and public functions provisions are structured across all protected grounds?

- 17.1 Yes, this will help ensure that the Single Equality Act is as simple and clear as possible to understand and comply with.
- 17.2 As the Green Paper indicates there are now two different ways in which 'goods, facilities and services' and 'public functions' are included within the scope of anti-discrimination legislation. In part this is a result of the relative dates when parliament chose to prohibit discrimination in the carrying out of public functions and in the provision of goods, facilities and services. It should be noted that for these purposes a public authority includes private and voluntary sector bodies when they are carrying out public functions. Many of these 'hybrid' public authorities also have functions that are not functions of a public nature, which could involve provision of goods, facilities or services, or management or disposal of premises or education, for example a private company that carries out a public function under a contract for the transport of prisoners but also provides a range of private transport services. It needs to be clear that any person carrying out functions of a public nature must not discriminate in doing so, regardless of the nature of those functions, and any person that is not a public authority must not discriminate in relation to specific activities such as providing goods, facilities or services.

Q18: Do you think the exceptions could be streamlined in this area or do you think that there are any exceptions that should apply to public authorities that it would not be appropriate to apply to the provision of goods, facilities or services by private bodies?

- 18.1 For the reasons set out above, the Mayor recommends that the Single Equality Act adopts the structure in the RRA, DDA and SDA, in which goods, facilities and services for public and private sector providers, as well as disposal and management of premises and

education, remain separate from other public functions. This would ensure that if specific exceptions continue to apply, rather than the generic justification for discrimination proposed under Q 12, any exceptions are linked to the activity to which they are relevant. If certain exceptions were to apply to all public functions, this could involve adding new exceptions in relation to discrimination on grounds of race, disability or sex, when goods, facilities and services are provided by public authorities, and would have the effect of reducing protection on those grounds contrary to the principle of non-regression.

- 18.2 There are a number of exceptions that are common to all of the provisions concerning public functions and some that, surprisingly, are unique. For example in Part 2 of the Equality Act 2006 prohibiting discrimination by public authorities on grounds of religion or belief there is an unexplained exception for local authorities exercising the power to promote well-being under the Local Government Act 2000 and exceptions relating to the curriculum of an educational institution, home to school transport and establishment, or alteration or closure of an educational institution. In Part 3 of the Equality Act 2006, prohibiting discrimination by public authorities on grounds of sex, there is a welcome positive action exception that is not included in Part 2 of the same Act or in the RRA, DDA or SDA for *'action taken for the purpose of assisting one sex to overcome – (a) a disadvantage (as compared with the other sex) or (b) the effects of discrimination'*.
- 18.3 The Mayor would expect a Single Equality Bill to adopt consistent exceptions for all grounds in relation to discrimination in carrying out public functions. As the GLA has sought to emphasise in questions 12, 13, 14 and 15 above, exceptions to the prohibition of discrimination should be strictly limited and narrowly drawn.

Chapter 3: Equal Pay

The content of the Green Paper consultation on the issue of equal pay is a major weakness of the Discrimination Law Review process. The Green Paper fails to consult on some of the major reforms long argued for by equality campaigners, such as mandatory pay reviews. These omissions undermine the consultation and threaten to miss the opportunity to take a lead in effectively tackling pay inequality – a move that would both deliver equality and be extremely popular. The Mayor submits that this be corrected in subsequent stages towards a Single Equality Act, by providing for a full consultation on all key issues. The Mayor has undertaken considerable research into the gender pay gap in London and refers the Discrimination Law Review to this.³⁴

Q19: Do you agree that the distinction should be retained?

- 19.1 No, the Mayor does not agree that the distinction should be retained.
- 19.2 The question relates to the fact that law concerning pay is covered by both the Equal Pay Act and the Sex Discrimination. These contain different requirements (such as actual or hypothetical comparators) and different possible defences, time limits and remedies. There is a strong case for amalgamating equal pay provisions within a single piece of legislation, based on an anti-discrimination model. A Single Equality Act is the opportunity to do this. Doing so would also be in line with the DLR's goal of simplifying the law as far as possible. The Green Paper accepts the case for streamlining the legislation but rejects adopting a uniform anti-discrimination model. The Green Paper proposes to retain the 'distinction'

³⁴ Women in London's Economy reports 2005/2006/2007, Mayor of London and GLA Economics

between the legal models in effect, while bringing them under one umbrella piece of legislation: that is, it proposes effectively to squander the opportunity for the law to work more effectively in the interests of equality.

- 19.3 The Mayor is not convinced by the arguments put forward in defence of this proposal: that change would create uncertainty about case law (however, this applies to every new piece of legislation and will apply to other parts of a Single Equality Act) and that employers could face liability for ‘unlimited’ damages, even where there was ‘no deliberate discriminatory intent’ (however, such damages could not be awarded unless there was proven deliberate discriminatory intent). Indeed, awards at present are generally very low.
- 19.4 The Mayor notes the view of the Equal Opportunities Commission in support of a streamlining of the law in a meaningful way. The EOC points out that this would build on moves in European law, such as through Article 3(1)(c) of the Equal Treatment Amendment Directive 2002/74/EC (ETAD) which came into force on 5 October 2005, and where there is provision for a hypothetical comparator.³⁵ As the Green Paper goes on to oppose allowing for hypothetical comparators in Equal Pay cases, this is clearly part of the opposition to streamlining the EPA and SDA on an anti-discrimination model. The Mayor does not agree that the distinction should be retained.

Q20: Do you consider that there are further areas of the law of equal pay developed by case law, which it would be helpful to codify?

Q21: Do you have further suggestions on how we could simplify equal pay legislation or make it easier to work in practice?

- 20.1 The Mayor submits that it is a major omission for the Discrimination Law Review not to consult on the major changes to law potentially affecting equal pay. A proper consultation would include consideration of the case for mandatory pay reviews and for representative actions. Research for the Mayor has shown that the average (mean) gender pay gap is wider in London than at a UK wide level – at 23 per cent compared to 17 per cent – and reflects the fact that many more men than women are in highly paid jobs, with women outnumbering men among the low paid. Yet at the highest paid level, the pay gap is widest – the gender pay gap among the top 10 per cent of earners in London is 32 per cent. This discrimination needs to be met by stronger legal obligations, better tools and more systematic and rigorous enforcement.³⁶
- 20.2 One of the most effective steps towards simplifying the equal pay legislation would be to make pay reviews mandatory for all employers. A transparent system would enable both employers and employees to be clear about the situation in their workplaces, the criteria for pay awards and also reduce the need for recourse to the law. Where a pay gap was identified, the law should ensure that action is required to be taken to address it. This might be by looking at how women and men are segregated into different jobs, how jobs are graded; the unequal impact of contracting out, and failure to consider issues such as childcare or caring demands.
- 20.3 The case for mandatory equal pay reviews has been made many times, by the Equal Opportunities Commission, trade unions, the Hepple Report³⁷ and by many others. The

³⁵ Submission to the Discrimination Law Review, Equal Opportunities Commission, April 2006.

³⁶ Women in London’s Economy, 2007, Mayor of London and GLA Economics

³⁷ Equality: a new Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, Hepple, Coussey and Choudhury, 2000.

Women and Work Commission failed to reach agreement on mandatory pay reviews but as it was obliged to work by consensus this is hardly surprising. Those on the Commission who supported the case pointed out that, *'as long as the law remains based on individual rights, affording remedies to individuals who take cases to employment tribunals, we will not eradicate systemic discrimination in pay systems and workplace practices'* arguing that pay reviews were an essential component in a more systematic and realistic approach to tackling pay inequality.³⁸

- 20.4 The Green Paper summarily rejects consideration of pay reviews, proposing to continue to rely on voluntarism, or 'promoting the spread of good practice'. The enduring reality of the pay gap demonstrates, however, that voluntarism alone will not work. Virtually by definition, those employers who do not want to carry out pay reviews believe they are unnecessary. This is reflected in the EOC's 2005 Equal Pay Reviews Survey, which shows that the most common reason for not carrying out an equal pay review was the belief by employers that their existing pay systems were not discriminatory, cited by 85 per cent of large employers.³⁹ But without a review, employers cannot show that their pay systems are not discriminatory. In *Bodiman v API Group PLC* a key factor in the judgement in favour of the claimant was that the employer could not demonstrate that it had a transparent system of determining pay.
- 20.5 The argument in the Green Paper that, *'equal pay reviews directly address only one of the causes of the gender pay gap – that of gender pay discrimination'*, and that, *'the causes of the pay gap are complex, and are only partly related to issues that can be addressed specifically through equal pay legislation'*, is not convincing. The DTI's 2002 study of women's position in the labour market found that the largest factor causing the gender pay gap was discrimination (responsible for 29 per cent of the gap). Occupational segregation was responsible for 13 per cent of the gap and most of the remaining gap was due to women's caring responsibilities.⁴⁰ The GLA's own study of the gender pay gap found that discrimination was responsible for 27 per cent of the gap in London.⁴¹ A large scale survey of managers, published just as the Green Paper consultation was coming to a close, showed that the pay gap between men and women managers doing similar work averaged £6,076 a year, and that the gap had widened in the previous year.⁴²
- 20.6 Of course, discrimination itself is complex: pay reviews can reveal information to employers that they not only did not realise but did not consider it to be discriminatory and which in many cases can be easily remedied.
- 20.7 The House of Commons Trade and Industry Committee argued in its 2005 report, 'Jobs for the girls', that that the Equal Pay Act was 'reaching the limits of its usefulness'.⁴³ It considered that the issue of consistent undervaluing of work done by women needed to be addressed, saying, *'Although there are difficulties in dealing with the deep-seated problem of the undervaluing of women's work through legislation, the concepts of equal value and indirect discrimination are already embedded in statute and we believe it should be possible to build on these.'*

³⁸ Shaping a Fairer Future, Women and Work Commission, 2006

³⁹ Equal Pay Reviews Survey 2005, Working Paper Series no.42, EOC

⁴⁰ The impact of women's position in the labour market on pay and implications for UK productivity, Professor Sylvia Walby and Dr.Wendy Olsen, Women and Equality Unit, Department for Trade and Industry 2002

⁴¹ Women in London's Economy, January 2005, Mayor of London and GLA Economics

⁴² Research for the Chartered Management Institute, media reports 5 September 2007: women were making career progress more speedily than men but nevertheless suffering pay inequality.

⁴³ House of Commons Trade and Industry Committee, jobs for the girls: The effect of occupational segregation on the gender pay gap. Sixteenth Report of the Session 2004-05, published 7 April 2005

20.8 Moreover, while this discussion has primarily been in relation to the gender pay gap, the Mayor argues that a more proactive approach to other areas where there is systematic inequality should be discussed. In London the gap between the average earnings of BAME groups and those of white groups was 21 per cent in 2004, according to figures from the Annual Population Survey. On average BAME employees earned £9.43 per hour, compared with £11.93 for white groups. Overall, 30 per cent of BAME employees were earning less than £7 per hour, compared with fewer than 18 per cent of white groups. In 2005, gross hourly earnings for disabled employees averaged £12.46 per hour – 12 per cent less than the level for non-disabled employees (£14.13).⁴⁴ Such patterns of inequality need to be discussed and met by appropriate legal tools.

20.9 Ensuring that a Single Equality Act provided for representative actions, thus allowing relevant third parties to take legal cases for groups of individuals, would make the law easier to work in practice. Case law shows that many pay cases do not simply represent the discrimination experienced by one individual woman: her experience might be shared by 500 co-workers. Yet the law forces each individual to take their case individually, to bear the strain and uncertainty of that. That is a highly inefficient form of law. Neither the suggestion (in Chapter 7) that they would encourage a ‘litigation culture’ or unfairly benefit those with ‘spurious claims’ are demonstrated. Failing to consult on this issue by arguing that an unspecified ‘number of stakeholders’ have ‘expressed reservations’ is an unconvincing argument when compared to the inefficient and frustrating legal process as it stands and the strong public support for this change.

20.10 A reported quarter of a million cases of sex discrimination have been brought to employment tribunals over the 30 years since the Sex Discrimination Act came into force.⁴⁵ Far from tailing off, record numbers of cases have been filed in the last five years.⁴⁶ While there will always be the need for individual redress, it would be more efficient to introduce a system which increasingly promotes equality positively, thereby reducing the need for redress, while allowing for class and test actions. This could be done by extending positive equality duties beyond public authorities, and by specific requirements such as pay reviews and workforce monitoring, which triggered corrective action if problems were identified.⁴⁷

20.11 A further change that would make the aims of anti-discrimination law easier to meet, which is also motivated by the experience of cases, is to strengthen the remedies available to Employment Tribunals. These should be given powers to enforce general recommendations on policies or practices when warranted by the evidence, whether or not it benefits the specific claimant in the case. Again this would be a more efficient use of resources, enabling for more employees to benefit and action to be taken on entrenched practices.

Q22: Do you agree the use of hypothetical comparators would be unlikely to give any benefit in practice?

22.1 No. The Mayor does not agree with this and on the contrary supports the long-standing call that the law be changed to allow for the use of hypothetical comparators in equal pay claims. As stated above in response to question 19, if the provisions of the Equal Pay Act

⁴⁴ Annual Population Survey, 2005

⁴⁵ EOC Press release 30 May 2006

⁴⁶ The Tribunals Service published on 3 September figures showing that the number of cases brought to employment tribunals increased from 115,039 in 2005/06 to 132,577 during the 12 months to March, representing a 15 per cent increase over the previous year. Equal pay claims rose to 44,013, an increase of 155 per cent. http://www.tribunals.gov.uk/files/press/PN_05_07.pdf

⁴⁷ Women in London’s Economy, Mayor of London and GLA Economics, 2007

and Sex Discrimination Act are to be streamlined under a Single Equality Act, there is an obvious case for using this opportunity to ensure that the SDA's provision for hypothetical comparators applies to all equal pay and sex discrimination cases, including those taken under EPA-based provisions. While the SDA allows for hypothetical comparators, the EPA does not and this technicality limits the ability of women bring equal pay claims: for example, in gender-segregated workforces. The EOC point out that *'some of the worst pay and conditions are in the private sector... where jobs such as cleaning and catering are largely carried out by women employed by contractors, probably part-time. It is unlikely that there will be male comparators employed by their employer doing work of equal value so that the EqPA in its current form offers no remedy'*.⁴⁸ It is deeply disappointing that this barrier to equality is defended by the Discrimination Law Review.

- 22.2 The Women and Work Commission (WWC) recommended that the DLR should consider allowing the use of hypothetical comparators in equal pay claims. Recommendation 36 of the Commission's report said, *'The Discrimination Law Review should consider more fully the issues of whether or not to extend the hypothetical comparator to equal pay claims, and of generic or representative equal pay claims'*. The Green Paper fails to give this issue the serious consideration it merits and which was recommended by the WWC.
- 22.3 Allowing for the use of hypothetical comparators in equal pay claims would bring UK law into line with EU law. The EPA's requirement for an actual comparator of the opposite sex in the same employment is not only legally inconsistent with the SDA but with other areas of discrimination law: claims of race, religious, sexual orientation and age discrimination allow for a hypothetical comparator. The Mayor does not agree that allowing for the use of hypothetical comparators would be unlikely to give little benefit to women.
- 22.4 In summary, the Green Paper fails to recommend the changes necessary to more seriously tackle pay discrimination and inequality in either public or private sectors. These should be subject to discussion in later stages towards a Single Equality Act and include:
- hypothetical comparators in equal pay cases
 - adoption of an anti-discrimination model for pay cases
 - mandatory equal pay reviews which trigger action
 - allowing for representative legal actions
 - strengthening the powers of tribunals

Chapter 4: Balancing measures

Q23: What evidence is there of the extent to which the current 'positive action' provisions are being used? Do you consider that the current provisions limit the actions that employers and others would like to take?

- 23.1 The Mayor believes that the current positive action measures are too narrow to allow for the range of measures that need to be taken to address under-representation within a reasonable timescale.
- 23.2 The GLA has put in place various positive action schemes to increase the diversity of its workforce. These include:
- women's coaching scheme, especially targeting disabled and BAME women;

⁴⁸ Submission to the Discrimination Law Review, Equal Opportunities Commission, April 2006.

- job workshops for people in under represented groups – provides help with completing application forms and giving interview practice;
- work experience schemes for disabled staff;
- student placement scheme targeted at BAME and disabled students
- PATH trainee scheme,⁴⁹
- SCOPE trainee scheme – placing a trainee in one of the GLA directorates;
- promotion of GLA at job and careers fairs targeted at BAME and disabled groups;
- promotion of GLA jobs at London wide events with a high degree of community interest from BAME, women and disabled people;
- audit of recruitment practices to improve accessibility for disabled applicants;
- supporting the GLA and GLA group disabled staff network and creating disabled staff focus groups to identify any workplace issues that the GLA could address.

23.3 The functional bodies⁵⁰ (the Metropolitan Police Service, the London Fire and Emergency Planning Authority, Transport for London and the London Development Agency) have also implemented positive action measures to address under-representation of minority groups within their workforce.

Metropolitan Police Service (MPS)

23.4 The Home Office has set the police service employment targets aimed at building a visibly representative workforce that can more effectively relate to and interact with communities. The targets are that by March 2009 25 per cent of employees are from black and minority ethnic (BAME) groups, and by 2009, that women employees will total 40 per cent. As of the end of March 2006 black and minority ethnic officers represented 7.4 per cent of the MPS workforce an increase from 7 per cent at the same time in 2005⁵¹. At the same point, women officers represented 20 per cent of officers (up slightly from 2005).

23.5 Therefore although there have been improvements in workforce representation these are at a much slower rate – particularly for black and minority ethnic employees – that would suggest the MPS can not meet the targets set for black and minority ethnic recruitment. This is despite a series of positive action measures being taken. The Mayor firmly agrees that London's services should be representative of the populations they serve and that this slow progress indicates that the law must provide for more powerful forms of positive action to be taken.

⁴⁹ PATH (Positive Action Training Highway) National Ltd, funded by the LDA, is a specialist organisation that addresses under-representation and inequalities amongst black and minority ethnic and disabled groups in management and the professions through the provision of innovative training, career opportunities, motivation and support to individuals and organisations wishing to create a workforce that reflects diverse communities. The scheme at the GLA places a trainee, found by PATH, in the Housing and Homelessness Unit for a period of two years, provides an allowance, specialist training and support and funds a post-graduate course in housing or a related field.

⁵⁰ As defined at section 424 (1) of the Greater London Authority Act 1999

⁵¹ The Mayor's Budget and Equalities Review 2006-07 estimated that on the trend at that time the percentage achieved by 2009 is likely to be around 10 per cent and stated that the MPS recognised that was 'unacceptably low...in a city whose population is 29 per cent BAME'. The document goes on to mention that 'good progress has been made in recruiting women officers although there is still no possibility of the MPS reaching the HO target of 40 per cent women police officers by 2009. A target of around 23 per cent for women police officers should be achievable by 2009'. It stated that for these reasons the MPS and Mayor had called for legislative change in regard to positive action based on the Northern Ireland model.

- 23.6 The positive action measures that the MPS has undertaken include:
- taking activity into the heart of areas with high population of BAME communities;
 - recruitment stands at community events and festivals;
 - the Female and Ethnic Minority Detective Training Programme;
 - focused advertising and marketing on minority recruitment;⁵²
 - providing positive support and assistance to minority candidates.
- 23.7 The most recent MPS Equalities Scheme (2006-2010) suggests and identifies a number of positive action schemes to address workplace under-representation, including offering 'fast track' intensive training courses, mentoring, secondments and other developmental opportunities.

London Fire and Emergency Planning Authority (LFEPA)

- 23.8 LFEPA currently advertises in magazines such as Cosmopolitan, Company, Real, Pride and G3 as well as in the Voice and the Ethnic Media Group. These adverts/editorials feature operational staff from under-represented groups and are designed to encourage women and people from black and minority ethnic communities to attend Open Days as well as utilising the media to promote the image of the service as a career opportunity.
- 23.9 A recent national campaign focussing on showing women in the fire service attracted an increase in women applicants.⁵³
- 23.10 LFEPA also encourages applicants from under-represented groups through attendance at various community events such as Capital Woman, The Vitality Show, The Gunnersbury Park Mela, Asian Lifestyle show and London Pride. The Outreach Team also attends the London Graduate Recruitment Fair and Grades (Graduate Recruitment and Diversity Event).
- 23.11 All events are aimed at encouraging women and people from black and minority ethnic communities to attend Open Days. LFEPA hold a minimum of 15 Open Days aimed at people from Black and Minority Ethnic communities (average attendance is 65 per Open Day) and 15 Open Days/Physical Fitness Clinics (average attendance is 25 per Open Day) for women only throughout the year.
- 23.12 Traditionally women were less successful in meeting the required fitness standards and so LFEPA hold Physical Fitness Clinics, which are exclusively for women and provide the opportunity for women to understand the fitness requirements, access to a physical fitness development programme, use of the gym facilities and advice from the Physical Education Officers. During the current year, LFEPA have increased the number of Open Days, particularly those for women, due to the high volume of interest. Open Day attendees complete feedback forms and their responses indicate many intend to pursue fire-fighting as a career option. From 2000 to date there have been over 22,000 registrations of interest in attending the Open Days.

⁵² The 'Can You Be?' advertising campaign aimed to break perceived barriers that prevent groups currently under-represented from considering a career with the MPS. Advertising incorporates Muslim, Sikh, Hindu and Jewish focussed-adverts. The number of enquiries and applications made by those belonging to a religion or faith group more than doubled over a year: of the total number of applications, 12 per cent were made by Muslims and 2.5 per cent by Hindus. The proportion of Muslim and Sikhs applying to become police officers exceeds the respective proportion present within the London population.

⁵³ <http://www.london-fire.gov.uk/lfepa/reports/2006/P-HRE218.rtf>

23.13 Partly as a result of these initiatives, LFEPA has had a slow but steady rise in its recruitment of women fire-fighters. The latest statistics place the number at a total of 196 for 2006/07, which is a rise of 7 per cent, from 175, for 2005/06, and up from 165 for 2004/05⁵⁴. The ability to apply more extensive forms of positive action is likely to better assist in moving towards a more representative fire service for London, more speedily.

23.14 The Mayor agrees that current law limits the forms of positive action that the GLA Group would like to take in order to tackle under-representation.

23.15 Despite its general equality policies and the use of various legal positive action measures as outlined, there are still areas where the profile of the GLA and the functional bodies does not reflect London's diverse communities.

23.16 For example, at the GLA the proportion of women in the workforce is 56 per cent according to the latest GLA Staff Compendium, however only 13 per cent of women earn above £50,000, compared with 23 per cent of men. This is despite positive action measures that have included women's coaching schemes.

23.17 LFEPA has considered the following actions but has received legal advice that they would not be permitted by the current legislation:

- issue and accept application forms to women applicants only for a limited period due to their very low representation;
- hold Open Days (including tips and advice on the application process) for Black and Minority Ethnic men only;
- offer applicants from under-represented groups only post-application coaching throughout the selection process;
- issue application forms at targeted careers and community events and Open Days;
- issue application forms throughout the year to people from under-represented groups only until the Home Office targets are met;
- an accelerated selection process for under-represented groups;
- offer under-represented groups only the opportunity to re-enter the selection process if they fail at any point;
- provide bespoke pre-application training courses to those from under-represented groups only;
- make application forms available 30 per cent via the phone, and 70 per cent at open days targeted at black and minority ethnic and women applicants;
- allow women only to 'bank' achievement of physical standards during fitness workshops and not have to retake.

23.18 Legal advice is that these actions go beyond the limited positive action which is permitted by the Race Relations and Sex Discrimination Acts. That is, encouraging under-represented groups to take advantage of opportunities and would instead, we are advised, place ethnic minority and/or female applicants in a favoured position.

⁵⁴ http://www.london-fire.gov.uk/about_us/media/Our_Performance.pdf

Q24: Do you agree that it would be helpful for organisations seeking to make progress towards their goals of tackling under-representation and disadvantage to be able to use a wider range of voluntary balancing measures?

- 24.1 Yes, the Mayor agrees that the law needs to be changed so as to ensure that more substantial forms of positive action are lawful. As has been outlined above, relatively modest forms of positive action are currently outside the scope of the law. A wider and more substantial range of measures should be lawful and should apply across all equality groups and allow for under-representation to be addressed.
- 24.2 The Mayor welcomes the recognition in the Green Paper that European Directives allow for a wider range of positive action than is currently provided for under British law (4.31). If the Government amended the scope of existing legislation as provided for under Article 141 (4) of the EC Treaty, Article 5 of the Race Equality Directive and Article 7 of the Framework Directive, the ability to use positive action in Britain could be extended considerably.
- 24.3 However, the Mayor is concerned that simply *allowing* for positive action will not be sufficient to prompt the scale and pace of change needed: there need to be incentives which *encourage* change to be made. There are a range of levels of incentives that could be considered: targets, tied to monitoring, for example. The legislation in Northern Ireland is a useful model (see below).
- 24.4 The Green Paper also proposes not to outline in legislation measures that *'will always be regarded as falling within the positive action provisions'* (4.46). The result of this approach may be a continuation of the kind of lack of clarity that the Green Paper explains sometimes exists at the moment (4.36 to 4.38), over what kind of positive action is legally permissible or the purpose of positive action measures. Such room for confusion understandably leads to caution in taking steps. New legislation should seek to avoid this and make it as easy as possible to put in place meaningful positive action measures.
- 24.5 The proposals in the Green Paper, while welcome, are very modest compared with other European provisions. Within the UK context, the Northern Ireland under the Fair Employment and Treatment Order 1998 (FETO) requires positive action *'to secure fair participation by members of the Protestant, or members of the Roman Catholic community in Northern Ireland by means including: the adoption of practices aimed at encouraging such participation; the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation'*. It requires employers to *'review the composition of those employed and ceasing to be employed'* and their employment practices *'for the purposes of determining whether members of each community are enjoying, and are likely to continue to enjoy, fair participation in employment'*. Where such a review indicates that members of a particular community are not enjoying fair participation, then an employer is obliged to *'determine the affirmative action (if any) which would be reasonable and appropriate'*.⁵⁵ This approach is widely recognised as having achieved real change.
- 24.6 Norway has also taken more substantial measures. Since 1 January 2004, the boards of all state owned Norwegian companies have been obliged to have a minimum 40 per cent representation of each gender. The law was applied to public limited companies from 1 January 2006. The European Professional Women's Network 2006 survey of the number of women in the boardrooms of Europe's top companies, the growth rate was stagnating except in Scandinavia. It highlighted the achievements of proactive policies and quotas in

⁵⁵ FETO 1988, as amended in 2003 to give effect to the EU Framework Directive 2003/78/EC

Scandinavian companies⁵⁶ and contrasted this with low representation elsewhere. The contrast is highlighted by latest data on the composition of boardrooms: according to a Guardian survey, there were only 16 women out of the 527 top executives in Britain's leading 100 companies.⁵⁷

- 24.7 Beyond Europe, Canada is among a number of countries that allows for firmer action. The Employment Equity Act 1995 obliges 'positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in the relevant workforce'.⁵⁸
- 24.8 The Mayor regrets the rejection of the potential for extending the use of the concept of 'reasonable adjustment' (4.39 to 4.43) and believes a wider discussion on this would have been productive.

Q25: Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups?

- 25.1 Yes, the Mayor considers that it is fair and necessary to extend these measures to all protected groups so that measures may be taken to remove the barriers that create and maintain disadvantage.

Q26: Do you agree with these proposals for issuing guidance by the Commission for Equality and Human Rights, but that the Commission should not have a role approving positive action programmes?

- 26.1 Yes, the statutory equality body should have a role in developing clear and consistent guidance and a statutory Code of Practice (4.50). However, the Mayor is concerned that the approach taken in the Green Paper (as outlined in response to Q24) may place unrealistic pressure on the Commission for Equality and Human Rights in carrying out the function satisfactorily. Therefore the Mayor proposes that there is a need for a clear discussion of the intention of law on positive action and the scope of action the law allows during parliamentary discussion on the Bill, so that this provides a basis for the Statutory Code.

Q27: Do you agree that we should have the power to continue the operation of the current provision beyond 2015, if this is still necessary and proportionate?

- 27.1 Yes. Despite the progress on women's representation, women continue to make up just under one-fifth of all MPs. Black and minority ethnic women represent 0.3 per cent of MPs and when Dawn Butler was elected in 2005 she became only the second black woman MP, joining Diane Abbott. Pressure to conform to a stereotype would seem strong: there is only one openly lesbian MP and Stonewall report that there have been no lesbians elected through the shortlist system.⁵⁹ Westminster ranks fifty-ninth internationally in terms of women's representation in parliament. On current rates it is

⁵⁶ Qualitative research by SQW, Women in London's Economy, 2007

⁵⁷ Women bosses left behind by men's pay, Guardian, 29 August 2007

⁵⁸ Women in London's Economy 2007, Mayor of London and GLA Economics

⁵⁹ Ben Summerskill, speaking at the Mayor of London consultation event, 27 June 2007

estimated that equality of women's representation in parliament will take 200 years to achieve.⁶⁰ This is simply unjustifiable and firm measures should exist to allow for positive action. Such methods should operate in accordance with the democratic process and be transparent and accountable.

Q28: Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender?

28.1 The Mayor agrees that there should be scope to take positive action measures in the selection of candidates for political office – and in other areas of public life. There is marked under-representation of black and minority ethnic people in parliament and on current trends this will take a very long time to change. There is also inequality of a range of other groups facing discrimination. The Green Paper is very tentative in saying that the Discrimination Law Review intends to '*look at whether we should (and if so how)*' legislate to allow wider '*voluntary positive measures...in the selection of candidates from ethnic minority communities*'. The examples that are given are also overly limited - '*Parties could provide assistance, support, training and mentoring*' (4.58). Some of these steps are already taken by some parties, but have not proved sufficient to remedy under-representation. As to the exact method, the DLR should consult to ensure that positive action measures provided for in political selection are transparent, democratic and accountable.

28.2 However, in addition to this discrimination by political parties must be made unlawful. As the Commission for Racial Equality states: 'the RRA76 does not expressly prohibit discrimination by political parties. We consider that political parties should be brought within anti-discrimination legislation so that any discrimination which occurs in the selection process or in other areas may be challenged'.⁶¹ The Mayor agrees with this. In extension of this, it is also appropriate to discuss through the Discrimination Law Review the range of measures available to challenge the production by political groups of racist material.

Chapter 5: Public Sector Equality Duties

Q29: Do you agree that the race, disability and gender duties should be replaced by a single equality duty on public authorities to promote race, disability and gender equality?

29.1 The Mayor believes that the crucial matter is the content of the public sector equality duties, in relation to which the Mayor opposes the proposals under this section, as these would weaken the duties. Any practical arguments for combining the existing equality duties into a single duty would only be acceptable in that they did not involve a weakening in any of the content of the ground-specific existing general duties or the specific duties that are linked to them – and that differ in detail between the duties. The content should be strengthened where possible: the Green Paper does not propose this. Instead, it proposes to weaken the duties and their potential for improved equality outcomes. The issue is therefore not the form of the duties – six general duties or one combined duty – but the content. It will be crucial to retain the specific duties that attach to the existing general duties as these vary between the three strand duties and are the

⁶⁰ Sex and Power, Who Runs Britain, press release EOC 5 January 2007

⁶¹ CRE Briefings on a Framework for Fairness: Proposals for a Single Equality Act for Great Britain, August 2007

result of discussion identifying crucial issues relating to those specific groups. Consultation would be needed on the precise details of specific duties for new strands so that they reflect what is important to measure progress towards equality on age, sexual orientation and faith.

- 29.2 Second, the Mayor submits that, either in the form of a single integrated equality duty or by the creation of strand specific public sector duties, positive public sector duties should cover all those facing discrimination: or in the language of the Green Paper, all six equality 'strands'. The Mayor supports the content of the existing duties – beginning with, most fundamentally, the need for public authorities to consider equality in all their work. The Mayor disagrees with the implication in this section of the Green Paper that the evidence shows that the duties have produced limited change and that *'the specific duties (in particular the requirement for race equality schemes) may be focussed to much on bureaucratic process rather than on delivering tangible equality outcomes'* (p83).
- 29.3 This assertion is not borne out by the GLA's experience. The GLA is subject both to the equality duties in the Greater London Authority (GLA) Act as well as to the public sector duties here under discussion.⁶² The GLA Act provides the power (s30) for it to act to further the principal purposes of promotion of economic development and wealth creation, the promotion of social development and the promotion of the environment. The Act further specifies (s404) that when any function is exercised there is regard to the need: (a) to promote equality of opportunity for all persons irrespective of their age, sex, disability, sexual orientation or religion; (b) to eliminate unlawful discrimination; and (c) to promote good relations between persons of different racial groups, religious beliefs and sexual orientation. It is worth noting that the legal terminology of 'regard to' here is less firm than in the public sector duties. This Act and the public sector duties themselves have encouraged and supported a very robust development and application of equality policies that have led to definite improvements in equality outcomes. This is evidence both for the need for firm political commitment to the aims of the duties and that the legal terminology of the Acts has not represented a limiting factor, of the type suggested throughout Chapter 5.
- 29.4 The implementation of these duties has been advanced from the top. The Mayor has been entirely committed to carry out these duties to the fullest extent and they have been successfully mainstreamed into all of the work of the GLA.
- 29.5 The implementation of the different duties, for example, is embedded in the GLA's performance management framework (see under Q33 below). This involves the development of Operational Equality Action Plans (OEAP's), the establishment and implementation of an equality scheme, impact assessments and the monitoring of all of these. The Race Duty, for example, means that the GLA measures its annual improvement towards greater equality in the workforce, staff are trained in systems and procedures for delivering the full range of fair employment and equal pay objectives and managers are appraised against employment race equality employment targets.⁶³
- 29.6 In January 2002, 24 per cent of GLA staff were from black and minority ethnic groups (BAME). This had grown to 26 per cent by March 2007, against a target of 29 per cent.

⁶² Greater London Authority Act 1999

⁶³ <http://www.london.gov.uk/gla/equalities-framework/docs/equality-diversity-strategy.pdf> Equality and Diversity Strategy 2005-2008

The percentage of BAME GLA staff earning £50,000 or more has also increased slightly, from 18 per cent to 19.6 per cent by March 2007.⁶⁴

- 29.7 There has been improvement on the composition of GLA Group employees considered by race. These figures are set out in the Mayor's Annual Report:⁶⁵ the proportion of black and minority ethnic (BAME) firefighters had increased to 9.4 per cent in December 2006, almost doubling in 5 years. BAME operational management staff in the London Fire and Emergency Planning Service increased to 4.3 per cent in December 2006, from 1.2 per cent in 2001. In policing, by 2006, one third of Police and Community Safety Officers in London were from BAME groups. Although the proportion of BAME police officers has also been increasing, the proportions are still much lower than this and remain insufficiently representative of London's communities. BAME officers represented 7.7 per cent in December 2006, up from 4.2 per cent in 2001.
- 29.8 In the GLA, the proportion of employees that meet the DDA (1995) definition of disability or self-identified with the GLA definition of disability numbered 5.2 per cent in January 2002 – this increased slightly to 6 per cent by March 2007. Also the percentage of those disabled employees that earn over £50,000 stayed stable (6 per cent in 2002 and 5.9 per cent in 2007)⁶⁶.
- 29.9 This collection of employment data allows judgements to be drawn as to the effectiveness of equality policies and an informed discussion to take place on further steps or changes needed. For example, after the latest GLA staff statistics were compiled in March 2007, it was resolved to develop a new coaching programme for existing BAME and female staff to support them further in developing their careers.⁶⁷
- 29.10 Also, without the requirement to mainstream, to have specific race equality schemes and to have the kind of employment monitoring that the Green Paper proposes getting rid of (p93), it would have been extremely difficult to measure progress and be clear that progress in equality was being made.
- 29.11 The mainstreamed equality processes adopted are also the method by which to review change in the number of women in the top-earning band across the GLA Group. Comparing January 2002 and March 2007⁶⁸ the proportion of women employees earning over £50,000 increased from 38 per cent to 42 per cent, with the proportion of those earning over £70,000 in 2007 being 35 per cent. During the period March 2003 to March 2006 the proportion of women working at the LDA dropped slightly (from 57 to 53 per cent) but the proportion in the top 5 per cent of earners increased from 11 per cent to 40 per cent. At LFEPA, female support staff in top management increased from 36 per cent to 39 per cent. At the MPA, the proportion among the top 20 per cent of earners fell slightly from 21 to 18 per cent, although the total proportion of women employed increased markedly, from 39 to 50 per cent. The proportion of women police officers that are commander level and above in the MPS increased from 13.2 per cent to 17.5 per cent. Women's representation within the senior management team at TfL fell slightly from 21 to 17 per cent, though there was a slight increase in the total proportion of female

⁶⁴ <http://www.london.gov.uk/assembly/bmac/2003/bmacmar5/bmacmar5item06.pdf> and <http://www.london.gov.uk/assembly/bmac/2007/jul19/item12a.rtf>. It must be noted that during this time the GLA increased its employees overall by 67 per cent.

⁶⁵ http://www.london.gov.uk/mayor/annual_report/docs/ann_rpt_2007.pdf

⁶⁶ <http://www.london.gov.uk/assembly/bmac/2007/jul19/item12a.rtf>

⁶⁷ <http://www.london.gov.uk/assembly/bmac/2007/jul19/item12.rtf>

⁶⁸ <http://www.london.gov.uk/assembly/bmac/2003/bmacmar5/bmac5item06.pdf> and <http://www.london.gov.uk/assembly/bmac/2007/jul19/item12a.rtf>

employees, from 20 to 21 per cent.⁶⁹ Again, it is only the collection of employment data that allows progress to be objectively judged.

29.12 In addition to improvements in black and minority ethnic composition of the GLA Group workforce, as outlined above, the GLA's Race Equality Scheme outlines how the Mayor plans to 'eliminate unlawful racial discrimination, promote equality of opportunity and promote good relations between people of different racial groups'⁷⁰ in a range of ways. These have included:

- the London Development Agency ensuring an equalities perspective, including race equality, is embedded into their land assembly and legacy work for the Olympic Games;
- Transport for London starting a project to increase the number of black and minority ethnic (and women) bus drivers;
- setting race equality outcomes for regeneration projects, such as through a requirement for Supplementary Planning Guidance to encompass the needs of ethnic minority communities;
- the Metropolitan Police Service's Black and Minority Ethnic Crime Cracking Partnership Board continuing to work in partnership with local communities to develop minority ethnic sector involvement in crime prevention;
- a wide range of events and initiatives to engage with and celebrate London's diverse communities and discuss issues of concern, ranging from conferences like London Schools and the Black Child through to large scale festivals and community events;
- establishment of the Board for Refugee Integration in London, headed by the Mayor, to take forward Home Office plans for refugee integration, advised by refugees themselves through the Mayor's Refugee Advisory Panel. Refugees suffer extreme inequality: only 29 per cent of refugees are likely to be in employment and those who have professional qualifications in their country of origin are likely to be in much lower grade jobs in the UK.

29.13 A powerful reflection of the robust application by the GLA of the equality duties, and particularly the Race Equality Duty, has been the decline in racist offences: on 9 May this year the Mayor announced figures from showing that racist offences in London for the year April 2005-March 2006 had fallen for the sixth year running⁷¹.

29.14 With regard to women's equality, again in addition to making GLA Group workforces representative, a range of initiatives have been taken. The GLA's second Gender Equality Scheme was launched in March 2007. Achievements with regard to gender equality include:

- Providing support with childcare costs for up to 10,000 families, through the London Childcare affordability programme, jointly financed with the Department for Children, Schools and Families and run by the London Development Agency. Designed to improve mothers' employment rates and reduce child poverty.
- Addressing women's safety concerns through an increased visible police presence and through safer public transport: the Safer Travel at Night Campaign has seen a 60 per cent reduction in rape and sexual attacks.

⁶⁹ http://www.london.gov.uk/mayor/equalities/docs/gender_equality_scheme2007-10.pdf

⁷⁰ http://www.london.gov.uk/mayor/annual_report/docs/equals_rpt_2007.pdf

⁷¹ Total figure was 11,322, as cited in http://london.gov.uk/mayor/annual_report/docs/equals_rpt_2007.pdf

- The Mayor's Domestic Violence Strategy in partnership with the Metropolitan Police Service running a multi-agency project, Project Umbra, designed to reduce domestic violence.
- Promoting services to improve outcomes for women experiencing domestic violence, for instance, through specialist courts and domestic violence advocates. The number of offenders charged in London doubled between 2000/01 and 2005/06. The number of domestic violence murders has fallen.
- Improved services for women who have suffered sexual violence by developing specialised facilities (rape havens) and improved monitoring of rape crimes.
- Undertaking an extensive programme of research and consultation, involving engagement with a broad cross-section of women's organisations, public and private sector employers and service providers and contribution to raised awareness and development of policies.

29.15 The effectiveness of a strong public sector duty that delivers practical and real equality outputs is further demonstrated by the work done by the GLA Group in relation to disabled and Deaf Londoners. The Mayor has developed an ambitious programme to move London to the forefront of inclusion, accessibility and involvement for disabled and Deaf people. The GLA Disability Equality Schemes⁷² have, over a short period of time, delivered a range of improvements to the lives of disabled and Deaf people across London. These include:

- embedding inclusive design and measurable improvements in housing accessibility through the London Plan, and developing an accessible housing register for London in partnership with disabled and Deaf people and housing providers;
- making London's public transport accessible: London now has the world's largest wheelchair accessible bus fleet, a programme of improved access around bus stops is being implemented and all bus drivers and service controllers are required to attend a Disability Equality Training seminar; TfL has invested in a targeted and pragmatic programme of access improvements in the Underground, including aiming to provide step-free access to 25 per cent of LU stations by 2010 (50 per cent by 2020) and implement new fully accessible trains for the Metropolitan, Hammersmith & City, Circle, District and Victoria lines from 2009. All stations will have a modern PA and visual information system by 2010. Other initiatives include creating tactile maps, station diagrams and surfaces at stations on platform edges (to be completed by 2007 and 2012 respectively).
- establishing priorities for action through research and consultation with disabled and Deaf Londoners through the Mayor's disability rights festival Liberty;
- leading public authorities in promoting disability and Deaf equality through a range of high profile events under the Disability Capital brand;
- delivering specific improvements to access at City Hall, including better taxi access, facilities for Deaf, blind and visually impaired people, and developing new standards for accessing toilet provision;
- actively ensuring the leadership of disabled people in senior positions by appointing a Senior Disability and Deaf Equalities Policy Advisor to the Mayor;

⁷² <http://www.tfl.gov.uk/assets/downloads/corporate/DisabilityEqualityScheme.pdf> and <http://www.london.gov.uk/mayor/equalities/docs/dis-eq-progress2006.ptf>

- taking practical action to improve disabled and Deaf people's experience of policing: the Metropolitan Police have implemented a range of recommendations from the report 'Disabled people and the police – a new relationship?', adopted by the Metropolitan Police Authority in January 2005. An MPA Disability Oversight Group (involving disabled people) to support the MPS in the implementation of the 48 recommendations was established. Progress reports are discussed at bi-monthly meetings. Actions have included: school liaison officers in every borough working with schools to reduce harassment and hate crime of disabled people; recording and analysing hate crime against disabled people and consulting with local disabled peoples organisations in addressing identified trends and issues; consulting disabled people on ways of reporting crime and developing best practice such as third party reporting;
- establishing a strategy across the GLA Group for increasing the numbers of disabled and Deaf people in employment and creating a disabled staff network to inform the process of change;
- working through the GLA procurement procedures to ensure disabled and Deaf people are involved in delivering services for Londoners (examples include: communication support for most equalities events being provided by a Deaf-led company; supporting people using mental health services in marketing and photographic production).

29.16 This and other improvements rely on the existence of the equality duties, the requirement to mainstream them into the entire work of public authorities and the commitment of the Mayor to doing everything possible to promote equality consistent with the duties.

29.17 The wider effects of these policies, the result of having a mainstreamed disability equality process, precise actions and measured outcomes, is considerable. For example, in relation to the transport changes touched on above: nearly 40 per cent of disabled users would use public transport more frequently if it was easier to obtain information, and about half of the disabled population in London state that improvements in public transport would have positive impacts for them.⁷³

29.18 On age, the GLA and LDA have abolished compulsory retirement ages and this has been positively reflected in the workforce profile. The Mayor published an Older People Strategy for London in September 2006 and the GLA is in the process of developing an Age Equality Scheme.

29.19 Under the GLA's Faith Equality Scheme (launched in 2005 and the first of its kind in Britain) the GLA monitors faith in employment practices and faith equality is reflected in the GLA's Flexible Working Scheme. The London Stakeholders Team engage extensively through events with London faith communities and faith organisations have been invited to contribute to consultations, such as on the draft Housing Strategy and Supplementary Planning Guidance to ensure that specific equality needs are reflected and discriminatory policies avoided.

29.20 The GLA has produced a sexual orientation Equality Scheme. Workforce monitoring indicates six per cent of GLA employees to be lesbian or gay. Externally focussed achievements have included the launch of the 'Education for All' campaign, by the Mayor in partnership with Stonewall. This involved distribution of a DVD and information pack

⁷³ Cited in Appendix C of TfL's Disability Equality Scheme.
http://www.lda.gov.uk/upload/pdf/LDA_Disability_Equality_Scheme.pdf

against homophobic bullying to all London secondary schools and professionals working with young people.

- 29.21 Experience in these three areas not currently covered by the public sector equality duties confirms the Mayor's view that the duties should be extended to age, sexual orientation and religion or belief.⁷⁴
- 29.22 The difference that these policies – which are the implementation of mainstreamed equality duties linked to specific, definite and measured actions – make to the lives of Londoners was reflected in the fact that the GLA won the Guardian's Public Services 2006 award in the innovation and progress section: diversity and equality. The existence and impact of these equality policies is also the context in which the GLA has achieved Level 5 of the Equality Standard for Local Government. This is a Best Value Performance Indicator used by the Audit Commission to ascertain the performance of local authorities.
- 29.23 Similarly, if broader evidence is considered, it also does not support the suggestion that the duties have not produced tangible outcomes. For example, the Commission for Racial Equality (CRE) carried out a number of case studies at the beginning of 2006 to ascertain progress amongst public authority bodies and other bodies that are subject to specific duties within the Race Equality Duty. Overall, the policies and measures introduced were shown to have better reflected the surrounding community and enhanced the services provided.⁷⁵ For example, Kent Police had established public consultation groups to consult on service delivery and provide transparency, increased active representation at community events, re-launched the Kent Police Standard, undertaken research into areas of public concern such as apparent disproportionate stop/searches, increased ethnic monitoring to include Irish Gypsies and Travellers, and in January 2007 adopted the Equality Standard for Local Government (ESLG). A separate CRE survey in 2003, covering 3,300 public authorities, showed that 70 per cent of educational institutions that responded, 89 per cent of central government and 83 per cent of higher education bodies believed that the Race Duty had produced positive benefits; 74 per cent had identified service user satisfaction outcomes.⁷⁶
- 29.24 Tower Hamlets Council won recognition for its achievements after implementing its Race Equality Scheme (2002–2005) and Diversity and Race Equality Scheme (2005–2008), including the Beacon Status in 2005/06 for Promoting Racial Equality. As the Borough, for example, has the largest Muslim population in the UK and 76 per cent of school age children are from BAME communities, the specific initiatives implemented by Tower Hamlets to target ethnic minority communities are of far-reaching importance. Primary school attendance and attainment amongst BAME children has improved (a 2004 OFSTED report details particular success for Bangladeshi pupils), youth offending within BAME communities has declined, and there is increased uptake in adult education services and adult social care services. The number of black, Asian and minority ethnic staff in the borough's workforce had also increased, including among senior managers.
- 29.25 Another example is the progress made by the Crown Prosecution Service (CPS) since implementing their first Race Equality Scheme. After the CRE, in 1999, decided to formally investigate employment practices, the CPS commissioned the Denman Inquiry to investigate claims of institutional racism and discrimination. The preliminary findings were published in May 2000 (the final report in July 2001), and subsequently, the CPS reviewed

⁷⁴ In addition to information presented here and under Chapter 4, further information is available in GLA reports: http://london.gov.uk/mayor/annual_report/docs/equals_rpt_2007.pdf

⁷⁵ <http://www.cre.gov.uk/duty/gpexamples.html> and <http://www.cre.gov.uk/duty/grr/casestudies.html>

⁷⁶ Towards Racial Equality: An evaluation of the public duty to promote race equality and good relations in England and Wales, CRE, July 2003.

its policies and published its first Race Equality Scheme (in May 2002). Their first Race Equality Scheme detailed initiatives, such as the implementation of an Equality and Diversity Unit, Regional Equality officers, a Senior Managers' Advisory Group on Diversity and a new equality complaints procedure. The subsequent review of the Race Equality Scheme led the CRE to commend the CPS, and the CRE also recognised the CPS Equality Plan as a model. A report by the HM CPS Inspectorate in November 2006 found that significant progress has been made to reduce inequalities in the workplace. A staff survey in 2006 showed quality of dignity at work was felt to be 10 per cent higher (64 per cent) than the external benchmark (54 per cent). At Chief Crown Prosecutor Level, the percentage of BAME staff increased from 8 per cent in 2003 to 13 per cent in 2005, and at the same time the proportion of women rose from 18 per cent to 26 per cent.

The latest data⁷⁷ shows that in April 2006, BAME employees comprise 15.2 per cent of the CPS total workforce, higher than the Labour Force Survey benchmark by 2.3 per cent. These steady achievements are reflected in the service delivery within the community, although the CPS has identified areas of improvement. Public confidence in the CPS to bring offenders to justice was at 38 per cent in 2002-03, but rose to 41 per cent and has remained around that figure since. The proportion of victims and witnesses of crime that are satisfied with the service rose to 60 per cent in December 2006. There was also a slight reduction in the view from BAME communities that they would be subject to unequal treatment from the CPS (from 33 per cent in 2001 to 31 per cent in 2005). As is also evidenced by the recently published CPS Community Engagement Good Practice Guide, the CPS is slowly but steadily building on the equality and public duty structures established after the CRE initially announced its investigate proceedings into discriminative actions.

29.26 This evidence demonstrates that the public sector equality duties have very real and wide-ranging positive outcomes.

29.27 Lastly and in particular the Mayor submits that the changes as set out in the Green Paper would weaken the mainstreaming of the duties into the policy development and practice of public authorities, encouraging them to cherry-pick 'priorities' to which to apply equality duties. Unlike the duty to consider equality in all their work, this ability to select priorities would inevitably encourage subjectivity and be vulnerable to changes in the political climate and popularity or unpopularity of particular issues. The crucial issue therefore is not the form of the duties – whether single duties or a combining the duties into a single form – but what is the content and nature of the duties. The proposals outlined in Chapter 5 would lead to a substantive weakening of the public sector duties and the Mayor disagrees with that proposal.

Q30: Do you agree that it would be helpful to provide a clear statement of the purpose of a single equality duty which public authorities should use as a foundation for taking action to promote equality and good relations?

30.1 No. The Mayor believes that **the Single Equality Act as a whole should include a purpose clause**. The arguments that are made in this section of the Green Paper about why the public sector duties need to be understood if they are going to produce the most meaningful outcomes actually applies generally to anti-discrimination law and to the proposed Single Equality Act as a whole. The Green Paper says that, *'if public authorities do not understand what promoting equality of opportunity actually means in practice, this reduces the effectiveness of the equality duties in achieving meaningful outcomes for*

⁷⁷ CPS Annual Equalities Employment Report 2005-06

disadvantaged groups. We therefore want a clearer articulation of the purpose... (5.28). The point here – that it is necessary to understand the aims of anti-discrimination and equality law and that this is not always clear – would be better applied to the entirety of anti-discrimination law and the need for a Single Equality Act to be suitably clear to understand and uphold overall. This would be achieved by including a strong purpose clause within the new Act.

- 30.2 The case for a purpose clause has developed during the long period of discussion leading up to the publication of the Green Paper. The case has been endorsed by a wide spectrum of the statutory equality commissions, anti-discrimination legal experts and others. Legal academic Colm O’Cinneide, for example, has explained that there are strong reasons for a purpose clause, setting out the goals and underlying aims of legislation, and being an operative part of the legislation, for anti-discrimination law in particular: *‘Equality and anti-discrimination law appears to be an area crying out for more statutory direction and guidance: forty years of reliance upon traditional drafting techniques has generated a considerable degree of chaos and uncertainty. Because anti-discrimination law gives rise to so many issues of principle and also contains so many specific provisions and complex exceptions, it requires the provision of guidance on underpinning principles to a greater degree than many other areas of the law’.*⁷⁸
- 30.3 Unfortunately, the Green Paper elsewhere (p62) rejects the case for a purpose clause in the Act and fails to consult on this suggestion. The Green Paper merely says *‘some argue that they risk causing confusion’*. It is incomprehensible why the Green Paper notes the case for *‘a clearer articulation of the purpose’* in relation to the public sector duties but rejects it out of hand and without consultation, for the Act in general. Indeed a purpose clause within the Act as a whole would allow for improved linkage between the anti-discrimination and positive duty aspects of the law.
- 30.4 The Mayor notes the illustrative purpose clause that has been drafted and circulated by the statutory commissions and believes this should be discussed in future stages of discussion towards a Single Equality Act. It reads:
‘The purposes of this Act are –
a) to prevent discrimination on any of the grounds, whether singly or in any combination and ensure that every person has an equal opportunity to participate in society, including by means of different treatment as required or permitted by the Act;
b) to secure full equality in practice and promote the social inclusion of individuals and groups by,
 (i) eliminating and preventing patterns of systemic discrimination and inequality; and
 (ii) the adoption of measures to alleviate the disadvantage related to any of the grounds singly or in any combination;
c) to ensure respect for and protection of the human dignity of every person;
d) to provide effective remedies for victims of unlawful discrimination, harassment and victimisation; and,
e) to promote good relations between individuals and groups.’
- 30.5 A purpose clause of this type would ensure the aims of the Act are clear and would provide a guide to interpretation. It includes reference to eliminating discrimination, securing equality and adopting measures to alleviate disadvantage. The public sector duty section of legislation would then set out particular dimensions of equality that need to be achieved by public bodies. These would include equality of opportunity, the promotion of positive attitudes to all six strands covered by a (newly extended) public sector duty and

⁷⁸ Purpose clauses – giving coherence and direction to anti-discrimination law, Colm O’Cinneide, 2007

participation in public life. The Mayor believes this is what is needed and that therefore the Discrimination Law Review should reconsider its hasty ruling out of a purpose clause and link the dimensions of equality to be met by the public sector duty to the purpose clause in the manner set out here.

Q31: Do you agree with the four areas set out in the proposed statement of purpose? If not, please give your reasons and any alternative suggestions.

- 31.1 No. The Mayor does not agree that these four areas adequately express the purpose of the public sector duties or an integrated duty that properly brought these together under one umbrella and extended them to new strands. The Mayor believes that the text set out in 5.28 and 5.29, including the 'four dimensions of equality', does not adequately capture the purpose of the current equality duties or what would be required from a potential integrated duty. There is no reference to combating discrimination. The text is far too fuzzy and imprecise, such as '*delivering functions in ways which emphasise shared values rather than difference*', which will do little to clarify the law or guide public authorities in implementing it. This particular statement also risks creating confusion over the need for equality law positively to support 'difference': differences are intrinsic to society and are otherwise known as diversity. Public policy has increasingly recognised and tried to work to support this. The Single Equality Act should not undermine this positive trend.
- 31.2 As stated above in answer to question 30, the Mayor submits that a setting out of the dimensions of equality for public bodies to work to should be drawn from a purpose clause in the Act as a whole. Such an articulation would need to be more exact and include equality of opportunity, the promotion of positive attitudes to all six strands covered by a (newly extended) public sector duty and participation in public life. Public authorities would in this way be better assisted to understand their concrete responsibilities. These must continue to include requirements to consider equality in all their work, to identify and eliminate potential and actual discrimination and move towards equality by taking definite and measured steps.

Q32: Do you think that the proposed statement of purpose adequately captures the need for work to build good relations and promote positive attitudes within and between groups and underpins efforts to build integration and cohesion?

- 32.1 No. Firstly, the Mayor submits that the legislation would be clearer and easier to understand as a whole, including this part, if it incorporated a clear purpose clause (as already set out above) at the outset of the Act, which then addressed the particular dimensions of equality that need to be achieved by public bodies.
- 32.2 The purposes as set out in the Green Paper in relation to this question do not adequately express the dimensions of equality of opportunity, promotion of equality and positive attitudes, or participation that are covered by current duties. It is unclear to whom they would be applied. The relationship between cohesive societies and economic inequality is only implicit and respect for difference (inherent to social cohesion) is, at best, poorly expressed.
- 32.3 Secondly, the Mayor is committed to implementing the duty to 'promote good community relations between different ethnic groups' under the Race Relations Amendment Act and the policies and strategies implemented by the GLA reflect this. The Mayor believes this requires a robust challenge to racism, promotion of the public duty on equality, and both respect and promotion of awareness of the contribution made by

all cultures to enriching society. Cohesion requires public bodies to actively seek out and listen to the views of the more excluded communities, including by providing facilities and means by which people can come together. Similarly the Mayor strongly supports the Disability Duty requirement to promote positive attitudes and participation in public lives and believes there is no reason for limiting this solely to disability: this legal public sector duty requirement should be extended to all six strands.

- 32.4 Thirdly, the Mayor believes that this question on integration and cohesion must be understood in relation to subsequent proposals in this section. For example, the contribution that public bodies can make to cohesion will be undermined by the Green Paper's proposal to move away from equality duties that apply to all aspects of the work of public bodies and to weaken the specific duties as presently exist. The objective of cohesion cannot be achieved in isolation but will be the outcome of a broad palette of policy, funding measures, initiatives and programmes. In his submission to Commission on Cohesion and Integration⁷⁹ the Mayor argued that *'celebrating cohesion, multiculturalism and promoting equality form an integrated matrix: equality and diversity are very important for London but are meaningless unless the complex issues and inter-relationship with disadvantage and exclusion are addressed; similarly cohesive communities will only be achieved on the basis of policies that address inequality and discrimination, disadvantage and poverty.'* In relation to the public sector equality duties, this is a further explanation of why mainstreamed equality policies that apply across the all the functions of public bodies are important for both equality and anti-discrimination goals and for cohesion. Unless all the functions of a public body are subject to equality duties, opportunities to contribute to more cohesive communities are likely to be missed.
- 32.5 Fourth, the question, and text to which it is linked,⁸⁰ could be misunderstood as suggesting that 'difference' is a locus of a problem when it comes to 'cohesion'. An approach that problematises those who are actually the subjects of discriminatory, fragmenting, processes in society would be a mistake. The 'problem' as far as cohesion is concerned is not 'difference' but the value that is placed on difference, and diversity. We are all 'different' and counterposing 'shared values' to difference is not a route to cohesive societies: difference and shared or universal human values should both be embraced to create cohesive societies.
- 32.6 In London (and across Britain) the far right has been on the rise in recent years and is clearly planning how to target its vote for the 2008 elections to try to take advantage of the 5 per cent threshold for election. In the 2004 London Assembly elections, the British National Party took 4.71 per cent of the vote, coming less than 6000 votes away from having a representative elected. In the local elections in 2006, 11 BNP candidates were elected in Barking and Dagenham and it is likely that the BNP will particularly target outer east London in trying to achieve the low threshold for election to the Assembly. Their racist campaigns attack 'difference' and the negative impact of this trend upon community relations cannot be underestimated.
- 32.7 However, it was noticeable that following the attacks in London in July 2005, Londoners overall did not turn upon each other and strong community relations were maintained. The context for the diverse support achieved by the One London campaign was that the Mayor's Office had already well developed and established relationships with different communities in London, in which the Mayor's approach is to attempt to understand and relate to the differences between and within communities and, in the context of the

⁷⁹ Submission by Mayor of London to Commission on Cohesion and Integration, January 2007

⁸⁰ For example: 'delivering functions in ways which emphasise shared values rather than difference and which provide opportunities for sustained interactions within and between groups' (5.28)

equality duties, deliver services in a way that promotes equality. This approach has assisted in facilitating dialogue, identifying potential issues of concern and developing solutions. Following the bombings, community organisations were brought into the discussions with police at the earliest opportunity. It was notable that feedback from these organisations indicated a feeling of only being consulted in times of trouble or heightened tensions. It is clear that ongoing and meaningful dialogue with different communities contributes to better cohesion. This will be assisted by not avoiding a mistaken counterposition between what we have in common and differences.

- 32.8 With regard to integration, the Mayor believes a further proviso must be made. A view has been advanced in the debates around the future of equality that communities are becoming more segregated. This view is very contradicted by analysis, which shows that London is not becoming more segregated in the ways that have been suggested. Research by Dr Ludi Simpson and Professor Danny Dorling indicates that communities are not becoming more segregated by religion or ethnicity. Segregation by economic deprivation does occur, however. Public rhetoric on this is counterproductive and further de-stabilises community relations. The Mayor has produced several reports based on the 2001 Census that build a picture of different communities and the issues that affect them, from the Jewish community, Irish community and Muslims in London. Among other things, this research has informed the Mayor's approach to supporting multiculturalism and diversity as a crucial part of ensuring a cohesive and stable society.
- 32.9 In summary, the Mayor's experience is that the comprehensive demands of the public duties, and their specific duties, assist in ensuring that all opportunities are exploited to create more cohesive communities. The statement of purpose is badly conceived and expressed. It should be replaced with a purpose clause for the Act as a whole. This would assist the articulation of the dimensions of equality to be addressed by public sector duties. This in turn means that there is no narrowing of the scope or weakening of the content of the public sector duties. They should be extended to apply to all strands.

Q33: Do you agree that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement? If not, please give your reasons and any alternative suggestions.

- 33.1 No. The Mayor does not agree with this proposal which is explicitly one to narrow the current requirement as set out in the public duties, for public authorities to consider equality in all their work. In fact, the question is misleading. The Green Paper says: *'we would like to consider whether the duty would be more effective in tackling the issues which have a major impact on people's life chances if it required public authorities to focus on taking action in a limited number of priority areas'* (5.31) and *'we propose to develop an approach...which places on public authorities a clear requirement to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement'* (5.33). To underline the lurch away from the current legal duties this would represent, the Green Paper says this *'contrasts with the general approach of the existing duties which requires public authorities to have "due regard" to the need to promote equality'* (5.32).
- 33.2 The Mayor opposes such a change. The current requirement to have 'due regard' to the elimination of unlawful discrimination and promotion of equality of opportunity impacts on every decision of a public authority. Equality must be 'mainstreamed' into the work of authorities. Initiatives such as equality impact assessments flow from this mainstreaming. Of course, the need to determine priorities is a fact of life – including for public

authorities. But objective priority setting can only follow from a requirement to consider equality in all the work of an authority, not to pre-judge what might be the most important areas, issues or communities. Priorities need therefore to be in addition to mainstreaming, not an alternative to it: they can only follow from a public authority fully considering equality in all its work.

- 33.3 The GLA's legal obligations have been set out above (Q29). These include both the public sector duties under discussion and the duties under the GLA Act. While the latter are broad based, the legal standard (i.e. to have regard to) is not more powerful than that set out in the public sector duties. Nevertheless, on this basis, because they require and allow for equality to be considered in all work, major achievements in equality outputs have been achieved, as reported above.
- 33.4 The practical basis for these achievements – in addition to the political centrality of equality to the Mayor's agenda – has been the mainstreaming of equality into GLA processes through the adoption of a clear performance management framework. The GLA Equalities Framework is located at: www.london.gov.uk/gla/equalities-framework/index.jsp and sets out work in promoting equal opportunities, challenging discrimination and celebrating diversity in London.

Key steps that have been taken to mainstream equality into all the work of the GLA include:

- the GLA's Equality and Diversity Strategy;
 - an Equality and Diversity Policy Statement which sets out the overall approach and priorities for action;
 - the Corporate Plan, which includes equalities deliverables;
 - Operational Equality Action Plans (OEAPs) for each directorate, which are revised annually and monitored quarterly – each directorate reports on progress in delivering equalities, including achievements, outcomes and future priorities;
 - Equality Impact Assessments, which are conducted to ensure strategies, policies and major projects take into account the impact they will have on people from the equality groups and ensure that the GLA promotes equality;
 - budget and equalities processes which put equality considerations at the heart of resource allocation and provide a framework for checking the progress on equality commitments, including such aspects as: mainstreaming and delivering equality; achieving a representative workforce; the adequacy of services targeted at equality strands; and expenditure on equality strands.
- 33.5 The GLA's requirement to report on the effectiveness of arrangements is critical in providing oversight, and this requirement should be part of cross-strand duty arrangements in any Single Equality Act.
- 33.6 By contrast, the Green Paper's proposals to remove the obligation to consider equality in all work would fundamentally weaken the public sector duties as currently operating and as originally conceived. The Mayor sympathises with the expressed view of the Chair of the Disability Rights Commission that the Green Paper in this regard, *'proposes to virtually destroy the Disability Equality Duty... it does to disability rights what a bulldozer does to a building... If it goes through as it is it will do enormous damage to disabled people and will unravel a lot of successes of the last 10 years'*. The Equal Opportunities Commission stated that, *'restricting the duty to the identification of a limited number of*

priority objectives would be a fundamental weakening of the duty that would fail to root out institutional discrimination', and points out that, 'focussing only on areas that public authorities regard as priorities will result in sidelining, rather than mainstreaming, of equality obligations'.⁸¹ The Commission for Racial Equality points out that without mainstreaming, 'it is near impossible to identify never mind challenge assumptions, attitudes, and ways of working that act to disadvantage ethnic minorities', and that challenging racism and delivering race equality often involves the 'harder' edge of discrimination which, 'are precisely those areas where many public bodies prefer not to go to. One can think about stop and search and racial profiling; to the vulnerabilities of Black people in mental health decisions; onto the susceptibility of Gypsy and Traveller communities to eviction; as well as to the treatment of immigrants in detention centres. These 'harder' edges need duties more than anywhere else'.⁸²

33.7 With reference to the need to take proportionate action, proportionality is already implicit in the current legal requirement to pay 'due regard' to the need to promote equality. A more explicit method of linking the requirement both to pay due regard to equality and to take action could be as follows:

'1. A public authority shall, in carrying out its functions:-

- a) eliminate unlawful discrimination and harassment on any or any combination of the protected grounds,
- and
- b) promote equality of opportunity between members of a protected group and other persons.

2. For the purposes of subsection 1(b) to "promote equality of opportunity" includes:
(a) for all protected groups, to promote positive attitudes towards members of a protected group and to encourage their participation in public life;
(b) for groups defined by disability, to take steps to take account of disabled person's disabilities, even where that involves treating disabled persons more favourably than other persons.

3. For the purpose of complying with subsection 1, a public authority is expected to have due regard to all relevant circumstances and take all proportionate steps.

4. For the purposes of this section, "protected grounds" means one or any combination of grounds of race, sex, disability, sexual orientation, religion or belief, transgender or age, and a "protected group" means a group defined by one or more of the protected grounds.'

33.8 The Mayor submits that the Discrimination Law Review must not lead to a narrowing of the need for public authorities to consider equality in all their work, that any process of priority-setting should be in addition to this and would need to be explicitly objectively justified, that due regard may be reinforced by linking it to the need to take proportionate steps, and that reporting and monitoring must be central to the operation of the legislation.

Q34: Do you agree that public authorities should be required to review their priority equality objectives at least every 3 years? If not please give your reasons and alternative suggestions.

⁸¹ Discrimination Law Review Green Paper, Briefing from the Equal Opportunities Commission, August 2007

⁸² Briefings on the Discrimination Law Review, CRE, August 2007

34.1 The Mayor does not agree with adopting the model that this question is dependent on. The Mayor supports the retention of the requirement by public authorities to consider equality in all their work. In this context the implementation of the public duties should be subject to reporting, monitoring and review.

Q35: Would it be helpful for strategic equality outcomes to be set by the appropriate national government? If so, what would be appropriate ways of doing this?

- 35.1 Yes. The Mayor welcomes the proposal that the national government promotes equality through setting strategic equality goals and outcome targets. However, it is essential this be done within the framework of the duty to consider equality continuing to apply to all the functions of public authorities. Strategic equality outcomes should specifically apply to policies and delivery targets as well as to internal methods such as employment targets. Setting of equality outcomes to be met in policies and policy delivery as well as in other ways would assist government departments and other public authorities to be clear about the extent of their obligations. Further, the Mayor believes that the involvement of the communities affected by discrimination is important in setting equality outcomes. The requirement currently in the Disability Duty that authorities involve disabled people in the development of their disability equality schemes should be similarly applied: government should involve equality communities in the process of setting equality outcomes.

Q36: We would welcome views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, and on the four key principles we have identified. Do you prefer this approach, or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties? Please give your reasons.

- 36.1 This question contains the proposal to release public authorities from the specific duties that currently apply and replace them with vague 'principles' that authorities could interpret in a variety of ways and that would be unenforceable. The Mayor opposes this proposal.
- 36.2 The current specific duties contain precise requirements of public authorities to produce equality schemes and show that they are complying with definite steps. For example, the Race Duty requires public authorities to monitor employment by ethnicity; the Disability Duty requires public authorities to involve disabled people in setting their equality scheme and show what they will do over the period of the scheme to meet their general duty; and the Gender Duty requires public authorities to set gender equality objectives, including considering how to address the causes of any gender pay gap. The Green Paper proposes to eliminate these specific duties. Instead, authorities would be invited to focus on 'principles'.
- 36.3 It is also proposed to give authorities considerable leeway in how these 'principles' could be interpreted, that is, what action they would, or would not, lead to. Whereas now authorities must do certain things, under the new proposal they could and (in some cases the Green Paper proposes) should do certain things, but there will be no requirement that they must do the kinds of things that they currently have to. As an example, the Green Paper states, *'our proposed approach would therefore mean that the law would no longer specifically require, for example, employment monitoring of different racial groups'* (5.45). It would, *'instead set out the key principles which support effective performance of a single equality duty, and require these to be applied proportionately. This would give public authorities greater autonomy'*. The duty, *'could be met by publishing an equality scheme...or by other means such as in business plans, school development plans and annual reports'* (5.44).

- 36.4 This proposal to remove definite and specific requirements means that it will be impossible for the enforcement bodies to adequately monitor compliance by public authorities with the duty. With regard to ethnic monitoring for example, unless public authorities are required to monitor their workforces, assessing how representative they are, or how fair and unbiased their employment practices are, any progress that is being made in achieving equality will be impossible to correctly gauge. The importance of collecting data is outlined above (Q29) – it is essential if progress in achieving a representative workforce is to be measured, and if this is to remain a goal to be accomplished. It is hardly surprising that the Head of Legal Policy at the CRE said of these proposals that with regard to race equality they, *'are a repudiation of the Stephen Lawrence Inquiry'*, and that they were, *'calling for a fundamental review'*.⁸³ Similarly, the Disability Rights Commission has opposed the proposals and pointed out that, *'this approach will be far harder to enforce and far harder for disabled people to use to hold public authorities to account'*, and is, *'a recipe for greater confusion and weaker activity'*.⁸⁴ The Equality and Diversity Forum, a broad network of statutory and non-statutory equality organisations, has also opposed replacing the specific duties with 'principles', agreeing that the latter would be unenforceable and regressive.⁸⁵
- 36.5 Therefore the Mayor opposes the approach proposed under this question and prefers the retention and extension of the types of specific duties so far introduced in relation to the race, disability and gender public duties. The general duty should be extended to sexual orientation, religion or belief, and age, with specific duties linked to these.

Q37: If you prefer an extension of the type of specific duties adopted so far in the race, disability and gender equality duties, which elements of the specific duties do you think should be retained for a single public sector duty and why?

- 37.1 The Mayor submits that all the specific duties have crucial elements that must not be undermined. Doing so would not only be wrong, it would specifically breach the DLR's aim of not eroding existing levels of protection. Important elements that should be in specific duties include regular review and reporting, provision for evidence gathering and use, involvement and consultation of those most directly affected by discrimination when developing policies, action plans with definite objectives, equality impact assessments undertaken across all strands, and transparent monitoring, reporting and accountability.
- 37.2 The GLA has specific and separate equality schemes across strands and these schemes are working well. It is important that the content of specific duties provide for appropriate actions to tackle the characteristics of discrimination of the particular group. This will be important in extending the public sector duties to new strands.
- 37.3 The public sector gender and disability duties place emphasis on specifying and delivering actions to a greater degree than the Race Duty: an example of a positive lesson learned from the Race Duty, which the current proposals in the Green Paper fail to emulate. The duties could therefore be strengthened by ensuring this emphasis on actions and outcomes is applied across all the strands.
- 37.4 The requirement in the Race Duty to monitor employment by ethnicity should be retained and there should be monitoring of the workforce by age, disability and gender. This should be a basis for target-setting by employers to redress patterns of under-

⁸³ Mayor of London consultation event on the Discrimination Law Review Green Paper, 27 June 2007

⁸⁴ Discrimination Law Review Briefing, Disability Rights Commission, 2007

⁸⁵ EDF, www.edf.org.uk

representation. Such target setting is undertaken within the GLA Group. Similarly the requirement in the Race Duty to provide training should be broadened to apply to all the strands.

- 37.5 The requirements in all the duties to produce equality schemes, have equality impact assessments of policies, and monitor employment and policy implementation must be retained. The Gender Duty's requirement to set equality objectives could usefully be extended to apply across all strands and the Disability Duty's requirement to involve those directly affected by inequality should also apply to all strands and in an extended duty.
- 37.6 The requirement in the Gender Duty to, *'consider the need to include objectives to address the causes of any pay gap in formulating its overall objectives'*, would usefully be reinforced by requiring that actions and outcomes on pay are specified. Employers should be required to publish on a regular basis the salary data specified by gender, and to show what action is to be taken to address any patterns of discrimination that are revealed. The GLA already does this, with the information published in its Human Relations compendium on a six-monthly basis. This monitoring and setting of action to tackle pay inequality should be extended to cover other strands as appropriate and specifically, race.
- 37.7 Under the Disability Equality Duty, ten Secretaries of State are required (from December 2008) to publish a report every three years with an overview of progress in the policy sectors for which they have responsibility and proposals for improving performance. This is a useful model for an integrated, cross-strand duty, and the Mayor proposes that it is included as a specific aspect, and further improved by requiring these reports to specify the equality objectives to be set. The reports should be laid before parliament.
- 37.8 The duties would further be strengthened by an explicit legal requirement on authorities to build equality considerations into the procurement process. Procurement is not used comprehensively to support the equality obligations on public authorities. The Green Paper argues that more guidance will address this but the Mayor submits that there has already been much guidance and that the experience of the GLA supports the strengthening of the law. More is said on procurement below.
- 37.9 In response to consultation on the Gender Duty, the Mayor submitted that consideration should be given to including in a duty the aim of elimination of violence against women and gender based harassment and abuse. This consultation is an opportunity to reconsider the case for this.

Q38: Do you think that the proposed single public sector equality duty should apply to all public authorities? If not, please say how you think it should be targeted and give your reasons.

- 38.1 Yes, the public sector duty or duties should apply to all public authorities. The general duty should apply to all authorities and the specific duties to listed authorities on the widest basis currently existing. This combination provides for the proportionality which the Green Paper is concerned to ensure. A list approach, while providing some certainty would require continual updating. A proportionate approach (5.50) alone without a clear definition of public authorities to which the duty applied could, *'lead to some uncertainty about which bodies were subject to the duty'*.
- 38.2 No convincing argument is presented in the Green Paper as to why it might be appropriate not to apply the public sector duty to all public authorities. Yet the Green

Paper says, 'we are keen to obtain views on how a public sector equality duty could be effectively targeted to a specific group of public authorities', (5.56) while saying, 'this approach brings with it a number of practical difficulties'. Indeed it would. Along with removing mainstreaming and replacing the specific duties with unenforceable 'principles', this approach would signal the demise of the public sector duties. The Mayor is opposed to a reduction in the range of public authorities to which the duty would apply: only by including the broad sweep of public authorities within the remit of a meaningful public sector duty will it be possible to identify and tackle discrimination and most effectively and speedily promote and deliver a more equal society.

- 38.3 The public sector duty must clearly apply when a private body is carrying out public services on behalf of a public body. This raises the issue of the definition of public authority. This definition should not be that used in the Human Rights Act as the latter has proved restrictive – organisations such as housing associations or private care homes are only covered in certain respects. Using the Human Rights Act definition would raise major problems for the impact of the equality duties.
- 38.4 Any exemptions to the duty must be subject to discussion and regularly reviewed to decide if the exception continues to be appropriate.
- 38.5 Concretely, the Mayor proposes explicitly stating in the legislation that for the purposes of the equality duties the definition of public authority is broader than in the Human Rights Act and that the public sector duty applies to all authorities and defining this in relation to the bodies covered by the main inspectorates as follows:
- Commission for Healthcare Audit and Inspection (healthcare commission)
 - Independent Regulator on NHS Foundation Trusts
 - National Audit Office
 - Audit Commission
 - Commission for Social Care Inspection
 - Her Majesty's Inspectorate of Constabulary
 - Her Majesty's Inspectorate of Prisons
 - Her Majesty's Inspectorate of Probation
 - Her Majesty's Inspectorate of Court Administration
 - HM Crown Prosecution Service Inspectorate
 - Office for Standards in Education
- 38.6 This approach would ensure broad coverage and mean less updating.

Q39: Do you think that a single public sector duty should be extended to cover: age, sexual orientation; religion or belief? Please state your reasons, including examples of the types of disadvantage you believe are experienced by people because of their age, sexual orientation or religion or belief which could be addressed effectively through such a duty.

- 39.1 Yes. Again, the Mayor disagrees that this would mean, 'requiring public authorities to identify whether there was a need for specific proportionate action to address priority objectives...' (5.57). Rather, under the model promoted by the Mayor and based on the current duties, it would mean that a duty would require public authorities to consider equality of all the strands that face discrimination in the work of public authorities, and to fulfil the specific duties. The duty should cover all six strands in order to promote equality and tackle disadvantage and discrimination which clearly affect all six strands.

Public services should be delivered on the basis of equality for all. It is illogical to offer such protection to some groups and not others. The Commission for Equality and Human Rights will have to enforce the rights of all six strands and it should do so on an equal basis.

- 39.2 With regard to age for example, on the Government's figures, 40 per cent of the population will be aged 50 and over by 2020.⁸⁶ Given the Government's stated intention to promote a positive response to an ageing society (as in Opportunity Age and Sure Start to Later Life) and to create sustainable communities that are 'fair for everyone',⁸⁷ it would be contradictory not to put older people on the same footing as other groups facing discrimination. There are many examples of older people being discriminated against in health and social care: for example, health screening programmes that use age criteria to determine access; there is less money spent per head in comparison to other groups in social care services,⁸⁸ and there are many reports of age discrimination by NHS staff and a lack of dignity in care.⁸⁹ In the justice system age discrimination is evident in the requirement for magistrates to step down at 70 and the refusal to allow people above this age to serve on a jury.
- 39.3 The suicide rate amongst men over 75 is 19 per 100,000, yet the National Suicide Prevention Strategy does not explicitly focus on any prevention amongst this age group. Other examples of differential treatment are: breast cancer screenings are not automatically offered to women over 70; 60 per cent of older people are at risk of malnutrition when hospitalised; waiting lists for services such as wheelchairs and hearing aids are long though they are not made subject to government improvement targets. During the next 50 years, those aged over 85 are set to rise from 1.1 million to 4.2 million, so addressing such discrimination will become increasingly pressing. Another recent journal article published in 2007 has suggested that those over 65 are treated differently, for example they were less likely to be referred to a cardiologist for the treatment of angina.⁹⁰ Statistics from the Department of Health, published in July 2005, states, that older people suffering from poor mental health present in 40 per cent of GP attendees, 50 per cent of hospital patients and 60 per cent of care home residents. This will be compounded by the projection that, in the next 10 years (to 2015), the population of those over 65 will increase by 15 per cent and the number of those over 85 years will increase by 27 per cent.⁹¹ If public authorities and public health bodies are required to include age discrimination in their diversity and equality strategies, differential treatment will be tackled and differential outcomes minimised.
- 39.4 Age Concern believe that people aged over 55 are almost twice as likely to suffer age discrimination more than other forms of discrimination and one-third of people thought

⁸⁶ According to the Wanless Review, "Securing good care for older people" published in 2006 (http://www.kingsfund.org.uk/publications/kings_fund_publications/securing_good.html), the number of people aged over 85 is set to increase by two-thirds in the next 20 years, compared with an overall population growth of 10 per cent.

⁸⁷ Department for Communities and Local Government definition.

⁸⁸ Yet in 2002, almost 1 million older people were assessed to have a high level of need and over the next 20 years to 2025, this will rise by 54 per cent, the number of those older people who have some level of need according to standard assessments will rise by 53 per cent, and the number that do not require care will rise by 44 per cent. http://www.kingsfund.org.uk/publications/kings_fund_publications/securing_good.html

⁸⁹ Age of Equality? Age Concern England contains testimonies to this effect.

⁹⁰ <http://qshc.bmj.com/cgi/content/abstract/16/1/23?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&andorexactfulltext=and&searchid=1&FIRSTINDEX=0&sortspec=relevance&volume=16&firstpage=23&resourcetype=HWC> IT. Quality and Safety in Healthcare, 2007, 16:23-27

⁹¹ "Securing better mental health for older adults".

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4114989

that those over 70 are typically viewed as ‘incompetent and incapable’.⁹² The Mayor submits that it is imperative that protection against age discrimination is comprehensively introduced, including through extension of the public sector duty and protection against discrimination in goods, services and facilities.

- 39.5 With regard to sexual orientation, there is evidence of the impact of discrimination that is currently not tackled by public sector equality duties. Kairos in Soho’s Change Up 2006 research argued that there is: ‘*extensive evidence that LGBT people are exposed to discrimination and face barriers in accessing public services (Wilton 2000, Fish 2006); experience specific health inequalities across a wide range of issues (Count Me In 2000, DoH 2006, Henderson et al 2002); are subject to hate crime, harassment and violence (Home Office 2006) are limited by employment discrimination (DTI 2006); are exposed to media prejudice (Stonewall 2006); and are managing in a social context that is undermining and alienating*’.⁹³
- 39.6 Service providers are not currently required to collect and monitor data on lesbian and gay communities – which then leads to lack of consultation with lesbian and gay service users and therefore gaps in service provision (for example, the issue of homelessness⁹⁴). Even the national census does not record data on sexual orientation. After the recent round of consultation regarding the 2011 national census, though the Mayor has confirmed his support for including a sexual orientation category, the Office for National Statistics decided against this. Subsequently, there is a lack of comprehensive data on the experiences and barriers faced by lesbian and gay Londoners.
- 39.7 A recent Stonewall report found homophobic bullying in schools to be widespread: 65 per cent of young lesbian, gay and bisexual pupils having experienced direct bullying and more than half of young lesbian and gay pupils did not feel able to be themselves at school. Far fewer felt themselves positively protected: only 23 per cent of young gay people have been told that homophobic bullying is wrong in their school. In schools that have said bullying is wrong, gay young people are 60 per cent more likely not to have been bullied.⁹⁵ This is the kind of process of change that could be effectively supported and generalised by a public sector duty.
- 39.8 With regard to religion and belief, as with age and, particularly, sexual orientation, the weakness of data itself creates a patchy picture. However, here also patterns of inequality indicate that more needs to be done by public authorities to understand the needs of communities and deliver services and run their organisations in ways that better speak to those communities. The impact of indirect as well as direct discrimination needs to be better understood. In London, Muslim households are 2.5 times more likely than other households to be overcrowded and in England and Wales as a whole, only 51 per cent of Muslim households own their own homes compared with 69 per cent of the general population.⁹⁶ Part of the Mayor’s response, given his new powers to set the overall distribution of funding for affordable housing, is to increase the supply of family-sized social rented homes (those with three bedrooms or more), which have reached very low

⁹² How Ageist is Britain”, 2005

<http://www.ageconcern.org.uk/AgeConcern/3DE4E64AB5874330A11C1AB7790587BC.asp>

⁹³ Kairos in Soho, May 2007

⁹⁴ Hove YMCA’s recent paper entitled ‘Out of my Own’, published in 2006, estimates that to up 40 per cent (more likely around 20 per cent however) of homeless youth are LGB. However, the combination of a lack of accurate data and a lack of adequate specific service provision targeting LGB homeless youth has contributed to an over-representation of LGB youth in the homeless community. This report recommended that further work is needed on anti-harassment policies, specialist projects and specific targeting of LGB youth to help them access mainstream services. http://spectrum-lgbt.org/downloads/reports/Out_On_My_Own___full_report.pdf

⁹⁵ The experiences of young gay people in Britain’s schools (2007)

⁹⁶ Drawn from 2001 Census, cited in Muslims in London, GLA, 2006

levels in London.⁹⁷ Muslims also experience higher levels of disability compared to the general population.⁹⁸ A study by the Maternity Alliance in 2003 revealed that basic facilities in the NHS were often insensitive to Muslim parents needs, such as easily understandable information or access to female doctors.⁹⁹ A 2004 survey in the British Medical Journal established that of 72 NHS hospitals contacted, only ten reported having multi-faith prayer rooms¹⁰⁰ and another survey in 2001 reported that employers did not provide prayer facilities for 87 per cent of respondents.¹⁰¹

- 39.9 Discrimination on the basis of religion and age may also intersect, creating multiple disadvantage. Older people are more likely than younger people to say that they have a faith. And as Abdurahman Jafar, of the Muslim Council of Britain, argued at the Mayor's consultation event on the Green Paper, *'the whole point about the three public duty strands of race, gender, and disability was to make sure that the public authorities are much more sensitive to the needs of the communities that they serve. I think that if you don't include the other three strands you're unreasonably frustrating their ability to meet the needs of the people they are serving.'*
- 39.10 The extension of anti-discrimination law to goods and services on grounds of religion and belief and on sexual orientation will go some way to provide protection (not, of course, to age, which remains without protection). However, these provide highly individualised rights. Public sector duties are designed to be much more proactive and systematic in their identification and tackling of institutional discrimination and promotion of equality. The case for them in relation to age, sexual orientation and religion or belief is just as valid as for the areas presently protected – race, disability and gender. The very fact that the public duties would include a duty to collect information would begin to provide a much clearer picture of the inequality and discrimination affecting communities presently not covered by the duties.

Q40: Might there be disadvantages in extending the duty to any of these groups?

- 40.1 No. The Mayor does not see any disadvantages to considering everyone to be equal and extending the public sector duty in this way.
- 40.2 The Green Paper seems to be looking for arguments against extending effective public sector duties across all strands. Confusing stereotypes are raised in the consultation in relation to this and the previous question, such as, stating that a public sector duty on sexual orientation *'would not require public authorities to "promote homosexuality" or devalue the importance of marriage'* (5.67). The repeal of Section 28, which was a charter for discrimination and prejudice against lesbian and gay people and raised the entirely false idea of the 'promotion of homosexuality' by schools, was a high point for the Labour Government. Similarly, in discussing extending the public sector duty to religion, the Green Paper says, *'it would not, for example, require a local authority to ban*

⁹⁷ It is too early to gauge the impact of this strategy – in the Draft Mayor's Housing Strategy, to be published September 2007 – but the target of 35 per cent from the previous London Housing Strategy (a non-statutory strategy drawn up by the London Housing Board of which the Mayor was a member) was achieved by the Housing Corporation in its allocation of funding for the new social housing in the 2006-08 spending round.

⁹⁸ Office of National Statistics, Focus on Religion, 2004, cited in Muslims in London, GLA, 2006

⁹⁹ Experiences of Maternity Services: Muslim Women's Perspectives 2004

¹⁰⁰ BMJ 329:626, 2004; cited in Muslims in London, GLA, 2006, which also noted that there was progress in 'recent guidance from the Department of Health on developing chaplaincy services that meet the needs of all faith communities' (p75)

¹⁰¹ 2001 Home Office Citizenship Survey <http://www.homeoffice.gov.uk/rds/pdfs04/hors274.pdf>

displays of Christmas decorations' (5.72). The Green Paper provides no evidence that this has been a real concern.

- 40.3 The Mayor agrees with the opinion of Ben Summerskill, Chief Executive of Stonewall, on this point, *'The Green Paper... reads like a catalogue of reasons why we shouldn't make progress, rather than... why we should. For example, instead of arguing why the public duty should be extended to sexual orientation it gives the reasons why you shouldn't, including the possibility of being accused of promoting homosexuality. This view is appalling'*.¹⁰² He added that, *'200 of our 300 diversity champions are public sector organisations and not one says that they don't think a public duty for all the equality strands is the right thing to do.'*

Q41: Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from recently introduced duties on disability and gender?

- 41.1 Duties should be extended as rapidly as possible, which the Mayor believes would be around two years after passing legislation, as experience indicates that production of a Statutory Code takes about one year, with another year needed following that to allow authorities to produce equality schemes. The duties extended should be on the basis of content advocated above.

Q 42: Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling these authorities who have already taken an integrated approach to build on existing work?

- 42.1 Again, the Mayor supports the public sector duty and specific duties along the lines set out.

Q 43: Do you think that there should be a single enforcement mechanism for the proposed single equality duty, enabling the Commission for Equality and Human Rights to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court of Sheriff's court in Scotland?

- 43.1 No. Again, it must be underlined that this submission does not support the model again suggested under this question for the content of a public sector duty proposed which would *'remove the current distinction between general and specific duties'* (5.83) by moving away from a duty to consider equality in all work and replace the specific duties by vague principles.
- 43.2 Such a model will make the duties unenforceable.
- 43.3 The Mayor would in any case oppose the change that is proposed under this question, that is, the proposal to end the right that exists at present of any interested party to challenge a public authority decision on equality. Instead, it proposes, that only the Commission for Equality and Human Rights should be entitled to take enforcement action. The CRE argues against the proposal saying that, *'This would mean that the High Court in England & Wales, and the Court of Session in Scotland would have no remit for enforcing the proposed equality duties.'* It would also get rid of the important principle

¹⁰² Mayor of London consultation event on Discrimination Law Review Green Paper, 27 June 2007

that those directly facing discrimination should be empowered to take action to hold public authorities to account. This is inherent in the current structure and would be removed by this proposal.

43.4 Leaving the responsibility for enforcement of the public sector duties in the 43,000 public bodies in Britain to the CEHR alone is deeply unrealistic. As the Disability Rights Commission has argued, *'We need to ensure that a range of stimuli are built into the system to secure compliance and produce results'*.¹⁰³ In effect the proposal will mean a massive reduction in regulation. Unfortunately, this seems consistent with Chapter 5 as a whole, where the proposals form a coherent attack on the purpose, content and impact of the public sector equality duties. The Mayor does not support this proposal to reduce the scope for enforcement and regulation of the public sector duties.

Q44: What do you think should be the role of the public service inspectorates in assessing compliance with the public sector equality duties?

44.1 All the public service inspectorates should be under an explicit legal duty to monitor the implementation of the equality duties as part of their overall assessment of public authorities.

Q45: What issues would you like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, whilst ensuring that the guidance works well for business?

45.1 The Mayor does not agree with the premise of this question, which is that no further legislative action is required to ensure that public authorities place equality at the heart of procurement. The Mayor's view, drawn from the GLA's experience, is that guidance alone will be insufficient to ensure the delivery of *'equality outcomes in the delivery of public services by the private sector'*, i.e. in procurement.

45.2 As large scale employers and purchasers of goods, services and works, public sector bodies can have a direct and significant impact on the economic, social and environmental well-being of the communities they serve. As the Green Paper points out, public sector procurement is worth over £125 billion each year. However, public bodies have to carefully consider a range of apparently contradictory legislative provisions. It is often perceived that best value and fiduciary considerations are pulling in the opposite direction to anti-discrimination measures. The general understanding of the extent to which EU public procurement law permits public bodies to undertake steps to address inequality and discrimination through the procurement process is muddled.

45.3 Notwithstanding the absence of express statutory provision, the GLA has:

- introduced a Sustainable Procurement Policy which strengthens the commitment to driving diversity and fair employment practices through procurement;
- reviewed all GLA contracts and implemented a programme to bring workers into line with the London Living Wage;¹⁰⁴

¹⁰³ Discrimination Law Review Briefing, Disability Rights Commission, 2007

¹⁰⁴ For example, cleaners at City Hall were uplifted to the London Living Wage rate of £7.05, which was the figure at May 2006. Many of the industries where workers are paid below the Living Wage employ significant numbers of women and black and minority ethnic groups.

- applied contract terms to appropriate new contracts to ensure that relevant contractors pay the London Living Wage;
- updated the Pre-Qualification Questionnaire to reflect new equality legislation;
- started the development of a guide for officers on how to assess responses to the equalities section of the Pre-Qualification Questionnaire;
- surveyed the supplier base to obtain a base line of supplier diversity;
- applied contract terms requiring contractors to implement appropriate equalities practices, and provide information on the diversity of their organisation and subcontractors;
- implemented a process of periodic reporting on the types of organisation winning GLA contracts (SME, BAME, women-led etc);
- continued to advertise our contract opportunities widely and circulate them to community groups to encourage participation from all sections of the business community.

45.4 However, the lack of statutory back up and clarity means that the work done by the GLA to embed equality in procurement is the exception rather than the rule.

45.5 The Green Paper fails to propose the level of legislative change that will lead to better equality outcomes. Its approach in this question is consistent with that set out in a DLR discussion paper 'The Role Of Public Sector Procurement In the Promotion of Equality'¹⁰⁵ which stated, *'legislation on the current and forthcoming public sector duties does not refer explicitly to public procurement. The obligations under the general duty apply to a public authority's functions as a whole. The DLR has considered whether it would be helpful to state explicitly in the legislation that the general duty applies to procurement functions (though without giving it precedence over other functions). We have, however, concluded that this is unlikely to have a significant impact on procurement practice: the way the law applies to procurement can be made clear in statutory Codes of Practice, widely disseminated so as to reach the largest number of public authorities.'*

45.6 The Green Paper takes exactly the same approach stating (5.100):

- *'there is a need for straightforward, practical guidance for public authorities on procurement and public sector equality duties, agreed jointly between the Commission for Equality and Human Rights and Government. This should focus on what public authorities can do in practice, within the limits set by European procurement law and by value for money policy and best value legislation. It should help procurers to develop their expertise, for example in evaluating contractors' responses to equality requirements and in providing ongoing support and challenge throughout the duration of contracts to meet the service requirements, and should be disseminated widely; and*
- *further action is needed to encourage good practice, simplify processes and explore the scope to develop streamlined approaches and minimise burdens on the private sector and public authorities alike. These might include encouraging good practice networks and considering the development of standard equality conditions for use in public sector contracts. There are roles here for Government and other interested*

¹⁰⁵ Discussion paper circulated for Discrimination Law Review seminar, 12 October 2006

agencies, with the Commission for Equality and Human Rights in a key position to drive progress.'

- 45.7 The Mayor considers this to be inadequate to ensure that public sector equality duties are fully embedded in contracts with the private sector. The Mayor's view is that a new statutory obligation placing anti-discrimination measures at the heart of the function of public sector procurement is essential to making progress across the public sector in this area.¹⁰⁶
- 45.8 The Code of Practice/Guidance route has failed to deliver significant results. Policy initiatives aimed at improving the public sector's approach to addressing equality in procurement have included The National Procurement Strategy for Local Government; CRE Guide on Race Equality in Procurement; IDeA Local Performance Indicators on Procurement; Equalities Standard for Local Government; and the DWP IRIS report. Despite these initiatives, DCLG's 'Two Years On' report on the National Procurement Strategy for Local Government identified that in 2004 only 34 per cent of authorities specifically addressed equality and diversity in their procurement strategies, and in 2005 only 40 per cent of authorities specifically addressed equality and diversity with examples or targets. However, useful and well-intended, these voluntary schemes have not produced the change that is required to embed equality in public procurement.
- 45.9 During the Mayor's consultation on the Green Paper, Caroline Gooding from the Disability Rights Commission pointed out that, *'all three commissions are agreed that what is needed is for the law to be clear that when services are contracted out organisations cannot contract out of equality. This was one of few recommendations made by the equality review for strengthening in the law, and it has been ignored.'*¹⁰⁷
- 45.10 The Mayor submits that only legislative provision will provide the clarity required. The Single Equality Act must explicitly state that the general duty applies to the procurement function, if public bodies are to join with the GLA to move the agenda forward through using their commercial/market power.

Chapter 6: Promoting good equality practice in the private sector

The Discrimination Law Review fails to grasp the opportunity to improve equality and tackle discrimination in the private sector. Devoting only four pages in a 190-page document to *'promoting good equality practice in the private sector'* does not reflect the serious consideration this area merits. No new rights are proposed. Instead the intention is to rely on entirely voluntary measures such as, *'a light touch "equality check tool" for employers...[and possibly] a voluntary equality standard scheme'*, and other encouragements to good practice *'without introducing additional legislation'*. The consultation seeks responses to two questions on this basis.

This approach is not justified. All evidence suggests that a reliance on purely voluntary measures is insufficient: private sector employers with a positive approach to tackling discrimination will act accordingly but those who are less concerned will get away with a failure to act. The Mayor works closely with private sector employers in London to identify and promote the best equality practices being implemented, and is committed to doing everything possible to support the work of employers committed to opposing and tackling discrimination. But discrimination

¹⁰⁶ Equality in our Lifetime? Public Procurement and the Discrimination Law Review', May 2007. See appendices

¹⁰⁷ Mayor of London consultation on the Discrimination Law Review Green Paper, 27 June 2007

remains widespread and employers who embrace the business case for equality by voluntarily implementing good equality policies need the law to ensure that their less fair-minded competitors are obliged to do likewise.

The majority of employees in London work in the private sector and the private sector is an increasingly significant provider of services through contracting out by the public sector. Many indicators show that inequality is worse in the private sector and legal protections are already lower, compared to the public sector. Therefore there is a need for equality in legal protection.

It has been noted that: *'To the extent that public sector equality duties mean that public sector workers are more likely to have equal opportunities and less likely to be discriminated against in practice because of the mechanisms accompanying the positive duties, failure to regulate private sector employers to the same extent means that private sector workers are, to that extent, second-class citizens.'*¹⁰⁸ Yet the Green Paper avoids the necessary legal incentives to tackle discrimination.

- The gender pay gap is wider in the private sector than the public sector.¹⁰⁹ In 2005, median gross hourly earnings for men working full-time in the private sector in the UK were 21 per cent higher than those of women working full-time. The full-time gender pay gap in the public sector was just under ten per cent. In the UK, 61 per cent of women in employment work in the private sector and in London, this goes up to 65 per cent.¹¹⁰ Under-representation of women at senior levels in companies is marked: only 13 FTSE100 companies have female executive directors and only 10 per cent of all directors are women,¹¹¹ less than one in ten FTSE 100 board members are women, and only three per cent are in executive roles and there has been virtually no improvement over the previous decade.¹¹² In London-based companies there is a similar under-representation and research has also shown a considerable under-remuneration between female directors and their male peers, with women averaging 44.5 per cent of male remuneration when all cash salary, deferred bonuses and other payments are taken into account.¹¹³
- In 2004 the ethnic pay penalty – the gap between the average earnings of black and minority ethnic (BAME) groups and white groups – was 21 per cent for London. On average, BAME groups earned £9.43 per hour, compared with £11.93 for white groups. However, again, the pay gap appears to be wider in the private sector than public sector. Although later figures are not currently available, analysis for 2001/02 showed that BAME workers across the public sector earned on average £9.61 per hour – 89 per cent that of white workers (£10.85) – while BAME workers in the private sector earned an average of £7.89 per hour – 74 per cent that of white workers (£10.68). The size of the pay gap within the private sector was driven by very low rates of pay for BAME employees – 25 per cent of BAME workers in the private sector earn less than £5.47 per hour compared with £6.98 for the lowest paid 25 per cent of public sector BAME workers.
- As most black and minority ethnic Londoners in employment worked in the private sector, these inequalities affected significant numbers of people. In 2005, a quarter of black and

¹⁰⁸ Equality, the private sector and the Discrimination Law Review: A preliminary report, M. Rubenstein, editor, Industrial Relations Law Reports and Co-Editor, Equal Opportunities Review, research for the Mayor, circulated to consultation seminar 27 June 2007.

¹⁰⁹ Annual Survey of Hours and Earnings, 2006, Office for National Statistics

¹¹⁰ Annual Population Survey 2005, in GLA DMAG Briefing, 2006/33

¹¹¹ <http://www.som.cranfield.ac.uk/som/research/centres/cdwbl/downloads/FTSE2006full.pdf>

¹¹² <http://www.com.cranfield.ac.uk/some/research/centres/cdwbl/introduction.asp>

¹¹³ Women in London's Economy, January 2005, Mayor of London and GLA Economics

minority ethnic Londoners in employment worked in the public sector while 73 per cent worked in the private sector.

- Within business, black and minority ethnic representation is also low. Ethnic minority representation among FTSE 100 executive directorships (including executive chairman) was 1.8 per cent in 2001, falling to 1.5 per cent in 2004, while the number of ethnic minority non-executive directors in 2001 was 17, rising to 20 in 2004 (an increase from only 2.5 per cent to 2.8 per cent).¹¹⁴
- Voluntary activity on Equal Pay Reviews has stagnated, and this is particularly so in the private sector. Research shows that far fewer private sector employers had conducted or were planning to conduct an Equal Pay Review, than was the case among similar public sector employers.¹¹⁵
- Recent research has also found significant differences in disability discrimination between the public and private sectors. Again, the majority of disabled people who work in Britain are employed in the private sector, so if discrimination exists, it is more prevalent in the private sector and is likely to impact on large numbers of people. Studies commissioned by the Department for Work and Pensions showed the public sector consistently outperforming the private sector in terms of awareness of the Disability Discrimination Act, employment of disabled people and making adjustments to accommodate disabled staff.¹¹⁶
- Other conditions which differ between the public and private sectors may shed some light on some of the differences outlined. These include:
 - Trade union membership, where 16.6 per cent of private sector employees were union members in 2006 compared with 58.8 per cent of public sector employees. Unions were present in 86.6 per cent of public sector workplaces, more than double that of the private sector.¹¹⁷
 - Existence of equal opportunities policies and practices, which were almost universal in public sector workplaces and in workplaces with recognised unions but were present in only 67 per cent of the private sector workplaces and 63 per cent of workplaces without recognised unions.¹¹⁸
 - Monitoring and reviewing, where public sector workplaces and workplaces with a recognised union were more likely to review and monitor recruitment, selection and promotion, and relative pay rates in relation to gender, ethnicity, disability and age. The incidence of monitoring was also more common where workplaces had an equal opportunities policy in place: 31 per cent of workplaces with a formal equal opportunities policy monitored recruitment and selection by gender, compared to only 4 per cent of workplaces which did not have a formal written policy.¹¹⁹
- The enforcement regime provides little incentive to employers to avoid discrimination. Despite sometimes sensationalist media reports, in 2006, the median award by Employment Tribunals for a successful discrimination case (across all grounds) was £7,500, slightly lower

¹¹⁴ <http://www.berr.gov.uk/files/file13427.pdf>

¹¹⁵ Equal Pay Reviews Survey 2005, Working Paper Series No. 42, Equal Opportunities Commission, 2006

¹¹⁶ Simm et al, 2007, Roberts et al, 2004 <http://www.dwp.gov.uk/asd/asd5/rports2007-2008/rrep410.pdf>

¹¹⁷ 2006 statistics DTI: www.berr.gov.uk/files/file39006.pdf

¹¹⁸ Inside the workplace: first findings from the 2004 Workplace Employment Relations Survey (WERS), Kersley et al, July 2005, DTI.

¹¹⁹ WERS, as above

than the previous year (£7,567). More than half of the awards for injuries to feelings fall in the band below £5,000, with the median award being £125 down on the previous year, at £4,875.¹²⁰

Q46: Do you think that an 'Equality Standard' would be beneficial to businesses, employees and customers?

46.1 The Mayor agrees with the statements in this section of the Green Paper that, *'there is a clear business case for diversity'*, and that, *'organisations with a diverse workforce are best placed to understand and respond to the needs of the widest customer base'* and are *'drawing on the talents of all'*. The Mayor's Private Sector Team works with London private sector employers on exactly this basis and has, for example, engaged employers in the case being developed on Women in London's Economy. Also, Diversity Works for London is a programme led by the Mayor *'to engage organisations in maximising the benefits of a diverse workforce and supplier base. Through strategic partnerships and working closely with the business community, the programme aims to support businesses in addressing inequalities in the workplace and enable businesses to harness diversity to improve the economic performance of London and enable all Londoners to share in the city's opportunities and prosperity.'*¹²¹ However, government is in the position to go further than this, by ensuring the law upholds and promotes equality. If this approach is opposed, and the private sector is only encouraged to have a 'light touch' approach on equality, it is hard to see government introducing an equality standard that is sufficiently robust to deliver the change that is needed. A robust and strongly promoted equality standard may have use in relation to employers already committed to equality but it will not be sufficient to tackle firmly entrenched discrimination. It would also be useful, providing it was not at a lower standard than similar other private sector initiatives and did not, as a result, 'lower the bar' on equality that many businesses are signed up to.

Q47: We would welcome your suggestions for other ways in which good equality practice could be encouraged and embedded in the private sector.

47.1 The Mayor does not accept that no further regulation in favour of equality in the private sector should be introduced through a Single Equality Act. Key issues that the Mayor submits for consideration are:

Private Sector Equality Duty: This could incorporate a number of individual proposals. The overall aim would be to create a proactive approach to equality, similar in intent to the public sector duties, though of course the exact detail would be specific to the realities of the private sector. For example, large private sector employers, above a designated number of employees, could be required to take steps to eliminate discrimination and to achieve the progressive realisation of equality. Such a duty could be designed so that it was not unduly burdensome on employers, such as by allowing employers to assess what steps were necessary and proportionate to take steps towards equality. Specific duties on employers could thereby include requirements for employers, which are above the agreed designated number of employees to conduct an equality review at intervals to be determined and to publish the results; to take action to address any evidence of significant under-representation of any group in any occupation or level within the undertaking; and to consult with members of the designated equality groups and employees in developing action plans triggered by equality reviews. Again, it would

¹²⁰ Equal Opportunities Review, August 2007

¹²¹ Diversity works for London at <http://www.lda.gov.uk>

be possible to write into such legislation provision that no employer should be obliged to take any action which would involve undue hardship to the employer's undertaking, nor to recruit or promote a person who would not be qualified for the job.

Equal Pay Reviews: The case for mandatory EPRs is set out in response to Chapter 3 above. An equal pay review involves comparing the pay of women and men doing equal work, investigating the causes of any gender pay gaps and eliminating any salary differences that cannot be satisfactorily explained objectively rather than on grounds of sex. It is all but impossible for an employer to proactively address pay discrimination against women without having accurate pay data on the differentials between men and women, and without examining the reasons for these differentials. Yet many employers continue to avoid doing this – among large employers, many more in the private than public sector are failing to undertake pay reviews on a voluntary basis.¹²² The pay review process helps to reveal whether employers are providing equal pay, what processes in an organisation contribute to pay inequality and how these might be tackled. ACAS (the Advisory, Conciliation and Arbitration Service) says that, *'In the private sector ACAS advisers report that employees are less likely to know the pay rates of their colleagues because of a general lack of transparency in pay scales.'*¹²³

In London, firmer legal powers to tackle pay inequality are needed. Research by the Mayor's Women in London's Economy programme shows that the average gap in pay between women and men is greater than in the rest of the UK.¹²⁴ In research undertaken for the GLA into international best practice in addressing discrimination in employment, the Head of Employee Relations, Reward and Diversity at HBOS plc, one of the UK's leading financial organisations, stated that, *'An EPA [Equal Pay Audit] is something a company should do if it is firmly committed to equal opportunity and diversity, as it seeks to alleviate any reward issues as well as to identify and seek to address areas where cultural change is necessary'*. As the review of EPA activity already cited shows, too many private sector employers are not voluntarily showing this commitment to equality, and the results are reflected in the gender pay gap.

It was widely hoped, therefore, that the DLR would recommend legislation to make equal pay reviews mandatory for both private and public employers over a certain size. Consultation on this widely supported matter should be permitted in future discussion on a Single Equality Act.

Workforce monitoring: Monitoring of workforce statistics has been seen as a key component of an effective equal opportunities policy for many years. This is reflected in the statutory Codes of Practice. Thus, the CRE's Code of Practice, 'Racial equality in employment', recommends employers to *'monitor workers and applicants by racial group'*. The CRE goes on to explain that *'monitoring, by racial group, gives employers the information they need to understand how their policies, practices and procedures in the field of employment affect people from different racial groups'*. Michael Rubenstein has pointed out that, *'some private sector employers are reluctant to undertake monitoring for fear that the results obtained will be disclosable in subsequent legal proceedings. Where the statistics are germane, that might well be the case'*. He pointed out that, *'such an ostrich-like approach, however, is likely to lead to more unlawful discrimination – and*

¹²² 'the overall incidence of EPR activity amongst large organisations is significantly higher in the public sector; 28per cent had a first EPR in progress in 2005, compared with only 5per cent of organisations in the private sector', Equal Pay Reviews Survey 2005, Working Paper Series no42, EOC

¹²³ Back to Basics – ACAS experience of equality and diversity in the workplace', ACAS, November 2006

¹²⁴ Women in London's Economy 2007, Mayor of London and GLA Economics

*hence more successful discrimination claims – than taking proactive steps to reduce the likelihood of the organisation unlawfully discriminating’.*¹²⁵

The Green Paper rejects a statutory requirement on private sector employers to monitor and report on their equality practices, and is not consulting on the issue. Noting that there is such a regime in Northern Ireland, the DLR says: ‘we do not consider that this type of approach would be the right solution for Britain. A reporting regime which could guarantee the necessary degree of accuracy would be bureaucratic, burdensome on employers and costly to run and enforce’ (6.12). Given obvious differences of scale between Northern Ireland and Britain, the detailed content of such a requirement might differ but the value that monitoring and reporting would have in providing clear a clear picture of private sector workforces remains obvious. The Mayor notes that the final report of the private-sector led Race Equality and Diversity Taskforce in 2004 included a proposal that companies with more than 50 employees should publicly report on race equality and diversity, thereby indicating that those employers in this survey at least did not view monitoring as a major burden.¹²⁶ Similarly the evidence from Northern Ireland is that employers have been able to implement the requirements under legislation. Equality monitoring and reporting would be important tools towards making workforces more representative of the entire population – addressing the under-representation of sectors of the population in senior jobs, professions, and sectors, and tackling inequality in pay and employment.

Comprehensive protections: A range of changes should be supported to render protections more comprehensive in the private sector. For example, by:

- making discrimination on grounds of age illegal in the provision of goods, facilities and services;
- making it illegal to discriminate against women in the provision of insurance;
- providing a non-discrimination right for carers;
- providing an extension of flexible working rights to all parents and to carers, using a wider definition of carers.

Other sections of this submission state in more detail the case for improvements such as these.

The Companies Act 2006: The Green Paper makes reference to the Companies Act which provided for improved company reporting and transparency, including information on social/community issues. The Companies Act opened the door to statutory equality reporting as part of the normal reporting obligations of companies and while the Green Paper does no more than cite the current, quite limited, provisions, the Act gives the Government power to strengthen these through regulation. For example, companies could be required to include information specifically related to equality in the company’s employment policies, and the categories of companies required to prepare a business review could be extended.

Positive action: Consistent with the views set out above under Chapter 4, the Mayor submits that greater potential for employers to take positive action steps to address under-representation and patterns of discrimination and disadvantage should be legislated for through a Single Equality Act. The Green Paper notes that the ‘provisions for positive action balancing measures in the relevant European Directives are framed more widely than those in British discrimination law’ (4.31). The amended provisions that

¹²⁵ Equality, the private sector and the Discrimination Law Review: A preliminary report, M. Rubenstein, editor, Industrial Relations Law Reports and Co-Editor, Equal Opportunities Review, June 2007.

¹²⁶ Membership included B&Q, Barclays Bank, BT, Ford Europe, Innogy, IXL Laundry Group Ltd.

came into force in October 2005 further enhanced the scope for positive measures. While the DLR is relatively positive towards more fully exploiting the potential this creates – and this is welcome – it is still very vague about just what such measures might be. Neither does the Green Paper contemplate creating the kinds of incentives or legal requirements that would make any impacts from positive action more likely. Positive action should cover the ability to take action in recruitment and promotions and in selections for political and public office. Future stages in this discussion should explore this area more precisely.

Procurement: The issue of public sector procurement is covered extensively in Chapter 5. The Single Equality Act should ensure private bodies contracting with the public sector are clearly required to conform to public sector equality duties. During consultation on the Discrimination Law Review the Mayor heard views from stakeholders on the need to provide protection to vulnerable and migrant workers¹²⁷. Research has highlighted the way in which subcontracting increases ‘the costs borne by those doing the work, as workers who remain or used to be “in house” have better pay and conditions than those taken on directly by subcontracted service providers’¹²⁸. The same research points out the London’s low paid labour market is segmented by ethnicity and gender. The Mayor submits that clearer law to mandate public authorities to include equality considerations in procurement is one way to address this important area, in addition to other measures that need consideration.

International comparisons: Law in other countries is much more ambitious in tackling discrimination in the private sector and provide useful examples that the Discrimination Law Review should draw upon. Only a few examples are given here. Since 1 January 2004, the boards of all state-owned Norwegian companies have been obliged to have a minimum 40 per cent representation of each gender and the same requirement came into force for public limited companies on 1 January 2006, stating that companies not complying will, conditional upon the issuing of several warnings, be dissolved. Under legislation agreed in Spain in March this year, companies with more than 250 employees will have to negotiate equality plans covering recruitment, promotion and training, with the aim of eliminating gender discrimination. Canada’s Employment Equity Act requires that employers in the public and private sector identify and eliminate employment barriers and make ‘*such reasonable accommodation as will ensure persons in designated groups achieve a degree of representation in each occupational group*’. South Africa’s Employment Equity Act imposes equality duties on public and private sector employers. As has been mentioned, the Northern Ireland Fair Employment and Treatment Order 1988 imposes statutory obligations on both private and public sector employers, allowing for broad affirmative action measures and requiring equality auditing.¹²⁹

In the United States, federal law requires that all employers with 100 or more employees, regardless of whether or not they have a business contract with the Federal Government, are obliged to collect and report data annually about the racial, ethnic, and gender composition of their workforces. State and city law also applies. For example, a private sector multinational operating in New York will be subject to New York State anti-discrimination laws and regulations. The New York Human Rights Law prohibits employment discrimination based on age, race, creed, colour, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status. New York City Law goes beyond this and prohibits discrimination in hiring

¹²⁷ For example, Siobhan Endean, Amicus, speaking at the Mayor’s consultation event on 9 November 2006 and Gloria Mills, Unison, speaking at the Mayor’s Women in London’s Economy conference, 8 February 2007.

¹²⁸ Making the City Work: Low Paid Employment in London, Evans et al, University of London November 2005

¹²⁹ See Women in London’s Economy, 2007, Mayor of London and GLA Economics

and firing and in a wide range of employment conditions and grounds. The New York City Human Rights Commission acts as an enforcement agency and has broad remedial powers.¹³⁰

Enforcement: The general lack of proposals to improve enforcement of the law (under Chapter 7) mean that where discrimination does occur in the private sector it will continue to be inefficiently and inadequately dealt with and meet weak sanctions. These issues are dealt with in more substance in the next section.

Chapter 7: Effective Dispute Resolution

Anti-discrimination law on paper alone is not sufficient: any law needs to be backed by robust enforcement and meaningful incentives to comply with the law. However, in Chapter 7, the Green Paper puts forward no proposals for substantial improvements in enforcement. Furthermore, access to justice is currently in the process of being further limited – potentially particularly so for discrimination cases – as a result of changes to Legal Aid. Again, this issue is ignored by the Green Paper. The Mayor urges reconsideration in this area so that legislative proposals may include some of the important changes stakeholders have been urging to allow better enforcement of legal rights against discrimination.

A number of important changes – in relation to discrimination in employment cases – are also not consulted on as the Green Paper states that the Discrimination Law Review has effectively transferred consideration of them to the (then) Department of Trade and Industry's consultation on employment dispute resolution. Similarly, the DTI consultation paper 'Resolving Disputes in the Workplace' states that, *'it was agreed that the Discrimination Law Review would not make recommendations in this area [resolution of disputes as part of its work on enforcement], but would pass on the evidence it had received and the changes it had considered to the Gibbons Review'*. As the DLR Green Paper acknowledges, its remit originally included a review of enforcement in employment-related discrimination cases. While it is reasonable that the DTI post-Gibbons review considered this issue, it does not appear reasonable to exclude it from consideration in the consultation on this Green Paper by the Discrimination Law Review. Doing so changes the remit of the DLR review in mid-process, renders the review less coherent in content and potential outcome, and may well reduce the scope of consultation, as most stakeholders would only be aware of this decision when the Green Paper was published on 12 June – but the dispute resolution consultation closed shortly after this. The Mayor therefore also sets out his views on employment-related cases here, particularly on the case for permitting representative legal actions and for improving the range of remedies open to Employment Tribunals.

The range of options that need to be put forward, but are currently ruled out, include:

- allowing for representative legal actions;
- a uniform forum for hearing discrimination cases, by transferring jurisdiction of goods and services cases to Employment Tribunals;
- empowering Employment Tribunals to make recommendations for changes in policies or practices by employers to ensure discrimination does not recur, regardless as to whether such a recommendation would have an effect on the claimant in question;
- improved access to justice.

¹³⁰ See Rubenstein, June 2007

Q48: Can you suggest ways in which Alternative Dispute Resolution could be used more effectively or widely to resolve discrimination issues in the field of goods, facilities, services, premises and the exercise of public functions?

48.1 It is a sad reality that in many discrimination cases it is the threat or commencement of litigation that is an incentive on employers and service providers to take action to mend their ways. It is important therefore that those who believe themselves to have been discriminated against have easy access to justice and that tribunals are able to hear cases speedily and efficiently and enforce penalties that are effective. Moreover, while the Green Paper says that *'discrimination cases often involve sensitive issues, so it may be easier to express these in the less formal and less adversarial setting of an Alternative Dispute Resolution process'*, often discrimination cases are, virtually by nature of the dispute, unlikely to be resolved by mediation and also involve such issues of principle as are particularly important for tribunals to decide upon. All parties may benefit from the objectivity that comes with the formal legal process.

Q49: Can you suggest ways in which the role of the Ombudsman might be used more effectively to resolve discrimination disputes?

49.1 The actual potential to do so seems very limited. The question refers to using the Ombudsmen in relation to goods, facilities and services discrimination. Much of this discrimination takes place in the private sector, and the public sector is covered by more stringent legislation, at least on some grounds. The Ombudsmen in general do not apply to the private sector. The most significant being the Financial Ombudsman Service, which is financed by business, and 1000 staff and a budget of £60 million. Therefore the potential to use the Ombudsmen to help resolve disputes relating to discrimination in service provision, goods and facilities seems limited.

Q50: Do you have any views on our proposals for enhancing discrimination expertise in the county and sheriff courts?

50.1 The proposal does not address the main problem with the enforcement of services discrimination cases. The Green Paper acknowledges concerns expressed as to unpredictability in outcomes when goods, facilities and services-based discrimination cases are heard in County Courts. It says this is because of County Court judges' *'relative unfamiliarity with discrimination law compared to employment tribunal cases'*. It suggests dealing with this by designating a smaller number of courts to hear all non-discrimination cases and to give special training to judges in these. However, this will not deal with the main problem regarding access to justice in this area, which is not poor expertise of judges but the difficulty and expense of taking discrimination cases in the county and sheriff courts.

50.2 The reason county court judges are unfamiliar with cases is because very few cases are taken through the courts. This is not because of the lack of people who believe themselves to have been discriminated against in the provision of goods, facilities and services¹³¹ but because of the barrier that exists in the form of the cost and complexity of

¹³¹ Nearly 1,000 individuals a year contact the EOC's Helpline because they believe they have been discriminated on grounds of sex in the provision of Goods, Facilities and Services alone (i.e. not including employment cases) while the DRC Helpline in the last quarter of 2005 received over 1,800 enquiries from individuals who claimed similar discrimination. Source: GFS Cases, County Courts or Employment Tribunals, Caroline Gooding and Alice Leonard, presented at Mayor of London consultation event, February 2007

the County Court system. It costs a minimum of £210 to commence proceedings in these courts and there are further charges at each stage. In addition, the person who loses the discrimination claim may be required to pay the legal costs of the other side. These costs can be considerable. Together these are formidable disincentives to individuals, particularly when the average compensation award is around £1000. The Disability Rights Commission says that *'whilst precise numbers are not possible to access because there is no central collection of statistics, we believe that only about ten cases a year are brought by disabled individuals in relation to services (excluding DRC supported cases)'*.¹³² The EOC and CRE report similar problems. All three commissions and the Mayor therefore support goods and services cases being heard in Tribunals.

- 50.3 In Employment Tribunals there is no cost for starting or proceeding with applications, costs are only very exceptionally awarded against the unsuccessful party and the procedures are more straightforward.
- 50.4 The Green Paper says it is not attracted by the proposal to create a unified forum for hearing discrimination cases. By contrast a unified forum has been supported by the three equality commissions, the Hepple Review¹³³ and the Parliamentary Scrutiny Committee on the Disability Discrimination Act 2005.
- 50.5 The Green Paper cites jurisdictional and resource problems. In terms of resources, a removal of the division between the two courts with respect to discrimination cases will simply allow valid claims against discrimination to be heard; in other words, it would be unreasonable to continue to effectively block cases being heard by making them subject to the barriers of the County Court system. Additionally, the experience accumulated in the Employment Tribunals of dealing with discrimination cases means that these are likely to be a more efficient, 'predictable' and just way of dealing with discrimination cases relating to goods, facilities and services. The substantive issues are similar. Neither can it be beyond the skill of the DLR to recommend ways of dealing with any jurisdictional problems. Recommendations on this were previously outlined by Hepple.
- 50.6 The Mayor notes another concern expressed on the proposal to only have certain County Courts hearing discrimination cases. The Disability Rights Commission expressed concern that this may actually make access to justice more difficult by making journeys to courts longer and increasing the difficulties faced by individuals.
- 50.7 The other suggestion under this section is for an increase in the use of expert assessors in discrimination cases. The Mayor supports this proposal and the above outlined proposal to unify the system for hearing discrimination cases, by hearing them in the Employment Tribunal, redesignated Equality Tribunals.

Q51: Do you think that the powers of the Additional Support Needs Tribunals for Scotland should be extended to include consideration of disability discrimination cases in education?

- 51.1 The Mayor supports the proposal to harmonise the situation on this matter between Scotland and England and Wales.

¹³² Discrimination Law Review Briefing, Disability Rights Commission, 2007

¹³³ Equality: A New Framework, Report of the Independent Review of the Enforcement of UK anti-discrimination legislation, Hepple, Cousey and Choudhury, Hart Publishing, 2000

- 51.2 The Mayor also believes there should be harmonisation through making the following changes:
- As is currently the case in Scotland, children from age 12 should be presumed able to bring cases under the Disability Discrimination Act in their own name.
 - As in cases brought under race or gender legislation, a child should be able to claim compensation for injury to feelings or other damages as a result of disability discrimination in education.
- 51.3 However, a further change needs to be made to better deal with discrimination in the education system. There is a need for a properly legally qualified appeal system against permanent exclusions. At present, across all strands, any appeal against a permanent exclusion that a parent alleges is contrary to discrimination law must be taken to an independent appeal committee established by the Local Education Authority. These panels are not legally qualified or chaired and appear to have limited training. As they have the power to deprive a child of their education this must be of grave concern. Admissions cases are also dealt with in a similar way.
- 51.4 This legally unqualified system must be considered in the context of the disproportionate exclusions of certain groups of pupils. Since 2000, the proportion of black pupils excluded has increased more rapidly than any other group. Black pupils are three times more likely than white pupils to be permanently excluded. Each year 1000 black pupils are permanently excluded and nearly 30,000 receive a fixed term exclusion. The effect on their life chances can be catastrophic. On average these pupils will:
- be one-third less likely to achieve 5 or more A* - C at GCSE
 - be 3 per cent more likely to be unemployed
 - experience a reduction of £36,000 in lifetime earnings
 - be more likely to commit crimes and to re-offend¹³⁴
- 51.5 The Mayor believes that there is a need to ensure better mechanisms for challenging school exclusions in order to avoid the harmful consequences of such action. At the Mayor of London's 2002 London Schools and the Black Child conference, attended by approximately 2,000 parents, teachers, students and educationalists, 39 per cent of respondents to a survey cited pupil exclusions as their biggest educational concern.
- 51.6 Every school must be required to have effective dispute resolution policies. Schools and local authorities should be compelled to ensure their exclusion and resolution policies are equality impact assessed. The obligations that schools, local authorities and Ofsted have under the Race Relations Amendment Act and other legislation should be properly enforced, and extended to other pupil groups not currently protected. Parents must have better information and guidance as to what steps they can take to minimise any disruption to the education of their child.
- 51.7 In addition, the Mayor notes the report of the Council on Tribunals in May 2003, which criticised the above panel system. Its recommendations included that panels should have legally qualified chairs. The Mayor supports this recommendation.

¹³⁴ Source: DFES: Getting It. Getting It Right (2007). This followed the work of the Department for Education and Skills (now Department for Children, Schools and Families) Higher Level Group on Race Equality, which identified exclusions of black pupils as a priority area for action.

Q52: Can you provide us with evidence illustrating any difficulties of gaining legal redress in cases of multiple discrimination?

Q53: Are there particular issues you would want to see addressed in relation to multiple discrimination claims?

- 52.1 There is relevant research on this issue: *'the UK's present anti-discrimination scheme comprises discrete, and inconsistent, legislative measures, addressing race or gender or disability etc. The classes protected by the anti-discrimination laws are not homogenous, and disadvantage is experienced differently even within groups. Because the protected classes are defined mono-characteristically, tackling "multiple" or "intersectional" discrimination is problematic. In a case of indirect discrimination, for example, a black woman complaining of indirect discrimination as such will find either white women or black men (depending on whether she characterises the complaint as one of sex discrimination or race discrimination) included in her pool for the purpose of determining whether she and others are disadvantaged by any measure under challenge. This can have the effect of undermining any claim to be disadvantaged by it as a member of either class'*.¹³⁵
- 52.2 The Equality and Diversity Forum express the problem in the following way: *'for instance, a black woman cannot compare her treatment with that of a white man, if she wishes to take a race case she can compare her treatment with that of a white woman and if she wishes to take a sex discrimination case she can compare her treatment to that of black man what she is not permitted to do is to compare her treatment to that of a white man. Consequently the full extent of the discrimination that she has experienced cannot be properly shown.'*¹³⁶
- 52.3 The Green Paper states that there is little evidence of this being a problem. However, its approach is unfair. As the parliamentary Communities and Local Government Committee commented, the Government needs to recognise *'the inherent difficulty in amassing evidence of actions that have not been taken.'*
- 52.4 If developments in society are considered for a moment, the kinds of discrimination that may not be able to get proper redress, because the law does not providing for action on one or more of the protected grounds or on any combination of these grounds, may become more clear. For example, when Muslim women are assaulted or abused for choosing to wear Muslim dress such as the hijab or niqab, it is because they are Muslim and women. Or when young black men are stereotyped in certain policing or educational situations, their race, age and gender identities are inseparable parts of the discrimination to which they find themselves subject.
- 52.5 The Equality and Diversity Forum and other organisations have provided other case examples. Furthermore a number of studies have provided evidence of the impact of multiple discrimination. The Mayor supports the case for allowing multiple comparisons to be expressly permitted, allowing the Courts to combine consideration of two or more grounds. This could be achieved by a Single Equality Act specifying that, *'a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'*.

¹³⁵ Women in London's Economy, February 2007, Mayor of London and GLA Economics

¹³⁶ EDF, August 2007

Other important areas that need to be considered

52.6 Representative Actions

Representative actions would allow third parties to take cases on behalf of groups of people affected by the same issue of discrimination. It would avoid the entire weight of litigation falling always on individuals, often, by definition, the most vulnerable of people. It would be a more efficient system. The Green Paper rules it out of consideration for goods, facilities and services cases and does not consult on it.

For employment cases, the DLR has dispatched the issue to the post-Gibbons review on 'Resolving Disputes in the Workplace Consultation', as outlined above. In responding to that consultation the Mayor said that he favours legislating to allow for representative actions. Representative actions would allow for groups of people who believe themselves collectively affected by the same discrimination to take legal action and for a decision to apply to them as a group. Representative actions would be one way of facilitating greater access to justice.

Representative actions, brought for the benefit of a particular group of persons, may be defined as, *'a legal procedure which enables the claims... of a number of persons against the same defendant to be determined in one suit...one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons...who have claim to a remedy for the same or similar alleged wrong...only the representative plaintiff is a party to the action'*¹³⁷.

The Mayor believes that representative actions would be useful where issues of discrimination affect wide groups. For example, in equal pay cases where generally the group affected can readily be identified, the issues are clear and common, notice can be given to all members forming the group or class affected and where large workforces may be affected. Representative actions would allow for greater efficiency for the Employment Tribunal system: presently thousands of individual applications forms must be presented to the Employment Tribunal and each individually determined, at least notionally, presenting serious case management problems. As Sarah Veale from the TUC pointed out, *'you cannot go into the tribunal as a union and say, on behalf of 485 part-time workers, we want to pursue this particular claim against an employer. You have to file individual complaints and the tribunal system then has to process them individually. It is very haphazard, time-consuming and difficult'*.¹³⁸ The latest figures show an increase in the number of equal pay cases being lodged with tribunals: 44,013 claims were lodged over equal pay in the 12 months up to April 2007 — up 155 per cent on the year before¹³⁹. This in part reflects the need for changes in the substance of the law, as argued elsewhere in this submission, but it also reflects inefficiencies that could be addressed through the ability to take representative legal actions.

Representative actions would therefore provide for greater access to justice, assist the efficiency of Tribunals and allow for more effective and clear cut penalties affecting all in a group experiencing the same discrimination. Representative actions would require new law and for this reason should be considered by the Discrimination Law Review when drawing up its proposals for legislation.

These arguments apply just as well to goods and services cases; indeed, it could be argued even more so given the difficulties individuals in these cases face with regard to the

¹³⁷ *The Class Action, In Common Law Legal Systems*, Mulheron, 2004

¹³⁸ Mayor of London consultation event on the Discrimination Law Review Green Paper, 27 June 2007

¹³⁹ The Times, 5 September 2007

County Court system. The Green Paper provides little justification for its refusal to ask a question on this matter. Its suggestion (in Chapter 7) that they would encourage a 'litigation culture' or unfairly benefit those with 'spurious claims' are not demonstrated and do not outweigh the denial of access to justice caused by a complete reliance on individual litigation.

52.7 Remedies and Penalties

The consultation should reconsider its failure to consult on improving the penalties available to tribunals and courts where there is a finding of discrimination, and facilitate discussion on this at subsequent stages. Penalties need to be such as to encourage compliance. At present, they are not proving sufficient to deter discrimination – as the vast numbers of employment discrimination cases highlight. Repeat offenders get off the hook as each case is considered afresh. Despite occasional high profile cases, compensation levels are generally very low and tribunals have few powers to order offenders to change their ways. An important change would be to empower Employment Tribunals to make recommendations for changes in policies or practices by employers to ensure discrimination does not recur, regardless as to whether such a recommendation would have an effect on the claimant in question. In goods and services cases, where the average compensation award is low, sanctions are not proving adequate to incentivise compliance. This is reflected in the number of premises and services that continue to fail to make disability access provision, for example.

There are three other areas relating to the powers of Employment Tribunals where the Single Equality Act should regularise practice in line with other legislation:

- The powers of Tribunals to order interim relief (i.e. suspension on full pay) under the Employment Relations Act for employees who consider they have been unfairly dismissed should be extended to claimants under the Sex Discrimination Act.
- Tribunals should be able to order employers to re-instate or re-engage employees who have been dismissed as a result of discrimination but who do not have one year's service or a finding of unfair dismissal, to bring their rights into line with those found to have been unfairly dismissed under other employment legislation.
- Tribunals should be given the power to enforce compensation awards.

52.8 Access to justice

This is not considered by the Green Paper but is integrally connected to the impact of anti-discrimination law. The ability of individuals to access justice is already restricted – by such barriers outlined as the practical difficulties in taking cases, by the structure of the law and by the difficulty in getting Legal Aid and other support. There is considerable concern over the potential for further restriction.

Recent research¹⁴⁰ highlighted the impact of lack of representation for claimants in race discrimination cases. In depth interviews were conducted with 40 race discrimination claimants: 16 had no representation at all and most had found the process of securing representation difficult and time consuming. Those without representation felt at a considerable disadvantage as employers invariably were well represented. Many felt pressured to settle. Some used 'no win, no fee' solicitors for cost reasons, although some of these reported facing demands for lump sum payments.

¹⁴⁰ The experience of claimants in race discrimination cases, Employment Relations Research, series No55, Department for Trade and Industry, April 2006

The transition from the three existing statutory equality bodies to the Commission for Equality and Human Rights (CEHR) may exacerbate problems of accessing legal representation. The CEHR is likely to take very few legal cases. In evidence to the Communities and Local Government Select Committee (April 2007) the CEHR Chair said that, *'We will take a very tiny minority of the cases that enter tribunals'*, giving a notional figure of ten cases (implicitly each year). The Chair said that he would expect those cases not in this ten *'will be supported by trades unions, by individuals themselves, obviously not by legal aid but by other means and that our work will be concentrated on strategic cases.'* Given the high numbers of those seeking support to challenge discrimination and the difficulty they already have this is actually likely to mean that more people will be denied the necessary legal assistance.¹⁴¹

A further area of concern is the impact of changes in legal aid, including the introduction of a national fixed fee system and, ultimately, price competitive tendering.¹⁴² This may hit discrimination cases particularly hard, as they are the kind of complex and time-consuming cases that the new system will discourage.¹⁴³ From October 2007 the Legal Services Commission is limiting the average funding available for employment discrimination cases to 4.5 hours. The Discrimination Law Association estimates that a discrimination case going to a full hearing can routinely take over 40 hours. There are provisions for funding of over 12 hours where a case can be shown to be 'exceptional'. This is only likely to be available to a few cases in any year. Such funding can only be agreed retrospectively, which will discourage risk. Clients whose first language is not English or who have certain disabilities need to spend longer with their legal advisors in order to explain their case. Therefore this system creates a disincentive to take on these cases unless there is private funding available. A further negative impact on discrimination cases is likely to follow from the uneven impact of these changes on service provision. For example, the Carter Diversity Group (a cross-section of black and minority ethnic barristers and solicitors) has said that the reforms will disproportionately impact on BME legal aid firms, as these are over-represented in the small firms category (52 per cent compared to 33 per cent of white firms).¹⁴⁴

Chapter 8: The grounds of discrimination

Q54: Do you have any comments on whether we should remove the list of 'capacities' from the definition of disability?

- 54.1 Yes. The Mayor supports this proposal but adds that its interpretation needs to be open to review to ensure that it does not undermine existing practice. It is also important that good guidance is produced to assist interpretation by tribunals and courts.
- 54.2 More fundamentally, however, the Mayor submits that the definition of disability needs to change to one based on a social model, in order to focus on the act of discrimination rather than a particular category of impairment. The Mayor therefore disagrees with the statement that 'disability discrimination law should continue to protect from

¹⁴¹ Citizens Advice Bureaux, for example, report increasing difficulties in funding.

¹⁴² Resulting from the Carter Review of legal aid procurement and subsequent proposals by the Legal Services Commission to move payment for legal aid services from a system of hourly rates to one of best value tendering.

¹⁴³ The Law Society is among those organisations to have argued that proposals will adversely affect access to justice for discrimination cases.

¹⁴⁴ The Constitutional Affairs Select Committee in a report on the impact of the Carter Proposals, published in April 2007, criticised the disproportionate impact on BME firms (and on London providers).

discrimination only those people who are disabled in the generally recognised sense of that term [and] we are concerned that any substantial changes to the definition of disability would broaden coverage of disability discrimination law too widely' (8.4).

- 54.3 In June 2006 the Disability Rights Commission recommended to the Government that the DDA's definition of disability should be changed: to one which gives protection from discrimination to everyone who has (or has had) impairment without requiring the effects of that impairment to be substantial or long-term. This recommendation followed a request from the cross-party Parliamentary Scrutiny Committee on the Draft Disability Discrimination Bill for the DRC to review the definition.¹⁴⁵ This definition would move away from protecting a group of disabled people and instead protect anyone who experiences discrimination on the grounds of impairment. The Mayor agrees that such a change would ensure protection for all those who need it, identify the causes of discrimination and disadvantage in social barriers and not individual capability as medically defined, make it easier for everyone to understand when someone is entitled to protection from discrimination (at present, in many cases the only way to definitively determine whether a person is disabled is to go to tribunal), remove barriers to individual access to justice and facilitate a more systemic approach to equality. The present definition militates against good practice – which is to respond to a barrier or need as soon as it becomes evident – by encouraging employers to wait at least 12 months so that the employee meets a DDA definition of disability.
- 54.4 As part of the best value review entitled 'Equalities for All', the GLA Group in September 2003 adopted the social model of disability and incorporated this into the service improvement plans. Action taken by the Mayor to address discrimination faced by disabled Londoners is therefore informed by the social model. If disabled people are to be able to be part of mainstream society, which is their human right, the way society is organised must be changed. Removing the barriers which exclude (disabled) people who have impairments can bring about this change.

Q55: Do you have any comments on our approach to addressing the needs of parents and carers?

- 55.1 While the Mayor agrees with the statement that '*since 1997, we have taken unprecedented steps to protect carers*' (8.13), he submits that this still means that carers have no right as such against discrimination on the basis of their caring status, and this omission is reflected in the statistics of inequality with regard to carers. Carers can find themselves forced out of employment due to inflexible conditions, suffer economically, can suffer discrimination by association, and may end up socially isolated and experiencing physical and mental illness. The changes already introduced, while extremely welcome, are also patchy in coverage and implementation. The Mayor believes that carers must be protected from discrimination in their own right – as carers – by the inclusion of a non-discrimination right for carers in the Single Equality Act. This should include the right to reasonable adjustments. The Mayor therefore differs with the statement in this section that such protection '*would cut across the balance achieved by the existing provisions*' (8.20).

¹⁴⁵ <http://www.parliament.the-stationery-office.co.uk/pa/jt200304/jtselect/jtdisab/82/8205.htm#a10> The committee stated: 'if the government are to achieve their aim of comprehensive, enforceable civil rights for disabled people against discrimination in society or at work then the current inadequacies in the DDA definition must be addressed. Many of the deficiencies... would, we believe, be overcome by focusing disability anti-discrimination legislation on the act of discrimination, and not the extent of the impairment.'

55.2 A non-discrimination right would be an efficient, holistic approach to the discrimination faced by carers. This right is needed to combat discrimination such as: in employment, where employers – in both private and public sector – should be required to consider the needs of carers, for example through a requirement to make ‘reasonable adjustments’; in education, where greater legal protection is needed so that children and young people who are carers are not forced to miss out on education; in service provision, such as housing for example (where there should be a right to accommodation of a suitable size and for reasonable adjustments for carers), or in health, where the particular needs of carers requires recognition and provision, or in transport where the needs of carers accompanying people need to be protected.

55.3 Evidence for why carers themselves – and distinct from the rights of the person cared for – need to be legally protected, includes:

- Most carers in employment (2.5 million people in England and Wales juggle work and caring; 1.5 million of them work full time) but Age Concern has reported that carers in their fifties, especially women, were ‘penalised financially for taking time out to care for sick, older and disabled partners, relatives and friends’.¹⁴⁶
- 28 per cent of people caring for 20–35 hours a week were likely to give up work and 59 per cent of those providing care for more than 50 hours a week were likely to do so¹⁴⁷ while both men and women who provide 20 or more hours of unpaid care a week are concentrated in low level, lower paid, jobs.¹⁴⁸
- 33 per cent of carers report having problems paying household bills, 59 per cent use their own money to pay for equipment and one in three carers report cutting back on food¹⁴⁹. Adding to this pressure is the fact that in London carers allowance (currently only £48.20 a week) is not adjusted to reflect London’s higher costs.
- Many young people under 16 are providing unpaid care: in London, there are 14,000 young people in this situation.¹⁵⁰ At a UK level, 22 per cent of young carers miss school or have educational difficulties and only 18 per cent have had their needs assessed.¹⁵¹
- Carers disproportionately suffer social isolation: 77 per cent of carers have to cut down on leisure activities¹⁵² while one in five report having to leave a job or being unable to take up employment because of caring responsibilities.¹⁵³
- Carers suffer health difficulties and fail to get the help they need: nationally, 69 per cent of carers say their health has been adversely affected, rising to 72 per cent of those caring for over 50 hours a week; more than a third of carers nationally aged 44 or younger found access to a GP difficult or very difficult.¹⁵⁴

¹⁴⁶ Poverty in old age awaits the carers who save the UK £15 billion, Age Concern media brief for Carers Week, 2007

¹⁴⁷ Real change, not short change: Time to deliver for carers, Carers UK, 2007

¹⁴⁸ More than a job: Working carers, evidence from the 2001 Census, for ACE National/Leeds University, Carers UK, 2006

¹⁴⁹ Real change, not short change: Time to deliver for carers, Carers UK 2007

¹⁵⁰ Analysis of 2001 Census

¹⁵¹ Young Carers in the UK, Dearden and Becker, 2004

¹⁵² Whose rights are they anyway? Carers and the Human Rights Act, Carers UK, 2006

¹⁵³ Supporting parents and carers: unlocking the potential, Equal Opportunities Commission, 2004 survey.

¹⁵⁴ Primary carers – identifying and providing support to carers in primary care, Keeley and Clarke, PRTC, 2003

- 55.4 The Green Paper argues that, *'issues relating to [parents and] carers are best dealt with through targeted provisions in employment legislation and specific measures to address the issues they face in areas other than employment. This approach ensures a focused and proportionate way of addressing the particular needs of people with caring responsibilities which avoids placing undue burdens on employers and service providers'* (8.19). The Mayor believes that the suggestion of 'undue burden' is not proven. To determine this, first it would be necessary to quantify the loss to the economy from carers having to give up or partially give up employment or work below their skills level. As the statistics above indicate, such loss is considerable. The degree to which it would be reduced by a requirement to find a 'reasonable adjustment' between employment and caring also needs to be determined. In fact, there is an undue burden on carers, as it is estimated that carers save the UK £57 billion per year:¹⁵⁵ in the UK 5.8 million people provide unpaid care, with over 600,000 of these living in London (8.6 per cent of London's population), of whom 593,000 are adults, the rest being children.
- 55.5 The fragmentation of legislation means that: carers as a whole group are not legally protected; the implementation of a patchwork of rights is more complex than necessary; carers as a group do not receive the priority in policy making, resource allocation and implementation that they need; there is a loss to the economy and in social terms that has not been fully quantified.
- 55.6 Moreover, the Green Paper overly links the issues of carers and parents. While there *are* links, in 2005-06 61 per cent of all carers in the UK were looking after a relative outside their own home, while 16 per cent cared for a partner and 10 per cent of carers were looking after a friend or neighbour.¹⁵⁶ The Green Paper says, *'Carers may be able to use indirect sex discrimination provisions to challenge practices that have a disproportionate impact, and responsibilities caring for adults also need to be considered by public authorities under the gender equality duty'* (8.15). However, this assumes that carers are predominantly women: 42 per cent of carers are men at both a UK and London level.¹⁵⁷ Therefore sex discrimination provisions will not cover all carers as such. This is an argument for considering carers as a distinct group in anti-discrimination legislation rather than through partial targeted provisions.
- 55.7 The right of some employed carers to request flexible working (8.13) through the application to carers, introduced in 2007, through the Employment Act 2002, is an important step forward. However, it does not apply to people who care for friends and neighbours who are not partners or relatives or do not live at the same address. A broader definition of 'carer' is needed and these rights need to apply to the entire group of carers.
- 55.8 However, there is also a wider issue. Apart from the fact that a right to 'request' is a limited 'right', flexible working as it is normally understood and applied – the right to agree an ongoing variation in the employees working hours – is not the kind of flexibility that many carers often need. Carers may need agreement from their employers to have to leave employment on occasion to assist with the needs of the person they are caring for – such as social work, housing or hospital appointments – or to leave at short notice when faced with an emergency. Faced with inflexibility by employers who fail to understand the needs of an employee who is a carer, such an employee may be forced out of employment altogether. This is a loss to the labour market, to the individual

¹⁵⁵ Without Us? Calculating the value of carers' support, Carers UK, 2002

¹⁵⁶ Family Resources Survey 2005-06, DWP, March 2007

¹⁵⁷ Census 2001

business – which may be considerable depending on the skill and experience level of the employee – and to the individual concerned who will suffer loss of income, possible ongoing social isolation and greater vulnerability to illness. The Green Paper's starting point is that the concept of 'reasonable adjustment' should be confined to disability discrimination law (4.7). The Mayor believes that reasonable adjustment is based on an approach to discrimination that has much value – understanding that people do not all start from 'like' positions and that equality requires addressing the barriers that particular groups of people face. Specifically the Mayor submits that the case of carers is one where a reasonable adjustment approach could prove valuable. The Mayor urges consideration of this – and the wider approach of reasonable adjustment – at later stages in this discussion.

- 55.9 The introduction of the right to an independent assessment for carers (8.14) through the Carers and Disabled Children Act 2000 was an important step, reinforced by the introduction in the 2004 Carers (Equal Opportunities) Act of the duty on councils to provide information about this right, and to consider the wishes of carers in relation to employment, education, training or leisure activities. However, a national follow up survey in 2002¹⁵⁸ found that only half those questioned were aware of carer assessments, few were carried out – the rate of assessment had actually declined since 1998 – and there were concerns about their quality. Three-quarters of respondents were caring for 50 hours a week or more, but only a quarter of them had had an assessment. A further survey found that only 32 per cent of carers reported having been given a carer's assessment, and 45 per cent of those who had not been assessed did not know they were entitled to be.¹⁵⁹ A London survey showed that, during 2003/04, only eight per cent of carers received a carer's assessment or review.¹⁶⁰ During 2005/06 even fewer, 5.8 per cent, of carers did so.¹⁶¹ There is an obvious need for monitoring of implementation, as well as the protection of carers through legislation against this ignoring of their needs, which amounts to discrimination.
- 55.10 With regard to pensions (8.16) it is important that attention should be given to all carers, not only those caring for children and 'severely disabled' people, who are unable to build up through employment their own pension protection and face poverty in old age as a result.
- 55.11 The other measures referred to (8.17) are important and they need to be monitored to ensure they are properly implemented. However, these measures merely tackle the tip of an iceberg of carer need. The extra respite care provided is really emergency cover for caring responsibilities. Respite care as such should provide for breaks for carers on a regular basis to allow them to lead a normal social and private life. Current funding through the Carers Grant is inadequate and neither it nor the new additional funding announced is ring-fenced, so councils or other local bodies can, and frequently do, choose to spend it on other priorities. The establishment of a national helpline for carers is a good idea as is that for an expert training programme for carers. These measures need better funding to ensure they can reach all carers who need them. The review of the 1999 National Carers Strategy is much needed, as the above problems indicate. Proposals for improvements that may result from it will need to be monitored and enforced or they will suffer from the same lack of application, awareness, take up and funding outlined.

¹⁵⁸ Carers Speak Out, Keeley and Clarke, Princess Royal Trust for Carers with Barclays, 2003

¹⁵⁹ Missed Opportunities: the impact of new rights for carers, Carers UK, 2003

¹⁶⁰ Help secure a better future for carers, Carers UK, 2006

¹⁶¹ Princess Royal Trust for Carers, for GLA, 2007

- 55.12 Where discrimination and denial of rights does occur, carers need to be able to enforce legal rights. It is particularly hard for carers to voice and represent their needs so tools such as the provision for representative actions in goods, facilities and services cases may be of specific importance.
- 55.13 In summary, the Government has shown that it has good intentions towards carers. However, a non-discrimination right for carers is needed to provide all carers with the legal protection they need and to allow action to be taken when their rights are breached, to protect their position in employment and as service users and to underpin the range of benefit and partial rights introduced in recent years. This should include consideration of the introduction of a requirement on employers and service providers to make 'reasonable adjustments' for carers.

Q56: Do you consider that the protection for married persons and civil partners is still needed in the absence of a 'marriage bar' in employment?

- 56.1 The Mayor considers that this is an issue where the law needs clarifying. The case cited in the Green Paper¹⁶² illustrates that there is confusion about the use of the provision of the Sex Discrimination Act (SDA) which prohibits direct or indirect discrimination in employment against people on the ground that they are married or a civil partner. While the original purpose was to prohibit the use of the marriage bar to discriminate against married women in employment, there may well be a need to clarify the law to prohibit any discrimination at all on the basis of marriage or civil partnership status. As the Green Paper says, the SDA provision does not cover unmarried partners or single people, so it is not unlawful to discriminate in favour of married people or civil partners.
- 56.2 In any case, discrimination against married partners and against civil partners may need to be treated separately as they arise from different causes: sex discrimination and homophobic discrimination. While attitudes to married women in employment have changed out of all recognition in recent decades, homophobia – despite progress, including various legal protections – is still strongly prevalent.

Q57: Do you agree that there is no current justification for legislating to prohibit genetic predisposition discrimination?

- 57.1 No. The Mayor agrees with the view of the Disability Rights Commission and the Human Genetics Commission (HGC) that legislation is needed. The Green Paper argues against amending the Disability Discrimination Act to provide protection for people with a genetic predisposition and says that the HGC agrees with this. While the HGC did not conclude that amending the DDA was appropriate, they did think that legislation is needed. They wrote an open letter to the Chair of the Equality Review in December 2006 stating:

*'Although there is no evidence that genetic discrimination is currently widespread in the UK, the HGC is acutely aware that as technology and techniques become more sophisticated, the potential for discrimination will increase. For this reason the Commission has been recommending that appropriate regulatory measures are established so that the framework exists in advance of potential widespread discrimination occurring.'*¹⁶³

¹⁶² Chief Constable of the Bedfordshire Constabulary v Graham [2002] IRLR 239 EAT

¹⁶³ Discrimination Law Review Briefing, Disability Rights Commission, 2007

57.2 The Mayor believes that the Discrimination Law Review should act on this expert advice. The Green Paper notes that the option of *'further non-legislative measures and legislative measures (e.g. guidance, moratoriums or voluntary industry codes or schemes) and legislative measures should be considered carefully in the future, as and when justified by the emergence of any discriminatory practices in this area'*. This appears unduly cautious and the Mayor sees no reason not to act on the advice of the HGC.

Chapter 9: Age Discrimination

The Green Paper consults only on the potential for introduction of age discrimination protection covering older people – and does so unduly tentatively. Explicitly excluded is any consideration of inclusion of children and young people in the protection which new legislation would provide. The Mayor disagrees with this blanket exclusion of children and young people from the scope of protection against age discrimination at this early stage in discussion and submits that the Green Paper should have permitted consultation on this matter. More is said on this point in response to Q61 below.

Q58: What instances of unfair age discrimination outside the workplace against people of any age are you aware of?

58.1 The Mayor works closely with the London Older People's Strategies group (LOPSG), an umbrella organisation of more than 250 older people's organisations across London. At a well-attended recent meeting to discuss the Discrimination Law Review, their members gave a range of examples of age discrimination in their day-to-day life. This evidence is confirmed in extensive research by organisations such as Age Concern England and Help the Aged. Examples provided include:

- being refused holiday insurance cover simply because of age or being charged such a heavy premium that it becomes unaffordable;
- having to give up volunteering activities due to problems in getting insured;
- being turned down for mortgages or other financial products solely on the basis of age;
- media advertising making fun of older people in a derogatory way and reinforcing negative stereotypes to sell products;
- health screening programmes having an upper age limit;
- vital health services that can have a major impact on the quality of life for older people e.g. podiatry not given priority;
- learning and skills initiatives often being unsuitable to the needs of older workers.
- not being allowed to sit on a jury over the age of 70;
- club memberships having an upper age limit.

Q59: Is legislation the most appropriate and proportionate way of tackling harmful age discrimination? What would be the likely costs of legislation?

- 59.1 Yes. The law should provide protection against discrimination on the grounds of age in goods, facilities and services.¹⁶⁴
- 59.2 Age is the only equality strand where there is no such legal protection and this is unjustifiable. Good practice guidance and voluntary initiatives alone have failed to deliver the necessary culture change to effectively combat age discrimination. We are living in an ageing society and for older people to be able to play a full part it is essential that they are ensured the highest level of protection against discrimination in goods, facilities and services. This should be no less than the legal protection already provided for other groups and should not contain major exceptions. Age discrimination legislation that is broad in coverage is needed, as opposed merely to a list of target areas where discrimination is not legal.
- 59.3 Effective legislation must apply equally within the public and the private sector. The Green Paper suggests that there is ‘less evidence’ of harmful discrimination in the private sector, and that a more appropriate response might be to ‘work with relevant sectors to agree specific measures to deal with any areas of concern’ (9.17). In fact, evidence of discrimination by both private and public sectors is plentiful and some has already been cited. The approach in the Green Paper fails to provide adequate protection against discrimination for older people: rather than a complicated list of areas included and excluded in anti-discrimination law, which would undoubtedly create much room for confusion and would need to be regularly reviewed, equality in treatment for older people should be the law – without equivocation. This should obviously be provided for in a way that does not rule out positive measures themselves aimed at addressing disadvantage and the effect of historic and ongoing discrimination against older people: such as concessionary travel or other such measures.
- 59.4 The Employment Equality (Age) Regulations that came into force in October 2006 have raised the profile of the negative effects of ageism in the workplace – something that ‘non-legislative targeted measures’ have only had limited success in achieving.
- 59.5 Age Concern England’s ‘Age of Equality?’ report¹⁶⁵ provides some indication of what the likely costs of legislation would be. Of course, when considering cost, government must also take into account the current monetary cost of ageism. It has been estimated in 2002 alone that age discrimination cost the national economy £31 billion a year in lost output and the Government a further £5 billion in extra benefits.¹⁶⁶ The ‘grey pound’ accounts for £245 billion of the UK’s annual spend¹⁶⁷ so discriminatory business practices in the private sector make poor business sense. Similarly, rooting out ageism and age discrimination in the health service would lead to more appropriate services and a focus on maintaining well being and independent living which could help reduce costs in the long term.

¹⁶⁴ The London Older People’s Strategies Group (LOPSG) feels strongly that legislation should be extended to outlaw discrimination in goods and services.

¹⁶⁵ Age of Equality?, Age Concern England, May 2007

¹⁶⁶ Reports such as ‘Winning the Generation Game’, produced by the Government’s Performance and Innovation Unit reporting to the Prime Minister, and Age Discrimination in Public Policy published by Help the Aged in 2002 highlight the effect and persistence of age discrimination in Britain.

¹⁶⁷ Age of Equality? Age Concern England 2007

Q60: Do you have any views on how, if we decided to legislate, we can target the legislation to avoid unintended consequences and disproportionate burdens on both public and private sectors?

- 60.1 The Mayor believes that far-reaching legislation against age discrimination in goods, facilities and services should be introduced through a Single Equality Act and at the earliest opportunity. Where people are facing discrimination because of age – such as the denial of use of services, refused facilities, denied insurance and travel options or treated unfairly in public services – it is simply wrong and the law should protect against it. The Mayor is not aware of a strong case that such equality law would prove an ‘unnecessary burden’ and believes the focus of discussion needs to remain on the need to root out discrimination.
- 60.2 The general principle of any legislation must be to outlaw discrimination against people on the basis of their age, except in circumstances when they can be objectively justified. Legislation can and should state clearly what exemptions apply and what the general principle is for objective justification. This will provide clarity for the public and private sector as well as ensuring flexibility for the future.
- 60.3 The Mayor agrees with the Green Paper when it states that, ‘we would want to make sure that legislation addressed negative age discrimination without preventing different treatment on grounds of age which has positive consequences’ (9.5) and believes it entirely possible to frame the legislation so that this is ensured. Such drafting should ensure there is not room for any negative impact on the provision of age related services such as the Freedom Pass, free prescriptions or state pension. These can clearly be justified on social policy grounds.

Q61: Do you have any comments on any of the issues that would arise with a legislative approach to tackling age discrimination?

- 61.1 As already set out (in Chapter 4) the Mayor also believes that more the law should be changed to allow for a wider range of positive action measures to be taken. These may have positive consequences for tackling age discrimination.
- 61.2 A legislative approach to tackling age discrimination would also demonstrate visible commitment to equality. It would send a powerful message that age discrimination was unacceptable and that older people must not be discriminated against and that they have rights in law to prevent this. It would also help to provide much needed legal backing to non-legislative measures such as the National Service Framework for Older People, Opportunity Age and the Sure Start to Later Life.
- 61.3 Research has revealed that many people in Britain hold negative, stereotypical images of older people and age discrimination is thought to be the form of prejudice most experienced by people over the age of 55.¹⁶⁸ With a new legislative approach, older people would have a way of challenging this sort of unacceptable behaviour and discrimination.
- 61.4 As stated above, the concern expressed in the Green Paper about the cost of legislation (9.21) fails to acknowledge the massive cost of existing age discrimination. Effective legislation that tackles the discriminatory barriers preventing many older people from

¹⁶⁸ How Ageist is Britain? Age Concern England 2005

participating fully in society will only increase older people's contribution to the national economy.

- 61.5 The Mayor agrees that greater provision for positive action should be introduced and that this should strengthen the ability to treat people differently to make up for the affects of discrimination and disadvantage – such as with older people. The Mayor specifically agrees that legislation to prohibit age discrimination in goods, facilities and services should be introduced in such a way as that it cannot undermine the ability to undertake initiatives such as concessionary travel (9.30).
- 61.6 The Mayor is concerned with the exception for the insurance industry envisaged under 9.33. The Mayor is aware of major concerns about discrimination in insurance and would not wish to see significant exemption: on the contrary the Mayor submits that the basic position should be inclusion of this industry under the provisions of the law.
- 61.7 As with other anti-discrimination legislation, it would need to be enforced and people would need to be able to take cases if they felt their legal rights had been breached. Public sector duties would need to be monitored – and be on at least the same level as that which currently applies – and other anti-age discrimination protections would have to be adequately upheld through the legal process. In this respect, people believing they had been discriminated against on grounds of age would face similar problems as others, as currently outlined in response to Chapter 6. Therefore the current weaknesses in enforcing the law and accessing justice would need to be addressed if the full positive impact of legislation were to be felt.
- 61.8 Secondly, the Mayor believes that the decision, at this early stage, to rule out of consideration including children and young people is an error. The statement that 'a child's age is closely related to his or her levels of development and need' would potentially militate against special consideration or targeted services for children and young people. For example, this approach may lean against the agreed changes to the Mental Health Bill regarding NHS in-patient treatment of children on adult wards, or, in London, policies by the Mayor such as free bus/ tram fares for under-18s in full-time education.
- 61.9 Some examples of how discrimination against children and young people may be positively affected by inclusion in this protection are:
- The UK has placed a reservation on the UN Convention on the Rights of the Child (UNCRC), excluding certain asylum-seeking children from rights under the Convention and allowing asylum legislation to take precedence over it. This poses a serious risk that asylum-seeking children in the UK may also be excluded from the Every Child Matters Framework. The Mayor has urged that government removes its reservations on the UNCRC with regards to children under immigration control. Age discrimination legislation would assist in ensuring children receive the treatment that they need.
 - In relation to the physical punishment of children, Section 58 of the Children Act 2004 continues to allow parents and others to hit children under a justification of 'reasonable punishment'. The UN Convention on the Rights of the Child requires that children should have the same protection as adults under the law on assault. The Mayor's Children and Young People's Strategy called for law reform on physical punishment.
 - The national minimum wage enshrines discrimination on the grounds of age, permitting 16 and 17-year-olds to be paid less than other people for the same work.

Chapter 10: Gender reassignment

Q62: Do you agree that we should prohibit discrimination on the grounds of gender reassignment in the exercise of public functions?

62.1 Yes. There should be comprehensive protection against discrimination for trans people and this should include in the exercise of public functions. The Mayor believes that the impact of anti-discrimination measures will be unnecessarily weakened by the legal definition of transsexual that is used in current law, which this new proposal intends to keep.

Q63: Do you agree that it is unnecessary to include school pupils and education in any extension to protect on the grounds of gender reassignment? What are your reasons for supporting/opposing this?

63.1 No. The Mayor does not agree that schools should be excluded from the scope of new law. The argument is problematic. The Green Paper says (10.12) *'it will be very rare for a child to be planning to undergo or undergoing the process of gender reassignment as defined in the Sex Discrimination Act'*. This points to the problem of this definition and the approach that leads from it. The definition means that only those who are undertaking *'medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex'*. This narrow medical model means that a person who is discriminated against – for example, faces bullying, isolation, stigma, problems potentially leading to withdrawal or exclusion from an educational institution – because their actual or perceived gender identity does not conform to a stereotype would not be legally protected if they were not undertaking medical supervision to 'reassign their sex'. The problem lies in the medical focus rather than on the act of discrimination: the definition should be changed. The second argument is that obligations under the Human Rights Act and education law would provide protection. But these are arguments that could apply also in relation to the other spheres where it is proposed that protection is extended. Therefore this does not convince. It may be that such provision would be infrequently used in the sense of legal actions – we cannot know in advance. But, as with other areas of law, it would provide an equality standard – a measure of what we as a society consider unacceptable and wrong – and a clear guide for schools.

Q 64: Are there any circumstances in which you consider that it is necessary for organised religions to treat people differently on grounds of gender reassignment?

64.1 The purpose of the regulations is to protect 'transsexual' people from experiencing discrimination when accessing goods, facilities and services. The Mayor does not advocate impinging on the activities of religious organisations to freely practice their faiths and adhere to their religious beliefs. However, where religious organisations provide access to goods, facilities and services as defined by these regulations, the regulations should, as a general rule, apply. Wide exemptions would negate the proposed intention of these regulations to protect people when accessing goods, facilities and services and would be unacceptable. Exemptions should be reserved for matters strictly related to the appropriate interpretation of religious doctrine.

Q65: Do you agree that we should retain the existing definition of gender reassignment?

65.1 No, as already explained (Q3, Q4, Q63) the Mayor believes this definition is too narrow. It means that only those trans people undergoing, planning to undergo or who have undergone gender reassignment surgery are legally protected. The Green Paper says that the law is *'intended to provide protection for transsexual people with a diagnosable medical condition, and who intend to or are living permanently in their acquired gender, rather than those who temporarily adopt the appearance of a different gender, perhaps as a matter of lifestyle choice'* (10.15) This is gratuitously offensive as well as very confused. The law should be about protecting against discrimination. It is abundantly clear that people can face discrimination on the basis of gender identity without being under the kind of medical regime indicated or without considering themselves as having a 'diagnosable medical condition'. Anyone else who experiences discrimination on the basis of their actual or perceived gender identity is unprotected. Research undertaken for the Equalities Review stated that 38 per cent of the sample fell outside of the current restrictive legal definition.¹⁶⁹ It makes little sense to introduce legislation using a definition that leaves so many people out of the scope of protection.

Chapter 11: Pregnancy and Maternity

Q66: Do you agree that we should make less favourable treatment of women on grounds of pregnancy and maternity unlawful in the exercise of public functions?

66.1 Yes. The Mayor agrees that less favourable treatment of a woman on grounds of pregnancy and maternity should be made unlawful in the exercise of public functions.

Q67: Do you agree that it is neither necessary nor appropriate to extend protection on grounds of pregnancy and maternity to school pupils and education in schools?

67.1 No. The Mayor does not agree that protection on grounds of pregnancy or maternity should not be extended to school pupils and education in schools. The reasons given in paragraph 11.9 do not appear to justify such an exemption. While it may be the case that schools 'need to retain the ability to provide for pregnant schoolgirls on a case by case basis, taking account of the pupil's age, ability, aptitudes and any particular individual or special needs', it should not mean that girls are treated differently solely because of their pregnancy. Protection under the law would ensure that that pregnancy cannot be used as 'a reason for exclusion from school' and that health and safety is not used as a reason 'for preventing attendance at school' rather than relying on guidance only.

¹⁶⁹ Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination

Chapter 12: Private Clubs and Associations

Q68: Do you agree that it is a positive benefit to have clubs which are set up for the purpose of offering the benefits of membership to a particular group, including single sex clubs catering for particular religions or beliefs or age ranges, along with those currently permitted under race, disability and sexual orientation law?

- 68.1 Yes. The Mayor agrees insofar as this question relates to the explanation in the Green Paper, to *‘ensure that private clubs whose purpose is to bring together people who share a protected characteristic can continue to do so’* (12.3a). That is, such services, in the form of private clubs and otherwise, for groups protected by anti-discrimination law have developed as a consequence of inadequate service provision and discrimination in society more broadly. Given that the aim of the Single Equality Act is to address discrimination and advance equality, such clubs should be permitted where they positively address underlying or historic discrimination.
- 68.2 This area is an example of why the Green Paper is rendered less coherent by failing to give sufficient consideration to one aspect of the DLR’s remit: to consider the fundamental principles of discrimination legislation and its underlying concepts’. The need for lists of exemptions from anti-discrimination law arises to a degree because of weaknesses in Britain’s symmetrical legal model. Many problems arise from the necessity to ensure likeness in treatment rather than address disadvantage or discrimination. This could be addressed by a purpose clause combined with a strong positive action provision.
- 68.3 The DLR’s remit to consider these principles and concepts was logical: to start with the basics in order to help build a more coherent, effective and streamlined body of law. The weaknesses in the Green Paper’s proposals – and incoherence in its structure – stem in part from a failure to meet this remit.
- 68.4 If the question here were approached within positive action criteria, that is preventing or compensation for disadvantage and meeting special need, why should there be an age limit for a youth club or why would a Muslim women’s group be a problem? The approach should be to allow such things to happen where they are unlikely to cause harm, perpetuate disadvantage or lead to exclusion.

Q69: Do you agree with the proposal to make it unlawful for private clubs with 25 or more members (other than single sex clubs or those set up for members who are a particular religion or belief) to discriminate on grounds of sex and religion or belief?

- 69.1 Yes. The Mayor agrees with this proposal to extend the prohibition on such clubs from discriminating against members, associates and applicants on grounds of race, disability and sexual orientation, so that they are also prohibited from discriminating on grounds of sex and religion or belief. The Mayor also believes in general it should apply to age discrimination.

Q70: Do you agree that private clubs with 25 or more members should not be permitted to discriminate against guests on the grounds of sex, race, sexual orientation and religion or belief, as is already the case on grounds of disability?

- 70.1 Yes. The Mayor agrees with this proposal. The Mayor believes there should be the most comprehensive protection and therefore it should apply to age discrimination.

Q71: Do you think that the law should address unjustified age discrimination by private clubs with 25 or more members (other than those set up to cater for a particular age range) if age discrimination is made unlawful in the provision of goods, facilities and services?

71.1 Yes. The Mayor fully endorses this proposal. The Mayor supports the prohibition of discrimination on grounds of age in the provision of goods, facilities and services. Consistent with this the Mayor also supports equal protection against age discrimination as for other forms of discrimination by private clubs.

Chapter 13: Improving access to and use of premises for disabled people

Q72: Do you agree with our proposal for requiring disability-related alterations to the common parts of residential premises?

72.1 Yes. This is a very modest proposal to address the situation whereby some disabled people may become prisoners in their own home because they can only use the 'common parts' (e.g. communal hallways and stairs in blocks of flats) with difficulty. If a disabled person finds it unreasonably difficult to use the common parts of their home landlords should be under a duty to make a disability-related alteration, at the disabled person's expense. The Mayor notes that this proposal was made by the Review Group on Common Parts.¹⁷⁰

Chapter 14: Harassment

Q73: Can you provide examples of harassment you think is occurring or could occur on grounds of religion or belief, sexual orientation, age or disability, which would fall outside the existing protections in discrimination and other law?

73.1 The Mayor believes that all groups should be equally legally protected against harassment and agrees with the statement in the Green Paper that, '*some groups are expressly protected while others are not... As a general principle we want to make the law as consistent as possible*' (14.2). The Mayor therefore believes that the approach of this question is wrong. Rather than wait until the problems resulting from lack of legal protection mount up to a sufficient level of 'proof', the DLR should explore how to provide consistency of legal protection: in fact, this is part of its core remit. If in the end there are fewer legal cases on some grounds than on others, so much the better. Furthermore, precisely because there is no basis for taking legal action against harassment on certain grounds and in certain circumstances, it is more difficult to provide such evidence.

73.2 An indication of the problems created by inequality in protection is provided by research into prejudice undertaken by the Women and Equality Unit and published by the Equalities Review.¹⁷¹ This looked at the level of prejudice that exists to various groups in society. In terms of the cultural context the report found that, '*People think media*

¹⁷⁰ <http://dwp.gov.uk/aboutus/business.asp>

¹⁷¹ Equality, Diversity and Prejudice in Britain, Abrams and Houston, University of Kent

portrayals of Muslims and gay men and lesbians are more negative than portrayals of other groups’.

73.3 The report stated that, *‘The majority of people openly express negative views about certain groups, such as illegal immigrants, and asylum seekers. A substantial minority (around one-fifth) say they feel negatively towards gay men and lesbians and towards Muslims. In contrast almost nobody expressed any negative feelings towards men, women, older people or people with disabilities. Moreover, an overwhelming majority (over 70 per cent) expressed positive feelings towards these groups.’*

73.4 Racism was also strongly present with:

- *‘Muslims, Black people and gay men and lesbians are seen as posing stronger threats culturally and physically. Members of these groups are also less likely to be welcomed as neighbours, employers or in-laws’.*

And:

- *‘Arabs and Muslims are less likely to be viewed as being accepted as British than are other groups’.*

73.5 The researchers observed that, *‘this pattern of results shows that people do not feel inhibited from expressing negative feelings about some social groups’.*

73.6 While this was not a study on harassment, the results suggest that equality in legal protection is essential to provide protection against the potential results of such prejudicial views – including through what is legally viewed as harassment – and as a statement of the Government’s and society’s support for equality of all people against harassment.

73.7 Another example of the degree of concern over negative attitudes and behavior towards people on the basis of religious belief is reflected in the support given to a recent initiative by the Mayor. Along with religious leaders, political figures, trade unionists and human rights campaigners, the Mayor launched the Coalition to Defend Freedom of Religious and Cultural Expression in June this year. The Coalition’s founding statement said that *‘We believe that our most fundamental human rights include the rights to freedom of thought, conscience, religion and cultural expression’* and that *‘It took hundreds of years of struggles, including international and civil wars, to establish the freedoms of religious and cultural expression and these must be vigorously upheld subject only to the proportionate protection of the human rights and freedoms of others’.*¹⁷² Speaking at the launch, Edie Friedman of the Jewish Council for Racial Equality, referred to an article from the Manchester City News in 1888 which described the Jewish immigrants as follows: *‘Their unclean habits, their wretched clothing and miserable food enable them to perpetuate existence upon a pittance... these immigrants have flooded the labour market with cheap labour to such an extent as to reduce thousands of native workers to the verge of destitution... Surely our own people have the first claim upon us’.* She went on to quote the words of Guardian journalist Jonathan Freedland, who wrote, *‘I’ve been trying to imagine what it must be like to be a Muslim in Britain. I guess there’s a sense of dread about switching on the radio or television, even about walking into a newsagent. What will they be saying about us today? Will we be under assault for the way we dress? Or the schools we go to, or the mosques we build?’*

¹⁷² http://www.london.gov.uk/view_press_release.jsp

73.8 Finally, the Green Paper suggests (14.18, 14.19) that some such forms of harassment *may* be protected even where there is not express statutory provision. However, to ensure certainty and to avoid gaps in protection, the Mayor considers that this should be made explicit. A Single Equality Act should include comprehensive protection against harassment for all strands.

Q74: Do you think that express statutory protection against harassment on grounds of: religion or belief; sexual orientation; age; and disability, should or should not be provided in any of the following:

(a) the provision of goods, facilities and services?

(b) education in schools?

(c) the management of disposal of premises?

(d) the exercise of public functions?

74.1 Yes. The Mayor supports there being equality of protection, across all grounds and in all the above areas. As the Green Paper states *'extending the same statutory protection against harassment on all protected grounds would provide consistency'* (14.26).

Q75: Were statutory protection against harassment to be extended to one or more of the above grounds in one or more of the above areas, do you think that specific exceptions would be desirable?

75.1 No.

Q76: Do you think that harassment on grounds of religion or belief should be treated differently from the other protected grounds and that a different definition of harassment would be appropriate in this case?

76.1 No. The Mayor believes that harassment on the basis of religion or belief should have equal treatment under the law. The Green Paper states it wants to *'avoid unintended consequences, such as limiting the right to express a legitimate view or hold a different belief'* (14.5) and points to concerns that were raised in debate during the passage of the Equality Bill of the need to balance harassment protection against the right to freedom of speech. However, as it points out, the Human Rights Act 1998 requires courts to interpret all legislation in context of convention rights which include freedom of thought, conscience and religion and expression, allowing courts to *'strike a proper balance'* (14.24).¹⁷³

76.2 Harassment is defined as being when *'an unwanted conduct ... that has the purpose or effect of (i) violating that other person's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her'* (14.6). The Mayor submits that protection against harassment – that is, unwanted conduct that has this purpose or effect – does not conflict with the right to freedom of speech. Such

¹⁷³ Mark Norwood, a BNP member successfully prosecuted for displaying an anti-Muslim poster, appealed against his conviction to the European Court of Human Rights on the grounds that his rights under Articles 10 and 14 had been breached. However, his appeal was rejected by the ECHR on the basis that he had contravened Article 17, which denies the right to engage in acts aimed at destruction of the rights and freedoms enshrined in the Convention, including the right to practice one's religion. The same approach of balancing rights would be required by courts in the harassment cases under discussion.

legislation constitutes a statement by society that offensive behavior against an individual on the basis of their religion or belief is unacceptable. Even if one were to accept that there was a conflict with freedom of speech, one would have to conclude that this conflict is one that is accepted in some spheres (such as employment – where protection exists across all grounds) and in all spheres under discussion in some grounds (such as race, where protection against harassment exists across all areas). That is, in certain respects society has said that it is not always and in all contexts acceptable for a person to do and say just what they want, because this violates another person's dignity and right to be treated with equality and respect.

- 76.3 Some racists have utilised a 'free speech' argument: as the Muslim Council of Britain has pointed out '*racial discrimination is often practiced against Muslim communities through the surrogacy of religion*'.¹⁷⁴ When BNP leader Nick Griffin and member Mark Collet were accused of attempting to stir up racial hatred they used the argument that they were entitled to freedom of speech.¹⁷⁵ Video evidence showed Nick Griffin referring to Islam as a 'wicked, vicious faith' and that Muslims were turning Britain into a 'multi-racial hell-hole'. A jury found them not guilty under the law. Despite the subsequent passage of legislation,¹⁷⁶ a lower threshold of protection exists in relation to religious hatred in criminal law.
- 76.4 The Green Paper suggests that for anti-discrimination law also 'a different, more stringent, definition of harassment on grounds of religion or belief' (14.28) might be appropriate. It points out that this could be done by following the narrower definition of harassment within European Directives: in effect requiring both that the conduct was intended to violate the dignity of the victim, or it had that effect *and* that the conduct intended to create an intimidating, hostile, degrading, humiliating and offensive environment. This is not the definition used in other British law on harassment and if used in regard to religion and belief it is possible to identify two effects:
- it would introduce an inequality in treatment of this form of harassment and may suggest that is to be taken less seriously;
 - it would create a higher legal threshold for those who believed themselves victims of harassment.
- 76.5 The lack of impact of such a definition in tackling harassment should be considered. Would it result in successful cases being able to be taken against harassment on grounds of religion or belief? It could be argued that requiring a higher threshold for religious harassment cases within discrimination law would be an even more negative route to take than with the criminal law because in discrimination law much lower penalties follow if a prosecution is successful than is the case with criminal prosecutions. There is in any case little point in introducing ineffective law which itself enshrines inequality. The definition used in regard to harassment on the basis of religion and belief should be equal to that applied to other forms of harassment.

¹⁷⁴ Fairness for all White Paper, Response from MCB, August 2004

¹⁷⁵ Also, when BNP member Dick Warrington was prosecuted for incitement to racial hatred for displaying an 'Islam out of Britain' poster, the BNP said: 'Islam is not covered by the anti-free speech race law... It's legal to say anything you want about Islam'. The introduction of the Race and Religious Hatred Act 2006 came after this, but requires that 'intent' is proven.

¹⁷⁶ The Racial and Religious Hatred Act 2006 requires intent to be shown ('threatening words or behaviour, or displays [or] written material which is threatening... if... intend[ed] thereby to stir up religious hatred'. The Bill had been intended to outlaw religious hatred in the same way that racial hatred is dealt with. However, Conservative and Liberal Democrat amendments agreed during the Bill's passage introduced a requirement to show intent which makes prosecutions for incitement to religious hatred subject to a much tougher standard of proof – and more likely therefore to fail.

76.6 The Mayor believes proportionate protections – such as in relation to freedom of speech – are built into existing law and that a different legal standard on religious harassment would be wrong. The Mayor therefore submits that harassment on grounds of religion or belief should not be treated differently and should not be subject to a different legal definition.

Q77: Do you think there is a valid distinction to be made between harassment in an 'open' and 'closed' environment and that the approach to its prohibition should be differentiated accordingly?

77.1 No.

Q78: Do you have any evidence of harassment by third parties in the workplace in relation to protected grounds other than sex? If so do you consider that it should be dealt with in a similar way?

78.1 The Mayor believes that there is ample evidence of third party harassment in the workplace and that the law should provide equal protection for all six strands.

78.2 The question refers to the acknowledgement in the Green Paper that, as a result of the judicial review¹⁷⁷ the definition of harassment in the Sex Discrimination Act (SDA) requires amendment. The Green Paper states, '*we will be amending the law to make it clear that an employer can be held liable for harassment if it fails to take action to protect an employee in the workplace when it is aware that he or she is being subjected to persistent acts of sexual harassment by a customer or client*' (14.30). While it is not completely clear what the new definition will be, what had been argued before the High Court was that the definition of harassment in the SDA should be consistent with the definition in the European Amended Equal Treatment Directive 2002/73/EC - 'unwanted conduct related to the sex of a person', which would replace the current definition of 'unwanted conduct on grounds of her sex' – and that under such a definition employers could be liable for harassment by third parties where the employer failed to protect their employee when they were aware of the harassment to which s/he was being subjected.

78.3 During the course of hearing the EOC case, Counsel argued that if the SDA requires amendment in order properly to reflect the Directive, then other legislation introduced or amended for purposes of transposing the Race Directive 2000/43/EC and the Employment Framework Directive 2000/78/EC will also need amendment.¹⁷⁸ The High Court was satisfied that the SDA definition was too narrow. The Green Paper does not indicate how much evidence the Government would need before it accepted the need to amend the definition of harassment for all grounds. The Mayor recommends that the

¹⁷⁷ EOC v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)

¹⁷⁸ Counsel for the EOC added that if the SDA requires amendment in order properly to reflect the definition of harassment in Directive 2002/73/EC then other legislation that has been introduced or amended in for purposes of transposing the Race Directive 2000/43/EC and the Employment Framework Directive 2000/78/EC will also need amendment; while the DDA refers to "unwanted conduct for a reason related to the disabled person's disability", the RRA and the RB Regulations, SO Regulations and Age Regulations refer to "unwanted conduct on grounds of race/sexual orientation/religion or belief/age. The Race Directive defines harassment as 'unwanted conduct related to racial or ethnic origin' and the Employment Framework Directive defines harassment as 'unwanted conduct related to any of the grounds referred to in Article 1 [religion or belief, disability, age or sexual orientation]'.

Government should not wait for evidence of employers failing to act to prevent third party harassment before bringing our national law into line with the European Directives.

78.4 With regard to examples, third party harassment is a significant and recurring problem as is failure by employers to act. In relation to racial harassment, examples gathered from the TUC, from trade unions and race equality councils include:

- Racial harassment of traffic wardens by members of the public: A trade union official commented that when he was a regional officer he negotiated agreements with companies with contracts in different local authority areas to ensure that traffic wardens went out in pairs because of the levels of racial harassment and physical attack that black traffic wardens were subjected to by members of the public.
- A young girl working at fast food shop in Kent was regularly harassed by a group of young white youth. The manager there felt he could not intervene as they were not his employees. The local race equality council took action with the help of the police.
- A black midwife heard a patient say that she didn't want a black midwife to deliver her baby. The trade union challenged actions by the NHS Trust, and the midwife won her case.
- Following allegations by a group of black staff of a Mental Health Trust, Trust management commissioned an independent investigation. The investigators found that staff had been subjected to racial harassment and threats of physical violence and had been expected to put up with such abuse. The chief executive wrote to staff to reassure them that appropriate action would be taken and indicating a degree of urgency, but six months later the staff were still waiting for positive intervention. In the meantime the racist harassment and abuse had continued.

Annex B – Implementing the Gender Directive

Q79: Do you agree with the proposals in Table 1?

- 79.1 Consistent with views expressed in response to the consultation on the Discrimination Law Review Green Paper, The Mayor is concerned about exception S45, which permits insurance to be offered at a different premium and benefit rate for men and women (see below).
- 79.2 In response to the consultation on the Discrimination Law Review Green Paper the Mayor has also set out his views on the need for a wider range of protection for all trans people.
- 79.3 The Mayor notes the consultation proposes to use the term ‘proportionate means of achieving a legitimate aim’ for determining whether a particular exemption will be allowable or not. The Mayor questions whether this term accurately reflects the term ‘justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’, which is specified in the Directive and suggests consideration is given as to whether the proposed definition The Mayor notes the consultation proposes to use the term ‘proportionate means of achieving a legitimate aim’ for determining whether a particular exemption will be allowable or not. The Mayor questions whether this term accurately reflects the term ‘justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’, which is specified in the Directive and suggests consideration is given as to whether the proposed definition would narrow the equality outcomes from that provided for in the Directive.

Q80: Do you have any comments on the likely impact of the Gender Directive’s insurance provisions on providers and/or customers of insurance and related financial products?

- 80.1 Yes. The Mayor submits that gender-based actuarial factors are based on a stereotype and obscure differences that are the product of, for example, socio-economic factors, not gender. Such generalisations are not normally permissible for decision-making in a discrimination context. The proposal to require insurers to publish and regularly update the data they use for charging women and men different rates is not likely to prove sufficient to eliminate the discrimination that results. Therefore the Mayor does not agree with this proposal in relation to continued exception (S45).
- 80.2 The Mayor notes that the Race Relations Act and the Religion/Belief regulations make it unlawful for actuarial factors to be used in a parallel way – that is, to charge people of different ethnicity or religion different insurance rates – and sees no justification as to why it should be lawful to allow discrimination in this way in setting insurance rates for men and women.

Q81: Should the ban on differences due to maternity or pregnancy costs be implemented in December 2007 or deferred until December 2009?

- 81.1 December 2007 as there do not appear to be any good grounds for deferring.

Q82: Do you think 'maternity' should be defined for the purposes of the Sex Discrimination Act provisions covering goods, facilities or services and premises?

82.2 No.

- 1) The proposed definition unnecessarily limits the potential scope of the protection provided.
- 2) The Gender Directive does not limit the protection to when a woman is on maternity leave.
- 3) The proposed definition does not correspond with the public's understanding of the term 'maternity'.

Appendices – attached as separate documents

Submission to DTI consultation ‘Success at Work’

Equality in our Lifetime? Public Procurement and the Discrimination Law Review, May 2007

Women in London’s Economy report, February 2007