

INDEPENDENT LEGAL ANALYSIS OF THE COMPACT CODE OF GOOD
PRACTICE ON RELATIONS WITH “BME” VOLUNTARY AND
COMMUNITY ORGANISATIONS

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A. Terms of Reference

1. To review the “Compact Code of Good Practice on Relations with “BME” Voluntary and Community Organisations” (“the Code”).
2. To consider and report upon the extent to which the Code complies with and reflects,
 - Domestic equality law,
 - Regional (European) equality law,
 - International equality law.
3. To consider and report upon anticipated changes to relevant equality laws and to consider and report upon the extent to which the Code complies with and reflects such anticipated changes.
4. To consider and report upon the extent to which the Code complies with and reflects best practice equality standards.
5. To prepare a set of recommendations for improving the Code in light of the matters above including, as appropriate, redrafts reflecting those recommendations.
6. To present the key findings of the review and its recommendations to the Commissioner for the Compact (or his nominee).

B. Executive Summary

- ❖ There is a vast amount of domestic, regional and international equality law which regulates and otherwise affects the relationship between the voluntary sector and Government;
- ❖ The new Equality Bill (the proposals for which were published on 26 June 2008) will, when enacted, introduce new laws affecting the relationship between the voluntary sector and Government;

- ❖ EU proposals for new anti-discrimination legislation will, if enacted, introduce new laws affecting the relationship between the voluntary sector and Government;
- ❖ The existing Code is not on its face inconsistent with domestic, regional and international equality law. However,
 - It fails to give appropriate emphasis to the prohibition on (direct and indirect) discrimination by public authorities;
 - It fails to give appropriate emphasis to the duties on Government (central and local) to have “due regard” to the equality objectives set out in the statutory equality duties under the Race Relations Act 1976; the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995;
 - It will fail to give appropriate emphasis to the duties on Government (central and local) to have appropriate regard to the equality objectives which will be included in the Single Equality Act, when enacted, relating to sexual orientation, religion and belief and age;
 - It fails to give appropriate emphasis to the duties on Government (central and local) to undertake equality impact assessments on existing and proposed policies, including those relating to grant funding and procurement;
 - It fails to address intersectional/multiple forms of discrimination;
 - It fails to give appropriate emphasis to the opportunities that exist in equality law to create and deliver community (BME) specific services;
 - It fails to give appropriate emphasis to the requirement that sometimes arises in equality law to create and deliver community (BME) specific services;
 - It fails to give appropriate emphasis to the recognition that BME targeted services may promote equality and good relations and community cohesion;
 - It fails to give appropriate emphasis to the fact that voluntary and community (BME) services might themselves help the

achievement of Government's (the U.K.'s) obligations in regional and international human rights law.

- ❖ I recommend that consideration is given to adopting the changes suggested in the Annex hereto.
- ❖ A re - draft of certain sections of the Code is annexed hereto.

C. The legal Framework

7. There is a vast amount of domestic, regional and international equality law which regulates and otherwise affects the relationship between the voluntary sector and Government. This includes:
 - a. The Race Relations Act 1976 (as amended¹ by the Race Relations (Amendment) Act 2000; the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626 and the Race Relations Act 1976 (Statutory Duties) Order 2001, SI 2001/3458).
 - b. The Sex Discrimination Act 1975, (as amended by the Equality Act 2006, Part 4; the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467; the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006, SI 2006/2930; the Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963 and the Sex Discrimination Act 1975 (Amendment) Regulations 2008 SI 2008/656).
 - c. The Disability Discrimination Act 1995 (as amended by the Disability Discrimination Act 2005, Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966 and the Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673).
 - d. The Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1657 and the Equality Act, Part 2.

¹ These address the significant amendments only, for the purposes of this paper. Each of the primary pieces of legislation has been amended many times, often to address small technical matters that do not affect the substance of this paper.

- e. The Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661 and the Equality Act, Part 3.
 - f. The Human Rights Act 1998 (and the European Convention on Human Rights).
 - g. The “Race Directive” 2000/43/EC.
 - h. The “Framework Directive” 2000/78/EC.
 - i. The “Equal Treatment Directive” 76/2007/EEC (as amended by Directive 2002/73).
 - j. The Gender Goods and Services Directive 2004/113/EC.
 - k. The “*Procurement Directives*”.²
 - l. The European Convention for the Protection of Human Rights and Fundamental Freedoms [1950].
 - m. The European Social Charter [1961].
 - n. The Framework Convention for the Protection of National Minorities [1995].
 - o. The European Charter for Regional or Minority Languages [1992].
 - p. The International Covenant on Civil and Political Rights (1966, UN).
 - q. International Covenant on Economic, Social and Cultural Rights (1966, UN).
 - r. The Convention on the Elimination of Racial Discrimination (1965, UN).
 - s. The Convention on the Elimination of Discrimination against Women (1979, UN).
 - t. The Convention on the Rights of Persons with Disabilities (2006, UN).
 - u. The Convention on the Rights of the Child (1989, UN).
8. There are also a number of non-legislative measures which touch upon the relationship between Government and the voluntary sector, including the Equality Standard for Local Government (revised 2007) and the

² Though not equality provisions, they establish the parameters for promoting equality through procurement in equality law.

Codes of Practice published by the Commission for Racial Equality (“CRE”), Equal Opportunities Commission (“EOC”) and Disability Rights Commission (“DRC”).³

9. Finally, new law deriving from the *“Discrimination Law Review”* (2007) and the Green Paper that followed (*“Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”*) and reflected in the Equality Bill 2008 (published on 26 June 2008) is anticipated in the near future. In addition, on 2 July 2008, the European Commission adopted a proposal for a Directive (a legally binding enactment) which provides for protection from discrimination on grounds of age, disability, sexual orientation and religion or belief in the areas of social protection, including social security and health care, education and access to and supply of goods and services which are available to the public, including housing. I discuss this further below.⁴

(a) Domestic legal framework

i. Race Relations Legislation

10. The Race Relations Act 1976 (“RRA”⁵) regulates the relationship between public authorities and the voluntary sector in certain material respects and regulates both the activities of public authorities and the voluntary sector.⁶ The purpose of the RRA is, of course, principally to regulate discrimination connected to race in the spheres falling within its scheme. It does this by the creation of certain unlawful acts – by which discrimination, as defined, is outlawed – and by the statutory imposition of equality duties on listed public authorities (which include central and local Government).

(i) Discrimination

³ Before their dissolution by the Equality Act 2006 and their substitution with the Equality and Human Rights Commission.

⁴ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=373&furtherNews=yes>.

⁵ As amended by, amongst others, the Race Relations (Amendment) Act 2000; the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626 and the Race Relations Act 1976 (Statutory Duties) Order 2001, SI 2001/3458).

⁶ See sections 19B, 20, 21, 25 and 71, in particular, described further below.

11. “Discrimination” for the purposes of the RRA is defined⁷ as:
- Direct discrimination (less favourable treatment “*on racial grounds*”⁸);
 - Indirect discrimination (facially neutral treatment which puts or would put persons of a particular racial group at a particular disadvantage when compared with other persons and which is not justified⁹);
 - Victimisation (less favourable treatment by reason of having done a “*protected act*”¹⁰);
 - Harassment (unwanted conduct with the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment).¹¹
12. There are differences as between the meaning afforded to the concept of “discrimination” depending upon the activity concerned, under the RRA.¹² However, for present purposes, the above classifications serve to summarise the meaning given to the concept of discrimination for the purposes set out in the Code.
- (ii) Public Functions
13. As to the unlawful acts reacted by the RRA, in the first place, section 19B of the RRA makes it “*unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination*”.¹³ “Harassment” by public authorities is also outlawed in

⁷ Part 1, RRA.

⁸ Section 1(1)(a), RRA.

⁹ Section 1(1A), RRA. “*Justification*”, for these purposes, requires that the person imposing the treatment (which may comprise any provision, criterion or practice) show that such treatment is a “*proportionate means of achieving a legitimate aim*”.

¹⁰ Section 2, RRA. A “*protected act*”, for these purposes, means some act done to facilitate action under the RRA (bringing proceedings, acting as a witness etc), irrespective of the race of the complainant.

¹¹ Section 3A, RRA

¹² In particular, as to indirect discrimination and harassment.

¹³ There are exceptions to this provision but they are unlikely to be material to the activities covered by the Code, save that it (and the same applies to the ‘public authority’ provisions of the other pieces of anti-discrimination legislation referred to below) does not cover acts already covered by the goods, facilities and services provisions, discussed below; section 21A(9), paragraph 15-16, SDA; section 19B(6), RRA; section 21B(7), DDA; section 52(4)(m), EA.

the carrying out any functions which consist of the provision of (a) any form of social security; (b) healthcare; (c) any other form of social protection; or (d) any form of social advantage.¹⁴ Each of the matters falling within the anticipated scope of the Code are likely to fall under one or other of these heads so in practical terms section 19B also outlaws harassment for the purposes of the matters falling within the scope of the Code (see section 19B(1A), RRA).¹⁵

14. Accordingly discrimination and harassment by a public authority in the exercising of any of its (relevant) functions¹⁶ is outlawed by the RRA. The sorts of functions covered by section 19B will include “*the full range of a public authority’s duties and powers*”.¹⁷
15. “*A public authority*” includes any person “certain of whose functions are functions of a public nature”.¹⁸ A “core” public authority will be caught by the ‘public function’ provisions in respect of all their activities, subject to any exemption.¹⁹ A core public authority is “a body whose nature is governmental in a broad sense of that expression.... The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution.”²⁰

¹⁴ Reflecting the scope of the EU Directive that compelled the introduction of protection against harassment: 2000/43/EU.

¹⁵ It can be noted that the anti-discrimination legislation is enormously complex, largely because it has been successively amended to give effect to domestic or EU priorities, often by simply tacking on other provisions to the existing scheme even where they do not fit comfortably, and this is simply one example.

¹⁶ Save those which are excluded and which are unlikely to be relevant here.

¹⁷ “*Statutory Code of Practice on the Duty to Promote Race Equality*” (CRE, 2002), 5.

¹⁸ S.19B(2) RRA.

¹⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2003] UKHL 37; [2004] 1 AC 546.

²⁰ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37; [2004] 1 AC 546, paragraph 7.

16. A “hybrid” body authority is,²¹ on the other hand, a private body that exercises both public functions and non-public functions. In relation to a particular act, a “hybrid” body is not a public authority by virtue only of the fact that certain of its functions are functions of a public nature if the nature of the particular act under challenge is private (for example, selecting employees, opening bank accounts, purchasing stationery).²² The inclusion of “hybrid bodies” is intended to be expansive and to cover, for example, private security companies running a prison in respect of functions relating to the running of the prison.²³ However, it may also cover some voluntary organisations when carrying out some functions of a public nature.²⁴ This means that claims of discrimination *against* voluntary organisations might be brought against them, in some circumstances, where they are performing public functions. It is therefore important to recognise that voluntary organisations are themselves subject to the duty to act within the law.
17. As to whether voluntary organisations may themselves bring claims of racial discrimination *against* public authorities, the prohibition against discrimination in section 19B exists for the benefit of individuals (individually or collectively). However, many voluntary organisations are unincorporated and as such are constituted by a collection of individuals working together or in partnership. An individual affected by a discriminatory act by a public authority exercising its public functions, for example, in relation to grant funding, could then bring a claim under section 19B, RRA if the exercise of that decision was discriminatory and detrimental to that individual by herself or as part of a group (because,

²¹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37; [2004] 1 AC 546, paragraph 11

²² Section 21A(2)(b), SDA; section 19B(4); section 19B(4) DDA; section 52(2)(b), EA.

²³ See, for example, ‘Code of Practice – Rights of Access: Services to Public, Public Authority Functions, Private Clubs and Premises’ (2006) DRC (Disability Discrimination Code of Practice (Services, Public Functions, Private Clubs and Premises) (Appointed Day) Order 2006 SI 2006/1967, bringing the code into force on 4 December 2006), paragraph 11.5.

²⁴ Though the extent to which this will be so will be less than originally anticipated in consequence of the House of Lords decision in *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95; [2007] UKHL 27.

for example, it affects the ability of her/his group to continue or to continue in the same way).²⁵

18. The question whether a corporate body (that is, a company limited by guarantee or otherwise or a charitable corporation) could bring proceedings under section 19B or indeed any of the other unlawful acts provided for under the RRA, is a moot point.²⁶ Case law has established that an individual member of a partnership, and all members of that partnership, might bring proceedings under the unlawful acts provided for under the RRA where the partnership suffers some detriment in consequence of a discriminatory decision falling within the scope of the RRA.²⁷ However, that position is rather different from the position in relation to an incorporated organisation whose legal personality is that of the company rather than the individuals working within it.²⁸ There is some support in the RRA itself for the argument that incorporated bodies might bring proceedings under the RRA, relying on the unlawful acts. In particular, for example, the definition of “*direct*” discrimination requires that any less favourable treatment be “*on racial grounds*”, that is, not necessarily on grounds connected with the characteristics of any particular individual and more particularly an individual complainant. Claims of discrimination by reason that a person or organisation is connected with others of a particular racial group (for example, that its service users are predominantly from one community) may be brought

²⁵ See, for example, *Patterson v Legal Services Commission* [2004] ICR 312, in which the Court of Appeal held that an individual forming part of a partnership could bring proceedings against the Legal Services Commission in respect of a decision which affected the partnership and the provision of funding to it. That case was brought under the Employment and Related provisions of the RRA but nevertheless demonstrates whilst an action in respect of the unlawful acts under the RRA is a personal action, a claim could be made by a partner in a firm affected. See too, *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008, a case brought by service users in respect of a decision concerning grant funding to an organization whose services they used (the Southall Black Sisters case).

²⁶ See, by analogy, *Jameel (Mohammed) & Another v Wall Street Journal Europe Sprl* [2007] 1 AC, reaffirming the principle that a company might bring proceedings in defamation (notwithstanding the “*personal*” nature of the tort).

²⁷ *Patterson v Legal Services Commission* [2004] ICR 312.

²⁸ There is a case presently before the courts in which this issue is likely to be decided but judgment will not be handed down, assuming the case goes to trial, before the date upon which this paper is due.

under the direct discrimination provisions of the RRA.²⁹ In any event, as I have observed above, the members of an unincorporated association or body might bring proceedings under section 19B, RRA where, for example, grant funding or other benefits were removed on discriminatory grounds.

19. Further, service users affected by a decision made by a public authority in relation to services provided by a voluntary organisation might themselves too bring proceedings under section 19B in certain circumstances.³⁰

(iii) Goods, Facilities and Services

20. Section 20, RRA outlaws discrimination in the provision of goods, facilities or services. By section 20 *“it is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services”*.³¹

21. Again it is a moot point whether a voluntary organisation, whether incorporated or unincorporated, might themselves bring a claim under section 20 (against a body refusing to provide it with *goods, facilities or services*). The question whether incorporated bodies (companies, charitable corporations) might bring claims under the RRA is addressed above.³² Further, whether any voluntary organisation, incorporated or unincorporated, might bring proceedings under section 20 would depend upon whether, in relation to the particular claim to *goods, facilities or services*, they formed *a section of the public*. That would depend upon the facts of any particular case but clearly such claims may be available for voluntary organisations, against public authorities amongst others.

²⁹ See, by analogy, *Weathersfield Limited (T/a Van and Truck Rentals) v Sargent* [1999] ICR 425.

³⁰ *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008, a case brought by service users in respect of a decision concerning grant funding to an organization whose services they used (the Southall Black Sisters case).

³¹ Section 20(1), RRA.

³² Paragraph 17.

However, discrimination in the provision of goods, facilities, or services (which may include some forms of funding or the provision of other benefits) by a public body (central or local government, for example) against a voluntary organisation may be actionable by a voluntary organisation or, again, by an individual service user.

22. Again voluntary organisations themselves are covered by section 20, RRA so discrimination *by* a voluntary organisation against one of its own service users or another member of the public would be actionable by that service user or member of the public under section 20.

(iv) Premises

23. Section 21, RRA regulates discrimination in the disposal and management of premises. As to the disposal (by rental, donation or otherwise) and management of premises by public authorities in their relationships with the voluntary sector, these would be covered by section 21, RRA (with the same caveat that in the case of an incorporated body, they may not have a right of action under this or any other of the unlawful acts under the RRA, as is referred to above³³). A local council, therefore, that terminated an agreement which permitted a voluntary sector body to use premises belonging to the local council and did so on racial grounds, will be committing an unlawful act of discrimination under the RRA.³⁴

(v) Charities and Clubs

24. Two sets of provisions in the RRA address the types of organisations into which some voluntary and community organisations will fall: Charities and clubs.

³³ See paragraph 17.

³⁴ Subject to any exceptions, none of which are likely to be material and assuming, as I have indicated that a claim could be brought in the case of an incorporated body under these provisions. see, by analogy, *Jameel (Mohammed) & Another v Wall Street Journal Europe Sprl* [2007] 1 AC, reaffirming the principle that a company might bring proceedings in defamation (notwithstanding the “*personal*” nature of the tort).

25. As to charities, section 34, RRA has the effect of making any provision in a charitable instrument, whenever the instrument took or takes effect, void, insofar as it provides for the conferring of benefits on persons of a class defined by reference to colour. Where such provision is made, the instrument is to be read as if it provided for the conferring of such benefits on persons of the class which results if the restriction by reference to colour is removed or where the original class is defined by reference to colour only, on persons generally.³⁵
26. Otherwise section 34, RRA generally *exempts* from the unlawful acts anything done pursuant to provisions contained in charitable instruments conferring benefits on persons of one racial group (apart from one defined by reference to colour) only.³⁶ Importantly, then, this permits voluntary and community organisations, established as charities to provide race specific services (charities, for example, established explicitly to provide support and assistance to Asian women³⁷ victims of violence; or African Caribbean people experiencing mental ill- health³⁸).
27. The RRA outlaws discrimination by membership “clubs”.³⁹ This applies to any association of persons whether corporate or unincorporated, and whether or not its activities are carried on for profit, if it has 25 or more members and permission to membership is regulated by its constitution.⁴⁰ Discrimination against members, prospective members, associates and prospective associates is outlawed.⁴¹ This may affect

³⁵ Section 34(1).

³⁶ The exemption does not apply to any discriminatory act done on the grounds of race, ethnic or national origins which is unlawful by reason of the employment or contract worker provisions Section 34(3A), RRA.

³⁷ As to gender, see below. See too, the comments in *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008.

³⁸ Nor will the act of delivering services to only one such group or another be unlawful under section 19B or section 20 (see above) because of the operation of section 35.

³⁹ Section 25, RRA. Clubs which are truly open to the public, that is, that do not operate a genuine selection process will fall within the goods, facilities and services: *Dockers Labour Club & Institute Limited v Race Relations Board* [1976] AC 285.

⁴⁰ And is so conducted that the members do not constitute a section of the public within the meaning of the good facilities and services provisions and it is not an organisation to which the trade organisation provisions apply; section 25(1)(c), RRA.

⁴¹ Section 25, RRA.

some voluntary and community organisations that deliver services or promote community activities through membership arrangements. However, the RRA creates an exception for membership clubs with certain specialist interests, based on shared experiences or interests connected to ethnicity.⁴² Where the main object of an association is to enable the benefits of membership (whatever they may be) to be enjoyed by persons of a particular racial group defined otherwise than by reference to colour, the “clubs” provisions in the RRA will not render any act done by it unlawful, so long as it does not involve discrimination on the ground of colour.⁴³

(vi) Race Specific Services⁴⁴ and Positive Action

28. The RRA recognises that there may be a need for “race specific” services, if substantive equality is to be achieved,⁴⁵ and section 35, RRA makes it clear that the RRA does not outlaw any act done in affording persons of a particular racial group access to facilities or services to

⁴² Section 26, RRA.

⁴³ In determining whether that is the main object of an association regard shall be had to the essential character of the association and to all relevant circumstances including, in particular, the extent to which the affairs of the association are so conducted that the persons primarily enjoying the benefits of membership are of the racial group in question, section 26(1), RRA.

⁴⁴ For clubs, associations and charities directed at particular ethnic groups see paragraph 24 above.

⁴⁵“It follows from the principle of non-discrimination that it will remain unlawful to practice “reverse discrimination”; that is, to discriminate in favour of a racial minority. However, if the principle of non-discrimination is interpreted too literally and inflexibly it may actually impede the elimination of invidious discrimination and the encouragement of equal opportunity. Unless the legislation makes appropriate provision, it would, for example, be unlawful to provide special training courses for qualified coloured immigrant workers designed to enable them to compete on genuinely equal terms with others for work from which they have hitherto been excluded. It would also be unlawful for an employer to seek actively to encourage qualified coloured immigrants to apply for employment which, for whatever reason, they have not previously sought. The Government considers that it would be wrong to adhere so blindly to the principle of formal legal equality as to ignore the handicaps preventing many black and brown workers from obtaining equal employment opportunities. Accordingly, the Bill will contain provisions allowing (but not requiring) employers and training organisations to provide special training facilities to members of such groups and to encourage them to take advantage of opportunities for doing particular work. There will be similar exemptions allowing the provision of special training facilities and encouragement by trade unions, employers' associations, and professional and trade organisations. The Bill will also allow the provision of facilities and services to meet the special needs of particular ethnic or national groups (for example, in relation to education, instruction, training and health and social services), or for the fulfilment training and trade obligations to overseas countries, and permit discrimination in the employment, where necessary for these purposes, of persons of a particular ethnic or national group.” (The White Paper preceding the RRA: “Racial Discrimination”, Cmnd. 6234 (1975), para. 57). (emphasis added)

meet the special needs of persons of that group in regard to their education, training of welfare, or any ancillary benefits.⁴⁶

29. The “Statutory Code of Practice on Racial Equality in Housing”, CRE (2006) provides, for example that:

“2.40 The term ‘positive action’ refers to the measures that providers of housing and related services may lawfully take to meet special needs involving training, education or welfare (section 35), or to train or encourage people from a particular racial group that is under-represented in particular work (sections 37 and 38).

2.41 Section 35 allows housing organisations, including ethnic minority housing associations, to make special provision for certain groups; for example by developing temporary hostel accommodation catering especially for newly-arrived Somali refugees, who may have needs arising from shared traumatic experiences; or sheltered housing schemes for Chinese elders; or by providing wardens and carers who speak a particular Asian language; or by meeting certain dietary and religious requirements. Individuals should still be assessed according to their needs.

2.42 To take advantage of this exception, the housing or service provider must have objective evidence of the special need they wish to meet, and must demonstrate that the special provision is proportionate.” (“Statutory Code of Practice on Racial Equality in Housing”, CRE (2006)).

30. “The duty to promote race equality: A Guide for Public Authorities” (CRE, 2002) recognises that there are different and varied ways to promote good race relations. It makes clear that promoting good relations should include addressing all the needs in the public authority’s community either “*through projects specifically designed for particular groups*” or through “*wider initiatives that benefit the whole community*”.⁴⁷
In other words, projects targeted appropriately toward particular groups

⁴⁶ Section 35, RRA.

⁴⁷ Page 12.

may be as valid a method of promoting good relations as those that benefit and bring together the whole community.

31. Section 35 might, then, cover a wide range of services directed at people from a particular racial group, or groups, who might otherwise be excluded from opportunities or services.⁴⁸ As the court has made clear (in the only case⁴⁹ addressing section 35⁵⁰) section 35 is not an *exemption* from the principle of non discrimination and equality enshrined in the RRA but a composite part of it.⁵¹ As the court made clear (and indeed has Parliament made clear in the pre RRA enactment papers), simply treating all people in the same way is unlikely to deliver equality in all cases (and may positively disadvantage certain groups). Sometimes, therefore, specific services targeted and provided to, certain ethnic groups will be necessary, appropriate and lawful.
32. Again this is an important provision, taking account of, for example, the findings of the “Baseline study” on the Code and other evidence, discussed further below.⁵² Section 35 is permissive (it allows but does not require positive action). However, the scheme of the RRA and in particular the prohibition on indirect discrimination (which may outlaw treatment which is formally speaking neutral – ie the same – but which may disadvantage a particular racial group⁵³) may *require* different, targeted or specific services to ensure substantive equality is achieved.
33. Sections 37-38, RRA also permit the provision of training to particular racial groups for particular work which would help to fit them for that work

⁴⁸ See, for example, Code of Practice on Racial Equality Employment (2006), CRE, paragraph 3.43-4.

⁴⁹ That I am aware of and certainly no others are reported).

⁵⁰ At least outside the employment field.

⁵¹ *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008, a case brought by service users in respect of a decision concerning grant funding to an organization whose services they used (the Southall Black Sisters case).

⁵² Paragraph 170.

⁵³ For example, the provision of services through a generic service provider which a particular cannot access because of language/culturally specific reasons or which does not appropriately meet the needs of a particular group – eg health care or domestic violence services which does not address female genital mutilation or forced marriage.

or encouraging only persons of a particular racial group to take advantage of opportunities for doing that work where it reasonably appears to that person that at any time within the twelve months immediately preceding the doing of the act—(i) there were no persons of that group among those doing that work in Great Britain or in an area within Great Britain; or (ii) the proportion of persons of that group among those doing that work in Great Britain or in the particular area within Great Britain was small in comparison with the proportion of persons of that group among the population of Great Britain. Again this allows for training to be targeted at specific, disadvantaged, racial groups.

(vii) The Race Equality Duties

34. The Race Equality Duties found in section 71 RRA and in Orders made under the RRA are especially important in the context of managing and regulating the relationship between central and local government. As is now well known, following the report of the Stephen Lawrence Inquiry Report,⁵⁴ the RRA was amended⁵⁵ to introduce more compelling statutory duties. In broad terms, these duties are directed at addressing institutional and structural discrimination. Institutional discrimination in this context refers to the practices and processes, sometimes informal, invisible or attitudinal, of organizations that have the effect of disadvantaging certain groups. These phenomena are almost impossible to address through the statutory unlawful acts by individual enforcement⁵⁶ and require pro-active action to identify them and address them. Structural discrimination refers to entrenched social disadvantage associated with membership of a particular class that might include segregation and social exclusion.⁵⁷ Structural discrimination often has the effect of reinforcing disadvantage, by the replicating of disadvantage through sometimes negative practices and policies, and again it may be

⁵⁴ *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, advised by Tom Cook, the Rt.Rev Dr.John Sentamu, Dr Richard Stone, Cm 4262-I.

⁵⁵ By the Race Relations (Amendment) Act 2000.

⁵⁶ *Commissioners of Inland Revenue v Morgan* [2002] IRLR 776, paragraph 38.

⁵⁷ A classic example can be seen in *D.H. and others v Czech Republic* (2007) (Application no. 57325/00).

very difficult to identify a particular discriminatory act causing disadvantage. Remedying these patterns of disadvantage usually requires some positive intervention. The statutory duties are directed at going some way to achieving this. They have the capacity to mainstream equality norms and create a statutory basis for securing change to organizational practices. Recent case law demonstrates that they are extremely important and compliance with them is a necessary precondition to the lawful exercising of public authority power.⁵⁸

35. As to the duties themselves, section 71(1) of the RRA requires all public authorities listed in Schedule 1A to the RRA (and that includes all central government department and local authorities⁵⁹), in carrying out their functions, to have due regard to the need:

- “(a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity and good relations between persons of different racial groups.” (“the general duties”).

36. The CRE (before its dissolution) issued statutory and non-statutory guidance on the implementation of these duties. The CRE’s statutory Code of Practice on the Duty to Promote Race Equality⁶⁰ notes that:

“The duty will help public authorities to make steady progress in achieving race equality. In relation to policy development and service delivery, the duty will:

⁵⁸ Some case law discussed below identifies the limits on the obligations imposed by the duties (that they do not prescribe an outcome in any particular case – so long as proportionate regard to the equality objectives is had regard to), but the case law is still at a relatively early stage and case law may become more progressive as the meaning, in particular, of the more substantive duties under the SDA and DDA, described below, are considered. Presently the bulk of the case law has concerned the rather more process driven duties under the RRA.

⁵⁹ Schedule 1A of the RRA lists, either by description or by name, bodies within central government, local government, the National Health Service, police, public museums and galleries, regulatory bodies as well as the governing bodies of all maintained schools and of all colleges and universities. The total number of authorities subject to the general duty is more than 43,000: K. Godwin, “Race Equality: An Ongoing Obligation” (2006) EOR 154. The Secretary of State has power to amend Schedule 1A to add or remove listed public authorities (section 71(5), RRA) and that power has been exercised: See Race Relations Act 1976 (General Statutory Duty) Orders 2001 SI 2001/ 3457 and SI 2004/3127.

⁶⁰ (2002, CRE) available at http://www.cre.gov.uk/downloads/duty_code.rtf.

- a. encourage policy makers to be more aware of possible problems;
- b. contribute to more informed decision making;
- c. make sure that policies are properly targeted;
- d. improve the authority's ability to deliver suitable and accessible services that meet varied needs;
- e. encourage greater openness about policy making;
- f. increase confidence in public services, especially among ethnic minority communities;
- g. help to develop good practice; and
- h. help to avoid claims of unlawful racial discrimination."

37. The CRE's statutory Code of Practice on the Duty to Promote Race Equality advises that:

"Four principles should govern public authorities' efforts to meet their duty to promote race equality:

- a. Promoting race equality is obligatory for all public authorities listed in schedule 1A to the Act⁶¹
- b. Public authorities must meet the duty to promote race equality in all relevant functions.
- c. The weight given to race equality should be proportionate to its relevance.
- d. The elements of the duty are complementary (which means they are all necessary to meet the whole duty)."⁶²

38. As the Code makes clear, race equality will be more relevant to some functions than others: "Relevance is about how much a function affects people, as members of the public or as employees of the authority. For example, a local authority may decide that race equality is more relevant

⁶¹ "As a matter of law, [a public authority] is under the duty to have due regard to the relevant needs whether or not the section 71(1) point is raised by a party. The obligation to perform the statutory duty is not dependent on the issue being raised by one of the parties to the appeal (who may or may not have the benefit of professional representation or even advice)": *R (on the application of Baker & Ors) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, paragraph 29.

⁶² Paragraph 3.2.

to raising educational standards than to its work on highway maintenance. Public authorities should therefore assess whether, and how, race equality is relevant to each of their functions. A public authority may decide that the general duty does not apply to some of its functions; for example those that are purely technical, such as traffic control or weather forecasting.”

39. The “due regard” obligation, then, in section 71 “requires that the weight given to race equality should be proportionate to its relevance to a particular function. In practice, this approach may mean giving greater consideration and resources to functions or policies that have most effect on the public. The authority’s concern should be to ask whether particular policies could affect different racial groups in different ways, and whether the policies will promote good race relations.”⁶³ This proportionality analysis gives substance to the general duty. Where a policy or practice is likely in fact to impact adversely on particular racial groups, or the failure to adopt a policy or practice is likely to result in an adverse impact on particular racial groups, the a public authority subject to the duty will be required to prioritise action to ameliorate the effects of that policy, or the absence of such a policy, by changing it or introducing a new policy or practice.
40. In addition to the general duties, a number of specific duties are imposed by Order⁶⁴ on the main public authorities (listed in schedules to the Order and including all central government department and local authorities⁶⁵). These specific duties are designed to ensure that the institutional arrangements are put in place to secure compliance with the general duties. The Order requires listed public authorities to publish a Race Equality Scheme. The Race Equality Scheme should state which of its

⁶³ Paragraph 3.4 and 3.5.

⁶⁴ RRA 1976 (Statutory Duties) Orders 2001 SI 2001/ 3458 and SI 2004/ 3125; the RRA 1976 (Statutory Duties) (Scotland) Order 2002, Scottish SI 2002/ 62, made by the Scottish Ministers, include similar but not identical specific duties for Scottish public authorities with devolved powers, including Scottish local councils, health boards, chief constables and police authorities.

⁶⁵ Schedule 1.

functions and policies the authority has assessed as relevant to meeting the general duty and how it intends to fulfil its general duty under section 71(1), RRA and the duties under the Order⁶⁶. The Race Equality Scheme must set out the authority's arrangements for; assessing and consulting on the likely impact of its proposed policies on the promotion of race equality; monitoring its policies for any adverse impact on the promotion of race equality; publishing the results of assessments and monitoring; ensuring public access to information and services which it provides; training staff in connection with the general and specific duties.⁶⁷ The Order does not require in terms that the steps identified actually are undertaken, merely that the arrangements in respect of them be identified. However, it plainly anticipates that such is likely to be required if compliance with the general duty is to be secured.⁶⁸

41. The requirement on public authorities, under the specific duties, to have in place arrangements for assessing the impact of their policies on people from different racial groups imposes a significant obligation. The Statutory Code of Practice advises that:

“To assess the impact its functions and policies have on race equality, the authority may find it useful to draw up a clear statement of the aims of each function or policy. It should then consider whether it has information about how different racial groups are affected by the function or policy, as employees or users (or possible users) of services. The authority should also consider whether its functions and policies are promoting good race relations. The authority could get this information from various sources; for example previous research, records of

⁶⁶ Article 2.

⁶⁷ Article 2.

⁶⁸ Specific duties on schools and on colleges and universities require them to prepare and maintain a Race Equality Policy; assess the impact of their policies, including the race equality policy on pupils, students, staff and parents of different racial groups and monitor the operation of those policies by reference to their impact on pupils and students, staff and parents of different racial groups: Article 3. Further, obligations are imposed to monitor staff in post and applicants for employment, training, promotion and the numbers who receive training; benefit or suffer a detriment as a result of a performance assessment; are involved in grievance procedures or are the subject of disciplinary procedures or cease to be employed by that employer are imposed on specified authorities: Articles 4 and 5.

complaints, surveys, or local meetings. These methods should help public authorities to assess which of their services are used by which racial groups, or what people think of their services, and whether they are being provided fairly to people from different racial groups. This kind of evidence should help public authorities to decide what they might need to do to meet all three parts of the general duty.” (para.s 3.14).

42. Further, the Code suggests that in assessing the impact of a particular policy or the way a function is being carried out, a public authority ask itself the following questions:

- (a) “Could the policy or the way the function is carried out have an adverse impact on equality of opportunity for some racial groups? In other words, does it put some racial groups at a disadvantage?
- (b) Could the policy or the way the function is carried out have an adverse impact on relations between different racial groups?
- (c) Is the adverse impact, if any, unavoidable? Could it be considered to be unlawful racial discrimination? Can it be justified by the aims and importance of the policy or function? Are there other ways in which the authority’s aims can be achieved without causing an adverse impact on some racial groups?
- (d) Could the adverse impact be reduced by taking particular measures?
- (e) Is further research or consultation necessary? Would this research be proportionate to the importance of the policy or function? Is it likely to lead to a different outcome?” (para 3.16).

43. More specific (non-statutory) guidance is also provided by the Commission for Racial Equality in its’ non-statutory guidance: *The Duty to Promote Race Equality: A Guide for Public Authorities*⁶⁹, which

⁶⁹ CRE, 2002.

explains that the aim of equality impact assessments for proposed policies is to “build race equality into the policy-making process, and to make that process clear, open and inclusive”.⁷⁰ The method is designed to “challenge the assumption that policies affect everyone in the same way, by detecting and assessing any adverse impact on a particular group before the policies are introduced”.⁷¹ The merits of the method are that it enables the public authority to take account of the needs, circumstances and experiences of those who are affected by policies, to identify actual and potential inequalities in outcomes, to consider other ways of achieving the aims of the policy, to increase public confidence in the fairness of its policies, and to develop better policies generally.⁷² Further, the CRE has published a step - by - step guide to undertaking race equality impact assessments.⁷³ An equality impact assessment is a systematic method for assessing how a policy or practice or primary or secondary legislation affects, or is likely to affect, different groups. The object is to ensure that policies or legislation do not result in unlawful discrimination but go some way to promoting equality. Where an assessment indicates potential adverse impact then to comply with the general equality duty the authority will either need to change the policy, consider an alternative or justify the adverse impact in the context of the overall aim.⁷⁴ Consultation with relevant stakeholders should form a central part of impact assessments, thereby introducing some degree of transparency into the content and process of policy-making across the public sector. Further, the results of equality impact assessments should be publicly available.

44. Case law demonstrates that the requirement to undertake an impact assessment maybe critical to securing legality in public authority decision

⁷⁰ 36.

⁷¹ 37.

⁷² 38.

⁷³ In consultation with the Home Office:
<http://83.137.212.42/sitearchive/cre/duty/reia/index.html>.

⁷⁴ CRE guidance on race equality impact assessments - www.cre.gov.uk/duty/reia/what.html

making in relevant areas.⁷⁵ In *R (on the application of Diana Elias) v Secretary of State (CRE Intervening)* an important Government policy was ruled unlawful in part because of the failure to undertake a race equality impact assessment before its introduction. Before ruling the decision unlawful, the court observed that:

“It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact. I accept that even after considering these matters the minister may have adopted precisely the same scheme, but he would then have done so after having due regard to the obligations under the section.

Given the obvious discriminatory effect of this scheme, I do not see how in this case the Secretary of State could possibly have properly considered the potentially discriminatory nature of this scheme and assumed that there was no issue which needed at least to be addressed....

....I accept ...that the purpose of this section is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge.”⁷⁶

45. In *Bapio Action Ltd & Anor (R on the application of) v Secretary of State for the Home Department & Anor*⁷⁷, Sedley LJ in the Court of Appeal made it clear that compliance with section 71 was important “not as rearguard action following a concluded decision but as an essential

⁷⁵ *R (on the application of Diana Elias) v Secretary of State (CRE Intervening)* [2005] EWHC 1435 (Admin) Case No: CO/5181/2004.

⁷⁶ Paragraphs 97, 98 and 99, judgment of Elias, J.

⁷⁷ [2007] EWCA Civ 1139.

preliminary to any such decision. Inattention to it is both unlawful and bad government.”⁷⁸

46. The impact assessment process is always likely to be critical in the decision making of a public authority in its decision making including in so far as those decisions may affect the voluntary and community sector.⁷⁹

47. As to both the general and specific race duties, there is some recent case law which suggest that the duties are not concerned with securing “outcomes”. Thus:

“[I]t is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due* regard to it. What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other

⁷⁸ Paragraph 3. See too, *Chavda (R on the application of) v London Borough of Harrow* [2007] EWHC 3064 (Admin), in relation to the importance of the disability equality duties described below and the need for such to be addressed in an impact assessment.

⁷⁹ *R (on the application of 'AC', A Minor, by his litigation friend) v Secretary of State for Justice, and others intervening* [2008] EWCA Civ 882 (Judicial review resulting in the quashing of the Secure Training Centre (Amendment) Rules 2007 - held that it was wrong that the Race Equality Impact Assessment which should have been produced to inform the government before it made the decision to introduce the 2007 Rules was only produced to validate the decision that had already been taken); *R on the application of Kaur and Shah v London Borough of Ealing* Case No. CO/3880/2008 (the Defendant in fact withdrew the decision on the second day of the hearing when it was clear that the court was likely to hold it unlawful for, amongst other things, a failure to carry out an impact assessment).

hand, such countervailing factors as are relevant to the function which the decision-maker is performing”: *R (on the application of Baker & Ors) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, paragraph 31).

And: “I do not accept the submissions made by [counsel] that s.71 was concerned with outcomes; ultimately of course it is aimed at affecting the way in which bodies act. But it does so through the requirement that a process of consideration, a thought process, be undertaken at the time when decisions which could have an impact on racial grounds or on race relations, to put it broadly, are being taken. That process should cover the three aspects identified in the section”, *R(Smith) v South Norfolk Council* [2006] EWHC 2772 (Admin), paragraph 87.⁸⁰

48. Nevertheless, as at least accepted, section 71 *is* aimed at affecting the way bodies act and this is intended to occur by ensuring appropriate or proportionate regard is given to the racial equality objectives set out in section 71 and this is most likely to be achieved by complying with the obligations to undertake proper impact assessments. Further, where the outcome may be illegality (direct or indirect discrimination), a court will be bound to grant a remedy in any event.
49. The EHRC has specific powers to take enforcement action to secure compliance with the general and specific race equality duties. Firstly, it may conduct an “assessment” of the extent to which a body had complied with a general or specific race equality duty.⁸¹ Where the EHRC “thinks” that a public authority has failed or is failing to comply with a general or specific duty, it may serve a compliance notice on the authority in question requiring the authority to comply and to provide written information as to the steps taken to comply (subject to the assessment procedure being complied with first in the case of the

⁸⁰ And see to the same effect: *McCarthy & 41 Ors (R on the application of) v Basildon District Council* [2008] EWHC 987.

⁸¹ Section 31, Equality Act 2006.

general duties).⁸² If the authority fails to comply with the requirements of the compliance notice the EHRC may apply to the county court/sheriff court for an order requiring the authority to comply.⁸³

50. The equality duties have the potential to be very significant in the field of public procurement.⁸⁴ The expression *public procurement* refers to the State's purchasing of goods and services from the private sector. The State, of course, expends many, many millions of pounds on the purchasing of goods and services from the private, including the voluntary, sector and it has long been understood that this presents an opportunity for promoting equality by ensuring that the State uses its purchasing power to compel equality action by private sector actors with whom it contracts⁸⁵ and to promote equality through the work undertaken by, amongst others, the voluntary sector.
51. The extent to which equality objectives might be promoted through the public procurement process has attracted some controversy.⁸⁶

⁸² Section 32, Equality Act 2006.

⁸³ Section 76D(6), SDA; 71E, RRA and section 49F, DDA.

⁸⁴ 'Ethnic Minorities in the Labour Market, Final Report' (March 2003, Cabinet Office Strategy Unit) 119-126.

⁸⁵ Known as 'contract compliance' in the U.S. (see for early measures in the U.S, Executive Order 11246, which as amended (by Executive Order 11375), intended 'to correct the effects of past and present discrimination' by, *inter alia*, prohibiting federal contractors and federally-assisted construction contractors and subcontractors, who generate over \$10,000 annually from government contracts, from discriminating in employment decisions on the basis of race, colour, religion, sex, or national origin.).

⁸⁶ The Local Government Act 1988, for example, specifies that local authorities and certain other public bodies are precluded from taking into account "non commercial matters" in the award of contracts Section 17. However section 19 of the Local Government Act 1999 (which establishes the "Best Value" regime) provides that the Secretary of State may by order provide, in relation to best value authorities, for a specified matter to cease to be a non-commercial matter for the purposes of the LGA Local Government Act 1988. The Local Government Best Value (Exclusion of non-commercial considerations) Order 2001 SI 2001/909 provides that in respect of Best Value authorities, workforce matters have ceased to be defined as "non-commercial" matters for the purposes of the Local Government Act 1988 to the extent that they are relevant to the achievement of best value (Article 3) In particular, the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces and the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons are not to be regarded as non-commercial matters for the purposes of Local Government Act 1988. But for this change, there would have been a significant limitation on the operation of the statutory equality duties in relation to outsourced work force matters through the public procurement process. The change therefore very plainly operates

However, Part I of the Local Government Act 1999 includes the general duty upon a Best Value authority to “make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.⁸⁷ “Efficiency” and “effectiveness” must be construed consistent with the obligations upon a Best Value authority (and that includes local authorities and other significant authorities) by reason of other legal requirements, including the statutory equality duties. This is consistent with the performance indicators and standards in relation to Best Value as specified in the orders made under section 4 of the Local Government Act 1999. These include, for example, in the case of the “general corporate performance indicators” the “equality standard” found in the “Equality Standard for Local Government” (addressed below, paragraph 189) and the extent to which the authority complies with the duty to promote race equality.⁸⁸ The CRE (before their dissolution) published specific guidance on procurement: “*Race Equality and Procurement: A Guide to Public Authorities and Contractors*” and “*Race Equality and Procurement in Local Government*” addressing contracts between public authorities and the private and voluntary sector.

52. As the Codes make clear, it is the duty of a public authority “to be satisfied that [their] procurement policies and practices do not discriminate unlawfully, and that they promote equality of opportunity and good race relations”.⁸⁹ This imposes not just a negative obligation the (as the equality duties make clear) but a positive obligation to promote equality through the procurement process (and this may, of course, be achieved through supporting BME voluntary groups). To ensure the Race Equality Duties are complied with in the procurement process, public authorities are advised that they should review the

so as to allow Best Value authorities to impose requirements in the procurement process relating to equality of opportunity in the employment context “to the extent that a Best Value authority consider it necessary or expedient in order to permit or facilitate compliance with the requirements of Part I [of the Local Government Act 1999]”.

⁸⁷ Section 3.

⁸⁸ Schedule 1.

⁸⁹ “Race Equality and Procurement: A Guide to Public Authorities and Contractors” (CRE), 17.

outcome of the procurement process: “An assessment of your procurement function can include looking at [their] objectives, ...general procedures, and the outcomes in terms of involvement and impact on service users, suppliers, and employees from different racial groups.”⁹⁰

The Guidance gives very detailed advice on how the Race Equality Duties should be complied with in the procurement process, emphasising the importance of the same.

53. As can be seen, then, the Race Equality Duties are likely to be highly relevant to the relationship between Government (central and local) and the voluntary sector. In the development of its policies and in specific decision making, affecting the voluntary sector, public authorities will need to ensure compliance with their Race Equality Duties. As can be seen above, these are compelling duties, enacted with the aim of mainstreaming race equality norms and they will be enforced by the Courts.

(ii) The Sex Discrimination Legislation

54. The Sex Discrimination Act 1975 (“SDA”)⁹¹ again regulates the relationship between public authorities and the voluntary sector in certain material respects and regulates both the activities of public authorities and the voluntary sector.⁹² As with the RRA, the SDA principally gives effect to its purposes by the creation of certain unlawful acts (reflecting closely, though not exactly, those contained within the RRA) by which discrimination, as defined, is outlawed and by the statutory imposition of equality duties on public authorities (including central and local government).⁹³

⁹⁰ *Ibid.* 20.

⁹¹ As amended by, amongst other things, the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 SI 2001/2660; Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467; Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963; Sex Discrimination Act 1975 (Amendment) Regulations 2005 and the Equality Act 2006, Part 4.

⁹² See sections 21A, 29, 30 and 76A, SDA, in particular, described further below.

⁹³ The SDA imposes the statutory equality duties on all public authorities, save those exempted, unlike the RRA which lists those to whom it applies.

(i) Discrimination

55. “*Discrimination*”, for the purposes of the material provisions of the SDA, is defined in similar terms to those found in the RRA (save, of course, that they address sex rather than race). There are some material differences. In particular, the concept of direct discrimination protects a person against less favourable treatment “*on the ground of her sex*”.⁹⁴ This means, as can be seen, that any discrimination must be connected to an individual’s gender characteristics. In consequence, unlike the position under the RRA, a claim by an incorporated body would almost certainly fail under the SDA.⁹⁵ The law may change on this in consequence of EU law⁹⁶ which requires a broader meaning to be given to the concept of direct discrimination (matching that found in RRA), but presently the SDA has a narrower reach and focus. In addition express provision is made addressing direct gender reassignment discrimination and, some forms of, pregnancy and maternity related discrimination⁹⁷ otherwise the SDA contains concepts of indirect discrimination, victimisation and harassment closely matching those found in the RRA.⁹⁸ Recent amendments have been made to the SDA (bringing it, in some respects, closer in content to the RRA, by reason of amendments made by the EA and by the Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963 (in the latter case to give purported affect to the Gender Goods and Services Directive 2004/113/EC)).⁹⁹

(ii) The Unlawful Acts

56. As to the unlawful acts, they match closely those contained within the RRA. Accordingly, section 21B, SDA makes it unlawful for a public authority “*exercising a function*” to do any act which constitutes discrimination.¹⁰⁰ The same observations as are made above apply

⁹⁴ Section 1(2)(a), SDA.

⁹⁵ Cf. the RRA, described above, which prohibits discrimination “*on racial grounds*”.

⁹⁶ *Coleman v Attridge Law* (C-303/06) [2008] ECJ.

⁹⁷ See sections 2A and 3B SDA.

⁹⁸ Section 1(2)(b), 4 and 4A, SDA.

⁹⁹ Certain of those amendments might be challenged as not going far enough, by way of judicial review proceedings, though the status of that litigation is not yet clear or public.

¹⁰⁰ Including harassment: section 21A(1)(b), SDA.

equally in the context of the SDA. Similarly section 29, SDA outlaws discrimination by a person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public, reflecting closely the provision made in the context of the RRA. Again, as with the RRA, section 30, SDA outlaws discrimination in the disposal and management of premises.

(iii) Single sex facilities

57. As for those provisions directly affecting those organisations to which the Code is directed, section 34 SDA makes provision in relation to voluntary bodies. It provides that non-statutory not for profit bodies are permitted to restrict membership to persons of one sex¹⁰¹ and to provide benefits, facilities or services to members of any such body where the membership is so restricted, even though membership of the body is open to the public, or to a section of the public.¹⁰² This permits not for profit, non statutory, organisations to constitute themselves as single sex membership organisations. Other provisions address single sex services (for example, to protect privacy).¹⁰³ As with the RRA, these provisions are not an exemption or derogation from the principle of equality and non-discrimination but are designed to promote equality.¹⁰⁴

(iv) The Gender Equality Duties

58. In April 2007 the amendments made to the SDA by the Equality Act 2006 to introduce new gender equality duties, came into force.¹⁰⁵ The duties fall into two groups; the general duties (to have “due regard” to the need to achieve certain equality objectives) and the specific duties (imposed on certain public authorities, requiring that they take designated action). They follow the model adopted in the RRA and addressed above. Again these duties are extremely important.

¹⁰¹ Disregarding any minor exceptions.

¹⁰² Section 34(1) and (2), SDA.

¹⁰³ Section 35, SDA.

¹⁰⁴ *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008.

¹⁰⁵ Sections 76A – E, SDA.

59. The general duties require that public authorities in carrying out their functions have *due regard* to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women.¹⁰⁶ “Unlawful discrimination”, for these purposes, means the acts made unlawful under the SDA and a contravention of terms of contracts having effect in accordance with an equality clause (under the Equal Pay Act 1970).¹⁰⁷
60. Unlike the RRA (which lists the authorities to whom the duties apply), the SDA defines “public authority” as including “any person who has functions of a public nature” and the duty applies to any public functions, namely “functions of a public nature”.¹⁰⁸ Accordingly, the scope of application is potentially very wide, applying again not only to “pure” public authorities but also to voluntary bodies and private sector actors when, and to the extent that, they are carrying out public functions.
61. As with the Race Equality Duties, the gender equality duties are intended to have significant impact. According to the Equal Opportunities Commission’s Code of Practice on the Gender Equality Duty (2007),¹⁰⁹

“The duty is intended to improve this situation, both for men and for women, for boys and for girls. Gender roles and relationships structure men’s and women’s lives. Women are frequently disadvantaged by policies and practices that do not recognise their greater caring responsibilities, the different pattern of their working lives, their more limited access to resources and their greater vulnerability to domestic violence and sexual assault. Men are also disadvantaged by workplace cultures that do not support their family or childcare responsibilities, by family services that assume they have little or no role in parenting, or by

¹⁰⁶ Section 76A(1,) SDA.

¹⁰⁷ Section 76A(2)(c).

¹⁰⁸ Section 76A(2) SDA.

¹⁰⁹

<http://www.equalityhumanrights.com/en/publicationsandresources/Gender/Pages/Publicsector.aspx>.

health services which do not recognise their different needs. Both sexes suffer from stereotyping of their roles and needs. The duty should help the public sector, and those working with it, to identify and respond to stereotyping, sex discrimination and sexism, resulting in improvements for all.”¹¹⁰

62. The Equal Opportunities Commission’s Code of Practice on the Gender Equality Duty (2007) gives examples of the outcomes it is intended the duty will achieve stating that indicators of progress might include¹¹¹:

- “• Service-users notice that services are more accessible and better tailored to their needs, and service outcomes by gender begin to improve.
- Women and men are making greater use of services that their sex had previously under-used.
- Service-users with caring responsibilities are receiving appropriate support, such as better pushchair access on public transport and creche facilities for trainees.
- Fathers receive greater support for their childcare responsibilities from public services and employers.
- Girls have higher aspirations for their future careers.
- Women and men from all groups feel effectively engaged in decision and policy-making around issues that have a direct effect on them.
- Women and men are represented at all levels of the workforce and in all areas of work.
- Harassment and sexual harassment of staff, service users and others is dealt with promptly and systematically, according to agreed procedures, and tolerance of harassment drops within the organisation as a whole.
- The reported level of discrimination experienced by pregnant staff and staff returning from maternity leave reduces significantly and is eventually eliminated.

¹¹⁰ Para 1.20.

¹¹¹ para 1.22.

- The gap between women and men's pay narrows and is eventually eliminated.
- Employees with caring responsibilities are receiving greater support from the public authority, including flexible and part-time working opportunities at all levels of work.
- Transsexual people feel supported and valued as staff and potential staff.
- Barriers to the recruitment and retention of transsexual staff have been identified and removed.
- Employees are aware of the gender equality duty, understand how it will affect their work, and have the skills to implement the duty in their work.
- Gender equality issues, and their budgetary implications, are considered at the beginning of policy-making.
- It is easy to find a wide variety of data and information to assess effectively how certain actions will affect women and men.”

63. Specific gender equality duties¹¹² have also now been enacted by Order.¹¹³ These are imposed upon public authorities listed in Schedule 1 to the Regulations (including government departments, local authorities etc) and require those authorities to prepare and publish a Gender Equality Scheme by 30th April 2007, that being a scheme showing how they intend to fulfill their section 76A(1) (general) duties and their duties under the Order. In preparing a scheme, a listed authority is required to consult its employees, service users and others (including trade unions) who appear to it to have an interest in the way it carries out its functions; take into account any information it has gathered and any other information it considers to be relevant to the performance of its general duty and ensure that its Scheme sets out the overall objectives which it has identified as being necessary for it to perform its section 76A(1) duty and its duties under this Order. When

¹¹² s.76B and 76C SDA

¹¹³ The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006.

formulating its objectives, an authority must consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex. A listed authority is also required in its scheme to set out the actions which it has taken or intends to take to—(a) gather information on the effect of its policies and practices on men and women and in particular—(i) the extent to which they promote equality between its male and female staff, and (ii) the extent to which the services it provides and the functions it performs take account of the needs of men and women and (b) make use of such information and any other information the authority considers to be relevant. It is also required to set out the actions which it has taken or intends to take to assess the impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality between women and men and to consult relevant employees, service users and others (including trade unions). The specific gender equality duties require that a listed authority achieve the fulfilment of the objectives which it has identified as being necessary for it to fulfil its general duty, within three years and take information gathering steps within the same period. As can be seen, action must include gathering information on the extent to which the services it provides and the functions it performs take account of the needs *of men and women*, acknowledging that those needs might be different and therefore the services they provide and functions they perform may have to be *differently* provided and performed to meet the needs of men and women.

64. As to the requirements imposed by the general duty, these are mandatory (“shall...have due regard”) and prospective. The Code of Practice makes clear:

“Having due regard means that the weight given to the need to promote gender equality is proportionate to its relevance to a particular function. In practice, this principle will mean public authorities should prioritise action to address the most significant gender inequalities within their remit, and take actions which are likely to deliver the best gender

equality outcomes. This is likely to mean focussing on functions or policies that have most effect on the public, or on the authority's employees, or on a section of the public or on a section of the authority's employees. The authority should ask whether particular functions could affect women and men in different ways, and whether functions can be carried out in a way which promotes equality of opportunity between men and women.”¹¹⁴

65. The case law described above on the race duties but that case law is equally applicable to the gender duties. Further, the requirement on public authorities, under the specific duties, to have in place arrangements for assessing the impact of their policies on women and men also imposes a significant obligation. The EOC Code of Practice on the Gender Equality Duty gives guidance on conducting impact assessments.¹¹⁵ A gender equality impact assessment is a systematic method for assessing how a policy or practice affects, or is likely to affect, women and men. The object is to ensure that policies do not result in unlawful discrimination but go some way to promoting equality. Where an assessment indicates potential adverse impact then to comply with the general equality duty the authority will either need to change the policy, consider an alternative or justify the adverse impact in the context of the overall aim.¹¹⁶ Consultation with relevant stakeholders should form a central part of impact assessments, thereby introducing some degree of transparency into the content and process of policy-making across the public sector. Further, the results of equality impact assessments should be publicly available.
66. The procurement issues described above, in relation to the Race Equality Duties (paragraph 51), apply equally in the case of the Gender Equality Duties.

¹¹⁴ Para 2.22.

¹¹⁵ Para.s 3.57 *et seq.*

¹¹⁶ Para.s 3.66 and 3.67 and see, CRE guidance on race equality impact assessments - www.cre.gov.uk/duty/reia/what.html.

67. As with the Race Equality Duties, the EHRC has specific enforcement powers in relation to the Gender Equality Duties.

iii. The Disability Discrimination Legislation

68. The Disability Discrimination Act 1995 (“DDA”)¹¹⁷ again regulates the relationship between public authorities and the voluntary sector in certain material respects and regulates both the activities of public authorities and the voluntary sector.¹¹⁸ As with the RRA and the SDA, the DDA principally gives effect to its purposes by the creation of certain unlawful acts (reflecting closely, though not exactly, those contained within the RRA and the SDA) by which discrimination, as defined, is outlawed and by the statutory imposition of equality duties on public authorities (including central and local government).¹¹⁹

(i) Discrimination

69. “*Discrimination*”, for the purposes of the material provisions of the DDA, is defined in the main very differently, from the RRA and the SDA. In particular, unlike the RRA and the SDA, the DDA is asymmetrical. It protects “disabled persons” (as defined in section 1 and schedule 1, DDA) only. This has the obvious effect that services specifically targeted towards disabled people are not unlawful, but also means that (as with the SDA) only individuals might bring proceedings under the unlawful acts. However, this may change because the European Court of Justice¹²⁰ has ruled that the concept of discrimination should extend to discrimination by association, that is discrimination against a person (and therefore, perhaps, a body) because of their association with disabled people (in the particular case, therefore protecting carers of disabled children). It is safe, therefore, to assume that the DDA may soon protect a wider range of people (and perhaps organisations) against

¹¹⁷ As amended by, amongst other things, the Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673 and the Disability Discrimination Act 1995.

¹¹⁸ See sections 19, 21B, 21F and 22, in particular, described further below.

¹¹⁹ The DDA imposes the statutory equality duties on all public authorities, save those exempted, unlike the RRA which lists those to whom it applies.

¹²⁰ *Coleman v Attridge Law* (C-303/06) [2008] ECJ.

discrimination because they are connected to or are associated with, disabled people.¹²¹

70. Further, the concept of discrimination under the DDA extends further than those under the RRA and SDA, embracing (as mandatory) some forms of “positive action” to secure substantive equality. Accordingly, the DDA outlaws (in certain circumstances¹²²), direct discrimination, disability-related discrimination, a failure to make reasonable adjustments, harassment and victimisation.

(ii) The Unlawful Acts

71. As to the unlawful acts, they match closely those contained within the RRA and SDA. Accordingly, section 21B, DDA makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions. The same observations as are made above apply equally in the context of the DDA. Section 19, DDA outlaws discrimination in the provision (for payment or not) of goods, facilities or services to the public or a section of the public, reflecting closely the provision made in the context of the RRA. Again, as with the RRA and SDA, section 22, DDA outlaws discrimination in the disposal and management of premises. As with the RRA (but not the SDA), the DDA outlaws discrimination by “clubs”.

72. Further (unlike the RRA and SDA) section 28U, DDA read with Schedule 4C DDA specifically outlaws discrimination by youth and community services. These will include, clubs and activities; one to one counselling or guidance work; off site and outreach work; outings and trips; facilitated

¹²¹ The Government’s response to the Consultation process (“The Equality Bill – Government response to the Consultation” (cm 7454)(July 2008), referred to further below, indicates that the Government are considering their response to the ECJ decision in *Coleman v Attridge Law* (C-303/06).

¹²² And their meanings to some extent differ according to the unlawful acts concerned and not all forms of discrimination apply to all the unlawful acts.

work with groups of people, such as support for a residents association.¹²³

(iii) The Disability Equality Duties

73. Section 49A of the DDA¹²⁴ makes it a duty of every public authority in carrying out its functions to have due regard to; the need to eliminate unlawful disability discrimination; the need to eliminate harassment of disabled people; the need to promote equality of opportunity between disabled persons and others; the need to take steps to take account of disabled people's disabilities even where that involves treating disabled people more favourably; the need to promote positive attitudes towards disabled people and the need to encourage participation of disabled people in public life. The general disability equality duty is then more broadly framed than under the RRA and the SDA. Further, it applies to public authorities generally – that is, to “every public authority”¹²⁵ - rather than applying to an exclusive list (albeit a very long one) of public authorities, as in the case of the RRA.¹²⁶ Public authorities, for these purposes, include bodies “...certain of whose functions are functions of a public nature”¹²⁷ and will therefore embrace certain voluntary sector bodies which, whether under contract or other arrangements, are “in effect exercising a function which would otherwise be exercised by the state – and where individuals have to rely upon that person for the exercise of the governmental function.”¹²⁸ . In relation to a particular act, a body will not be a public authority by application of this definition if the nature of the act is private.

¹²³ Post 16 Code of Practice, paragraph 3.16. No comparable provision is made in the other main-anti discrimination enactments but to the extent that any activities described above fall outside the education provisions, they are likely, subject to any exemption, fall within the “goods, facilities and services provisions.

¹²⁴ As inserted by the DDA 2005.

¹²⁵ Section 49A(1), DDA.

¹²⁶ Schedule 1A, RRA.

¹²⁷ Section 49B, DDA.

¹²⁸ “The Duty to Promote Disability Equality DRC Statutory Code of Practice (England and Wales)” (2005), DRC, paragraph 5.4 and see paragraph 5.5.

74. Specific disability equality duties are imposed by regulations under the DDA¹²⁹. Public authorities listed in Schedule 1 to the Regulations (which include the main bodies within central and local government etc) are required to publish a Disability Equality Scheme¹³⁰. This must state; the steps the authority will take towards fulfilment of their general duty; the ways in which disabled people have been involved in its development; the authority's methods for assessing the impact or likely impact of their policies and practices on equality for disabled people; the authority's arrangements for gathering information about the effect of their policies and practices on disabled people in employment (including recruitment, development and retention), education, service provision and public functions more generally and making use of such information in complying with the general duty. Unlike the duties under the RRA, the specific disability duties require that within 3 years of publishing their scheme, an authority must take the steps identified in its scheme for the fulfilment of the general equality duty and for gathering information.¹³¹
75. As with the duties under the RRA and SDA, the "due regard" obligation in the statutory disability equality duties is again a compelling one: "Due regard" comprises two linked elements: proportionality and relevance. In all their decisions and functions authorities should give due weight to the need to promote disability equality in proportion to its relevance. This requires more than simply giving consideration to disability equality." (The Duty to Promote Disability Equality: Statutory Code of Practice (2005, DRC), para 2.34). As with the duties under the RRA and SDA, then, the duties under the DDA are very important indeed in the relationship between Government (central and local) the voluntary and community sector. The procurement issues described above, in relation

¹²⁹ Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 SI 2005/2966. See also Disability Discrimination (Public Authorities) (Statutory Duties)(Scotland) 2005, Scottish SI 2005/ 565.

¹³⁰ Reg. 2(6) requires national and local public authorities and most educational establishments to publish their disability equality scheme by 4 December 2006; governing bodies of primary schools and maintained special schools must do so by 3 December 2007.

¹³¹ Regulation 3, Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 SI 2005/2966.

to the Race Equality Duties (paragraph 51), apply equally in the case of the Disability Equality Duties. The DRC published its own guidance relevant to procurement (in addition to the contained in the statutory Code), including “Guide for Funders: Addressing the Rights and Requirements of Disabled People Within the Funding Process”.

76. The Regulations¹³² also require every Secretary of State listed in Schedule 2 and the National Assembly for Wales (and, the Scottish Ministers)¹³³ every three years to publish a report giving an overview of progress towards equality of opportunity between disabled people and others in the sector covered by her or his department, or in Wales (or Scotland), and setting out proposals for coordination of action by public authorities within that sector or nation, to bring about further progress towards disability equality.

(iv) The Sexual Orientation Discrimination Legislation

77. The Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007 SI 2007/1263¹³⁴ outlaw discrimination connected with sexual orientation. As with the other anti-discrimination measures referred to above, they regulate the relationship between public authorities and the voluntary sector in certain material respects and regulate both the activities of public authorities and the voluntary sector.¹³⁵ As with the other enactments, the Regulations give effect to their purposes by the creation of certain unlawful acts (reflecting closely, though not exactly, those contained within the RRA, SDA and the DDA) by which discrimination, as defined, is outlawed. There are no statutory equality duties on public authorities, in the field of sexual orientation (yet¹³⁶), comparable to those found in the RRA, SDA and DDA.

¹³² Regulation 5, Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 SI 2005/2966,

¹³³ Regulation 6, Disability Discrimination (Public Authorities) (Statutory Duties)(Scotland) 2005, Scottish SI 2005/ 565.

¹³⁴ The Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/ 1661 address discrimination connected to sexual orientation in the employment and related fields.

¹³⁵ See regulations 4, 5 and 8.

¹³⁶ See paragraph 182, below.

(i) Discrimination

78. “*Discrimination*”, for the purposes of the Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007, is defined in similar terms to those found in the RRA and SDA (save, of course, that they address sexual orientation rather than race and sex). There are some material differences. In particular, the direct discrimination occurs where “a person (“A”) discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).”¹³⁷ A reference to a person’s sexual orientation, for these purposes, “includes a reference to a sexual orientation which he is thought to have.”¹³⁸ Again, because of the reference to a specific person’s (the claimant’s) actual or perceived sexual orientation, a claim by an incorporated body would almost certainly fail under the Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007,¹³⁹ subject only to the impact of EU law.¹⁴⁰

(ii) The Unlawful Acts

79. As to the unlawful acts, those in the Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007 match closely those contained within the RRA, SDA and the DDA. Accordingly, regulation 8 makes it unlawful for a public authority exercising a function to do any act which constitutes discrimination. The same observations as are made above apply equally in the context of these Regulations. Regulation 4 of Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007 makes it is unlawful for “a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person (“B”) who seeks to obtain or to use those goods, facilities or services”, reflecting closely the provision made in the context of the RRA. Again, as with the RRA, SDA and DDA, regulation 5

¹³⁷ Regulation 3(1).

¹³⁸ Regulation 3(2).

¹³⁹ Cf. the RRA, described above, which prohibits discrimination “*on racial grounds*”.

¹⁴⁰ See paragraphs 55 and 69 above.

outlaws discrimination in the disposal and management of premises. As with the RRA and the DDA (but not the SDA), the Regulations outlaw discrimination by clubs (described as “associations”).¹⁴¹

(iii) Specific Services

80. Reflecting similar provision in the RRA, Regulation 13 excludes from the unlawful acts “anything by way of (a) meeting special needs for education, training or welfare of persons on grounds of their sexual orientation, or (b) providing ancillary benefits in connection with meeting the needs mentioned in paragraph (a).”

81. Further, and as to clubs and associations, the unlawful acts do not apply “to any association if the main object of the association is to enable the benefits of membership (whatever they may be) to be enjoyed by persons of a particular sexual orientation.” In determining whether that is the main object of an association regard is to be had to “the essential character of the association and to all relevant circumstances including, in particular, the extent to which the affairs of the association are so conducted that the persons primarily enjoying the benefits of membership are of the sexual orientation in question.”¹⁴²

82. Further, it is not unlawful “for a person to provide benefits only to persons of a particular sexual orientation, if— (a) he acts in pursuance of a charitable instrument, and (b) the restriction of benefits to persons of that sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument.”¹⁴³

83. As with the other “positive” action provisions under the RRA and the SDA described above, these provisions are not an exemption or derogation

¹⁴¹ Regulation 16.

¹⁴² Regulation 17.

¹⁴³ Regulation 18.

from the principle of equality and non-discrimination but are designed to promote equality.¹⁴⁴

(v) The Religion and Belief Discrimination Legislation

84. Part II of the Equality Act 2006 (“EA”) regulates discrimination connected with religion and belief, including in ways which affect the relationship between public authorities and the voluntary sector by regulating the activities of public authorities and the voluntary sector.¹⁴⁵ As with the other enactments, the Regulations give effect to their purposes by the creation of certain unlawful acts (reflecting closely those contained within the RRA, SDA and the DDA) by which discrimination, as defined, is outlawed. There are no statutory equality duties on public authorities, in the field of religion and belief comparable to those found in the RRA, SDA and DDA.

(i) Discrimination

85. “*Discrimination*”, for the purposes of Part II of the EA, is defined in similar terms to those found in the RRA and SDA (save, of course, that they address religion and belief rather than race and sex). There are some material differences. In particular, the direct discrimination occurs where “(1) A person (“A”) discriminates against another (“B”) for the purposes of this Part if on grounds of the religion or belief of B or of any other person except A (whether or not it is also A’s religion or belief) A treats B less favourably than he treats or would treat others”.¹⁴⁶ A reference to a person’s religion or belief, for these purposes, “includes a reference to a religion or belief to which he is thought to belong or subscribe.”¹⁴⁷ As with the Sexual Orientation Equality Act (Sexual Orientation) Regulations 2007, because of the reference to a specific person’s religion or belief, actual or perceived, a claim by an incorporated body would almost

¹⁴⁴ *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008.

¹⁴⁵ See sections 46, 47 and 52.

¹⁴⁶ Regulation 45(1).

¹⁴⁷ Regulation 45(2).

certainly fail under Part II of the EA,¹⁴⁸ subject only to the impact of EU law.¹⁴⁹

(ii) The Unlawful Acts

86. As to the unlawful acts, those in Part II of the EA match closely those contained within the RRA, SDA and the DDA. Accordingly, section 52 makes it unlawful for a public authority exercising a function to do any act which constitutes discrimination. The same observations as are made above apply equally. Section 46, EA makes it unlawful “for a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person (“B”)” again reflecting closely the provision made in the context of the RRA. Again, as with the RRA, SDA and DDA, section 47, EA outlaws discrimination in the disposal and management of premises.

(iii) Specific Services

87. There are a number of exceptions in the EA which permit organisations or services targeted at members of specific religious groups.

88. Firstly, section 57, EA, exempts acts done by certain organisations to restrict membership of the organisation, to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices, to restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices, or to restrict the use or disposal of premises owned or controlled by the organisation.¹⁵⁰ The organisations so exempted are those established (a) to practice a religion or belief, (b) to advance a religion or belief, (c) to teach the practice or principles of a religion or belief, (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or (e) to improve relations, or maintain good relations,

¹⁴⁸ Cf. the RRA, described above, which prohibits discrimination “*on racial grounds*”.

¹⁴⁹ See paragraphs 55 and 69 above.

¹⁵⁰ Section 57(3), EA.

between persons of different religions or beliefs. Organisations whose sole or main purpose is commercial are not so exempted.¹⁵¹ Further a minister¹⁵² may restrict participation in activities carried on in the performance of his functions in connection with or in respect of such an organisation, or restrict the provision of goods, facilities or services in the course of activities carried on in the performance of his functions in connection with or in respect of such an organisation.¹⁵³ However, these exemptions permit restrictions only if imposed by reason of or on the grounds of the purpose of the organisation, or in order to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.¹⁵⁴

89. Further, and again, reflecting section 35 RRA, section 61, EA provides that “anything by way of (a) meeting special needs for education, training or welfare of persons of a religion or belief, or (b) providing ancillary benefits in connection with meeting the needs mentioned in paragraph (a).” As mentioned above, this “positive action” provision is designed to promote equality for persons of a religion or belief.¹⁵⁵
90. The EA also allows for the provision of benefits only to persons of a particular religion or belief, if such is in pursuance of a charitable instrument, and the restriction of benefits to persons of that religion or belief is imposed by reason of or on the grounds of the provisions of the charitable instrument.¹⁵⁶
91. Further, the EA permits charities to require members, or persons wishing to become members, to make a statement which asserts or implies membership or acceptance of a religion or belief (but only in so far the charity, or an organisation of which the charity is part, first imposed a requirement of the kind specified in subsection before 18th May 2005,

¹⁵¹ Section 57(2), EA.

¹⁵² Defined by section Section 57(6), EA.

¹⁵³ Section 57(4), EA.

¹⁵⁴ Section 57(5), EA.

¹⁵⁵ See paragraph 28.

¹⁵⁶ Section 58(1), EA.

and the charity or organisation has not ceased since that date to impose a requirement of that kind).¹⁵⁷ (This exception was inserted in order to ensure that organisations such as the Scouts Association and the Girl Guides Association can retain a requirement for its members to assert a belief in God.)

(vi) The Age Discrimination Legislation

92. The Employment Equality (Age) Regulations 2006 SI 2006/1031 applies only to employment and the related fields. Accordingly, it has limited applicability to the issues with which the Code is concerned. New legislation addressing age discrimination is anticipated and this is addressed below (paragraph 182).

(vii) The Human Rights Legislation

93. The European Convention for the Protection of Fundamental Rights and Freedoms (1950)¹⁵⁸ (ECHR) contains important provisions which can form a significant context for the relationship between Government and the voluntary sector. The U.K. has given effect in large part (and to the extent relevant to this paper) to the Convention by the enactment of the Human Rights Act 1998 (“HRA”). Scheduled to the HRA are the “Convention rights”.¹⁵⁹ All are important for equality law because all the rights guaranteed must be secured free from discrimination within the meaning of Article 14, described below. However, the most important of the rights for the purposes of the Code are likely, in practice, to be Articles 8, 9, 14 and 17.¹⁶⁰

¹⁵⁷ Section 60, EA.

¹⁵⁸ CETS No: 005.

¹⁵⁹ Section 1.

¹⁶⁰ Articles 2 and 3 protect the right to life and protect against inhuman and degrading treatment, which are sometimes relevant in an equality context (see, *R (on the application of ‘AC’, A Minor, by his litigation friend) v Secretary of State for Justice, and others intervening* [2008] EWCA Civ 882 (Judicial review resulting in the quashing of the Secure Training Centre (Amendment) Rules 2007 - held that it was wrong that the Race Equality Impact Assessment which should have been produced to inform the government before it made the decision to introduce the 2007 Rules was only produced to validate the decision that had already been taken. Also held that the necessity for physical control in cases ensuring good order and discipline (as the Rules Amendment rule permitted) would be in breach of ECHR, Articles 3 and 8). Article 10 (free speech) is also sometimes relevant.

(i) Article 8

94. Article 8 provides that: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and protections of others.” Article 8 then embraces four spheres, private and family life, home and correspondence. All of them concern intimate aspects of a person’s life and the activities embraced by the Code will sometimes affect these areas (especially private, family and home life). Read with Article 14 (the non-discrimination guarantee addressed below), Article 8 has led to, for example, an interpretation of statutory tenancy rights which has protected the rights of same sex partners.¹⁶¹ As to the concept of “private life”, this is the most nebulous concept found in Article 8 and indeed in the ECHR. It has been held to be wide enough to encompass personal identity and integrity; “to a certain degree the right to establish and develop relationships with other human beings”¹⁶² and personal autonomy while an individual is alive.¹⁶³ This may impact upon the work of many voluntary organisations, for example (and this is illustrative only), organisations which work with BME disabled people.

95. As with some of the other Convention guarantees, Article 8 imposes certain positive obligations on the State, *requiring* that they take steps to ensure that the rights contained within Article 8 are protected and promoted – this may be done through the work of the voluntary sector. In determining whether such obligations exist, regard is to be had to the “fair balance” that has to be struck between the general interest and the

¹⁶¹ *Ghiadan v Ghodin – Mendoza* [2004] 2 AC 557, though less important now because of the impact of the Civil Partnership Act 2004.

¹⁶² *Neimetz v Germany* (1992) 16 EHRR 97 para 29.

¹⁶³ Though it does not confer a right to decide when or how to die; *Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2001] UKHL 61; [2002] 1 AC 800; (2002) 35 EHHR 1.

interests of the individual.¹⁶⁴ These positive obligations may be met through the funding and support of voluntary organisations and the work they do.¹⁶⁵

96. Article 8 is qualified by Article 8(2), as set out above (paragraph 94). Not all intrusions into the rights protected by Article 8(1) will violate Article 8. Interferences with private life are permitted where they are “in accordance with the law”; and “necessary in a democratic society” in the interests of one of the values listed in Article 8(2) of the Convention.¹⁶⁶ In addition, regard must be had to the hallmarks of a democratic society, namely “pluralism, tolerance and broadmindedness”.¹⁶⁷ Ignorance, prejudice and intolerance should not therefore be regarded as good justificatory reasons under Article 8(2).

(ii) Article 9

97. Article 9 contains the important guarantees relating to religious freedom. Those guarantees fall into two parts. Firstly, Article 9(1) provides an absolute right to freedom of thought, conscience and religion declaring that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes ... freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.” Article 9(2) provides a more limited right to manifest religion and belief by providing that “[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.¹⁶⁸ As such Article 9(2) allows for restrictions on the

¹⁶⁴ *Botta v Italy*, (1998) 26 EHRR 241, 257, paragraph 33.

¹⁶⁵ Through not argued as a human rights case, the Southall Black Sisters (SBS) case may have been – SBS may be a good example of an organisation which helps the State to fulfil its human rights obligations.

¹⁶⁶ *R (on the application of Begum, by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, paragraph 30, per Lord Bingham.

¹⁶⁷ *Handyside v United Kingdom* (1976) 1 EHRR 737 paragraph 49.

¹⁶⁸ For examples, see *R (Shabina Begum) v Denbigh High School* [2006] UKHL15; *R (Sarika Watkins-Singh) v Aberdare Girl's High School* [2008] EWHC 1865.

“manifestation” of religion or belief. Article 9 then provides important protections against religious discrimination.¹⁶⁹ Its importance too is in its recognition that “[r]eligious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society.”¹⁷⁰

98. Article 9 protects adherents to mainstream religious faiths¹⁷¹ and minority faiths and those who adhere to belief systems which diverge from established religious thought.¹⁷² As mentioned, Article 9(2) embraces the right to manifest one's religion or belief and this is in many respects a more important right. Article 9(2) only protects activities closely connected with religion belief so that it does not cover every act which is “motivated or influenced by a religion or belief”¹⁷³ but instead is directed at protecting the area “sometimes called the forum internum” and “acts which are intimately linked to these attitudes such as acts of worship or devotion”.¹⁷⁴ Again religious, voluntary, organisations might rely upon Article 9¹⁷⁵ and Article 9 might attach to the work of certain voluntary organisations.

(iii) Article 14

99. Article 14 is the Convention's non - discrimination guarantee. It provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

¹⁶⁹ And it covers, for example, dress codes affected by religious belief: *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

¹⁷⁰ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, paragraph 15, per Lord Nicholls.

¹⁷¹ *Ahmed v U.K* (1982) 4 EHRR 126 (Islam); *Stedman v U.K.* (1997) 23 EHRR CD 168 (Christianity).

¹⁷² See the observation of Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, paragraph 25.

¹⁷³ *Arrowsmith v U.K.* (1978) 19 DR 5.

¹⁷⁴ *C v U.K.* (1983) 37 DR 142.

¹⁷⁵ *Religionsgemeinschaft der Zeugen Jehovas & Ors v Austria* (App No. 40825/98).

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status.”

100. Article 14 complements the other substantive provisions of the Convention in that it has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded elsewhere in the Convention. However, in order for Article 14 to be engaged, it need not be shown that there has been a breach of a substantive provision, merely that the facts of his case fall within the ambit of one of the substantive provisions.¹⁷⁶ Broadly, five questions arise in an Article 14 inquiry¹⁷⁷, namely

- (i) Do the facts fall within the ambit of one or more of the Convention rights?
- (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?¹⁷⁸
- (iii) Were those others in an analogous situation?
- (iv) Was the difference in treatment objectively justifiable? I.e. did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?
- (v) Was the difference in treatment based on one or more of the grounds proscribed - whether expressly or by inference - in Article 14.

101. It also attaches to indirect forms of discrimination, including what is commonly described as “institutional” (caused by policies and practices which disadvantage one group or another) and “structural” (caused by *de*

¹⁷⁶ *Abdulaziz Cabales and Balkandali v UK* (1985) 7 EHRR 471; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, *per* Lady Hale para 133.

¹⁷⁷ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, *per* Lady Hale paragraph 133, based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, paragraph 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), paragraph 52 and [2003] EWCA Civ 797, [2003] 3 All ER 577.

¹⁷⁸ And a *de facto* distinction may suffice: *Zarb Adami v Malta* (App No 17209/02).

facto segregation and exclusion) discrimination and imposes a duty upon the State to take steps to avoid it. This obviously may be important for the work of some voluntary organisations, including those which are directed at taking action to alleviate some forms of disadvantage associated with race etc. In *DH & Ors v the Czech Republic* (App no. 57325/00) (2007), the ECtHR found a violation of Article 14 on the basis of facts demonstrating that more than half of Roma children in the Czech Republic attend special schools (those for children with a “social or mental handicap”). The Court made it clear in that case that statistics must be sufficient to establish a *prima facie* case of discrimination within Article 14 and that the State may be obliged to take action to remedy that. The effect of the judgment in *DH* then, is that where there is statistical evidence showing that some minority groups, including BME groups, are experiencing specific and serious forms of discrimination or disadvantage falling within the “ambit” of the other Convention rights (including those above and, as in *DH*, the Articles addressing education), then a State may be under a positive obligation to address it (unless it can show that the differences are as a result of objective factors unrelated to ethnic origin or that they are objectively justified). This may involve funding voluntary groups to address the same, depending upon the circumstances

102. Further, as the Court made clear, Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article 14. This, as with the RRA, SDA and other anti discrimination legislation, then, allows for (and may compel) positive action.
103. Again, then, Article 14 may have very real relevance to the work of voluntary organisations and the obligations of Government in relation to them.

(iv) Article 17

104. Article 17 is an important provision, which operates to limit the scope of the other Convention rights. It is headed 'Prohibition of Abuse of Rights' and provides that

"Nothing in this Convention may be interpreted or as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

105. It has particular significance in the context of race hate speech and activity. Thus in *Glimmerveen v Netherlands*¹⁷⁹ the European Commission concluded that an individual with a conviction for distributing racist pamphlets could be lawfully excluded from participating in an election on a racist platform. Article 17 reflects the limitations imposed in other international law instruments upon rights guaranteed, in particular rights to freedom of speech and related rights.¹⁸⁰

106. Article 17 will prevent any of the rights found in the HRA being used to promote hate or bigotry. This again is important in understanding the purpose of the anti discrimination legislation¹⁸¹, including its positive action provisions.

(v) The operation of the HRA

107. The HRA operates in two ways to regulate public authorities and ensure their compliance with the rights set out above. Firstly, section 3 of the HRA provides that:

¹⁷⁹ (1979) 18 DR 187, Ecomm HR; see too *Witzsch v Germany* (1999) Application no. 41448/98,

¹⁸⁰ See e.g. Article 19 of the Universal Declaration of Human Rights provides that 'Everyone has the right to freedom of opinion and expression'. However it also provides that these rights may not be 'exercised contrary to the purposes and principles of the United Nations' (Article 29(3)). Article 29(3) can reasonably be interpreted therefore, as limiting the protection for speech if the speech tends to promote racial, sexual, linguistic or religious discrimination

¹⁸¹ See for a case arising under the anti-discrimination legislation: *Redfearn v Serco Ltd t/a West Yorkshire Transport Service* [2006] IRLR 623.

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights.”

108. This means that legislation must be read *and* given effect to in a way which is compatible with the Convention rights (including those above) and the courts must give effect to that intention.¹⁸² This creates a very compelling and mandatory obligation and may require reading in words or reading them out. If the natural reading of a statute gives a meaning which is incompatible with a Convention right, then the court must strive to give it a compatible meaning.

109. Further, section 6 of the HRA makes it unlawful for a public authority,¹⁸³ including a “hybrid” authority¹⁸⁴ (that is private bodies carrying out public functions which may include some voluntary organisations) to act incompatibly with a Convention right. Government, central and local, then (and some voluntary bodies when carrying out public functions) will be required to comply with the rights described above, including the positive duties to, for example, protect private life and to take positive action to secure equality that arise in certain circumstances.

(b) Regional (EU and Council of Europe) legal framework

110. There are a large number of European measures which address discrimination and equality. Below are selected those which are likely to be most important to the work addressed by the Compact and the BME Code, in particular.

¹⁸² *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113, including at paragraph 59, per Lord Millett.

¹⁸³ Defined by section 6(3), HRA. See, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37; [2004] 1 AC 546; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (2002) QB 48; *R (Beer) v Hampshire Farmer's Markets Ltd* (2004) 1 WLR 233.

¹⁸⁴ Namely, a private body whilst carrying out functions of a public nature: section 6(3)(b) and section 6(5), HRA.

111. Importantly both the EU and the Council of Europe recognise the importance of the voluntary sector in promoting democracy and civil society.
112. The EU Commission has said: “voluntary organisations.... are playing an important role in almost every field of social activity. They contribute to employment creation, active citizenship, democracy, provide a wide range of services, play a major role in sport activities, represent citizens’ interests to various public authorities and play a major part in promoting and safeguarding human rights as well as having a crucial role in development policies.”¹⁸⁵
113. The Committee of Ministers has promulgated a recommendation regarding the same.¹⁸⁶ It has recommended that: “NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society; NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law; NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties; NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned; NGOs should be free to pursue their objectives through membership of associations, federations and confederations of NGOs, whether national or international.” Importantly too, the Committee of Ministers has

¹⁸⁵ Communication from the Commission – Promoting the role of Voluntary Organisations and Foundations in Europe (1995) Doc No. EN/23/95/00891100.W00 (EN).

¹⁸⁶ Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (*Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies*).

recommended that (with qualifications): “NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits” and “Governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people’s opinions as to the functioning of society. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information.” As the Committee of Ministers has observed:¹⁸⁷ “Although NGOs play an essential part in securing human rights, the ability to establish and operate those that are membership-based organisations is itself a human right, guaranteed at the regional level for everyone by Article 11¹⁸⁸ of the European Convention on Human Rights (hereinafter the European Convention) and for particular groups or forms of organisation by Article 5 of the European Social Charter (revised), Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level. Furthermore the ability of NGOs to contribute to public life and to express a wide range of views is itself a key element of the pluralism that is the hallmark of a true democracy.” This highlights the very important role of the voluntary sector in civic life.

i. EU Law (the Equality Directives)

¹⁸⁷ Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe.

¹⁸⁸ Freedom of association.

114. There has long since been protection in EU law against sex discrimination in employment and occupation and protecting the right to free movement (within Member States) for EU nationals.¹⁸⁹

115. Pursuant to Article 13, of the Treaty Establishing the European Community, three new Directives relevant to equality have been enacted:

- *The Race Directive*¹⁹⁰ - which requires Member States to outlaw race discrimination in the employment and related fields and in the provision education, goods and services, housing and in relation to “social protections” and “social advantages”;
- *The Framework Directive*¹⁹¹ - which requires Member States to outlaw discrimination connected to religion and belief, disability, sexual orientation and age in the employment and related fields; and
- *The Gender Goods and Services Directive*¹⁹² - which requires Member States to outlaw gender discrimination in the provision of goods and services, including insurance.

116. The driver for the enactment of Article 13 and then the Directives came, in particular, from the race lobby which became increasingly well organised following electoral gains made by the Far Right across Europe. The *Race Directive* and the *Framework Directive* were unanimously agreed in “record time”,¹⁹³ less than two years after the

¹⁸⁹ Article 141 (equal pay); Directive 75/117/EEC (Equal Pay Directive); Directive 76/207/EEC (amended by 2002/73/EC) (Equal Treatment Directive); 92/85/EEC (Pregnant Workers Directive); Council Directive 97/80/EC (burden of proof Directive); and Article 39 (free movement) and Regulation 1612/68/EEC (Free Movement Regulations), respectively.

¹⁹⁰ Council Directive 2000/43/EC, of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁹² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

¹⁹³ Bleich, Erik and M C Feldmann, 'The Rise of Race? Europeanization and Antiracist Policymaking in the EU' [2004] Paper prepared for the conference 'The Impact of Europeanization on Politics and Policy in Europe: Trends and Trajectories,' held at the University of Toronto, May 7-9, 2004, available at: <http://individual.utoronto.ca/wittenbrinck/europeanization/BleichFeldmann.doc> citing (at footnote

coming into force of the Treaty of Amsterdam 1997.¹⁹⁴ They have been joined now by *the Gender Goods and Services Directive*¹⁹⁵ and shortly legislation, described below (paragraph 187), will be enacted across strands addressing discrimination outside the employment field.

(i) The Race Directive

117. The *Race Directive*¹⁹⁶ provides that the “principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin” within the scope protected by the terms of the Directive, namely employment and related areas, and importantly “social protection” and “advantages” and access to goods and services including housing.¹⁹⁷ The *Race Directive* excludes nationality discrimination¹⁹⁸, so not interfering with immigration policy, and does not address “colour” or “national origins”.¹⁹⁹ This means that the amendments made to the RRA to implement the Directive are limited to discrimination connected with racial or ethnic origin and national origin (in the latter case because it was thought that that would be embraced by the concept of “racial or ethnic origin”).²⁰⁰

118. The *Race Directive* requires Member States to regulate direct and indirect discrimination, harassment and victimisation.²⁰¹ The scope of the Directive is wide and extends to “social protection” and “advantages” which is understood to give a wide scope to the Directive. These will cover matters addressed by many voluntary organisations and central and local Government.

20): “E.U. agrees on measures to combat racial discrimination,” *Deutsche Presse-Agentur*, 6 June 2000; “EU to combat discrimination,” *Financial Times*, 6 June 2000.’

¹⁹⁴ The Treaty of Amsterdam came into force on 1 May 1999.

¹⁹⁵ Council Directive 2004/113/EC.

¹⁹⁶ 2000/43/EC.

¹⁹⁷ Articles 2 and 3.

¹⁹⁸ Article 3(2).

¹⁹⁹ Compare the RRA.

²⁰⁰ Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1626.

²⁰¹ Articles 2 and 9.

119. The *Race Directive* requires Member States to ensure that procedures are in place for the enforcement of the obligations under the Directives and that such procedures are available to all persons who consider themselves wronged by the failure to apply the principle of equal treatment.²⁰² It also requires Member States to abolish all laws contrary to the principle of equal treatment and render void any rules or provisions in collective agreements, rules of undertakings etc contrary to the principle of equal treatment²⁰³ and to introduce rules on sanctions applicable to infringements of any national provisions adopted pursuant to the Directives and to take all measures necessary to ensure that they are applied. Such sanctions, which may include compensation to the victim²⁰⁴, must be “effective, proportionate and dissuasive”.²⁰⁵ Also importantly, the *Race Directive* requires that Member States “designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin” with competence to provide “independent assistance to victims of discrimination in pursuing their complaints of discrimination”; “to conduct independent surveys concerning discrimination”; and “to publish independent reports.. making recommendations on any issue relating to such discrimination”.²⁰⁶ These obligations are probably met by the EHRC but could be too by the roles performed by certain voluntary organisations (as appears to be recognised by the EU, see paragraph 112 above).

(ii) The Framework Directive

120. As to the *Framework Directive*,²⁰⁷ this provides that the “principle of equal treatment shall mean that there shall be no direct or indirect

²⁰² Articles 7(1).

²⁰³ Articles 14.

²⁰⁴ And such will be required where loss has been sustained: *Marshall v Southampton and South West Area Health Authority II*, Case C-271/91 [1993] ECR I-4367; [1993] ICR 893; [1993] IRLR 445.

²⁰⁵ Articles 15 and equivalent provision is made in the other Directives and this has proved very important, see, for example, *Marshall v Southampton and South West Area Health Authority II*, Case C-271/91 [1993] ECR I-4367; [1993] ICR 893; [1993] IRLR 445.

²⁰⁶ Article 13.

²⁰⁷ 2000/78/EC.

discrimination whatsoever on any of the grounds ...[of].... religion or belief, disability, age or sexual orientation” within the scope protected by the terms of the Directive, namely employment and related areas.²⁰⁸ Its scope is therefore much narrower than the *Race Directive* and the issues relating to competence do not arise.²⁰⁹ It will, necessarily, be of more limited importance to the Compact.

121. It requires Member States to outlaw direct discrimination, indirect discrimination and harassment and these concepts are defined in materially the same way as under the *Race Directive*.²¹⁰ It also imposes an obligation on Member States to introduce “reasonable accommodation”²¹¹ duties for disabled persons (or “reasonable adjustments” as we describe them in the U.K.).

122. The *Framework Directive* contains important exemptions, including for example, that the “Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”²¹² Other permissive exemptions are provided for, allowing for Member States to opt to exclude, for example, the armed forces from the scope of any implementing measures²¹³ and to introduce certain exemptions relating to religious organizations.²¹⁴

123. The *Framework Directive* has been given domestic effect by the Employment Equality (Religion or Belief) Regulations 2003²¹⁵; the

²⁰⁸ Articles 2 and 3.

²⁰⁹ There is plainly competence to enact labour market measures, see, for example, Article 137.

²¹⁰ Article 2.

²¹¹ Article 5.

²¹² Article 2(5).

²¹³ Article 3(4).

²¹⁴ Article 4(2). As mentioned, the *Framework Directive* also contains a non-regression clause: Article 8(2).

²¹⁵ SI 2003/1660.

Employment Equality (Sexual Orientation) 2003²¹⁶; the Disability Discrimination Act 1995 (Amendment) Regulations 2003²¹⁷ and lastly, and exploiting the extended time allowed for transposition under the Directive insisted upon by the U.K. Government,²¹⁸ the Employment Equality (Age) Regulations 2006.²¹⁹ These address discrimination in the fields of employment and occupation (broadly) only (though see paragraphs 182 and 187 below for anticipated changes).

(iii) The Gender Goods and Services Directive

124. The *Gender Goods and Services Directive*²²⁰ was the last of the three Article 13 Directives to be enacted. Member States were required to give effect to its terms by 21 December 2007²²¹ and the U.K. did (albeit late) through the Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963. It addresses some of those areas covered by the *Race Directive*, but for gender, which are not already covered by the *Equal Treatment Directive* and so provides that:

“Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.”²²²

125. As can be seen, the *Gender Goods and Services Directive* does not extend so far as the *Race Directive*. Further it contains important exemptions. It does not apply to “the content of media and advertising”; “to education”²²³ or to “matters of employment and occupation [or]... to matters of self-employment, insofar as these matters are covered by

²¹⁶ SI 2003/1661.

²¹⁷ SI 2003/1673.

²¹⁸ Article 18.

²¹⁹ SI 2006/1031.

²²⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

²²¹ Though for its effect before then, see *Mangold v Helm*, Case C-144/04 [2006] IRLR 143.

²²² Article 3.

²²³ Article 3(3).

other Community legislative acts.”²²⁴ However, the fact that it addresses services provided by both the private and public sector means it will cover areas addressed by the Compact.

126. As with the *Equal Treatment Directive*, the *Gender Goods and Services Directive* is “without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.”²²⁵ The Directive does not “preclude differences in treatment, 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.”²²⁶ The Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963 give purported effect to the *Gender Goods and Services Directive* (though there are doubts about whether the Regulations give proper effect to the Directive, the inadequacies are not relevant to this paper).

(iv) New Directive

127. The Commission has published its proposals for a single Directive addressing equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)426 final). It anticipates building on the existing Article 13 Directives (the Race, Framework and Gender Directives 2000/43/EC, 2000/78/EC and 2004/113/EC respectively). It will therefore address discrimination outside the fields of employment and occupation. Its scope will match that of the Race Directive and therefore cover both the public and private sector in: social protection, including social security and health care; social advantages; education; access to and supply of goods and services which are available to the public, including housing. Member States will have two years to implement the Directive once enacted. The Directive will require significant legislative change both to the scope of our anti-discrimination legislation and the concepts used within it. As is

²²⁴ Article 3(4).

²²⁵ Article 4(2).

²²⁶ Article 4(5). See section 29(3) for similar – though not so rigorous – provision in the SDA and see section 35 SDA.

relevant to this paper, the Directive will require, amongst other things, that age discrimination be regulated outside the employment field (which U.K. presently does not do). This will have relevance to voluntary organisations and most particularly Government's obligations in relation to age.

128. The Single Equality Act addressed below (paragraph 182) may address some of the changes needed. However, the Directive will protect children, as well as adults, and this is one area where significant change will be required to our domestic anti discrimination legislation. Presently the law does not protect children against age discrimination (because of the limited scope of the Age Regulations) and the Government does not propose to extend protection to children through the Single Equality Act. Many organisations, addressed in the Compact, will represent the needs of children and it is important to recognise therefore that the Directive when enacted will require change in the law.²²⁷

(ii) EU Law (the Procurement Directives)

129. The EU regulates Public Procurement (the purchasing of services by the private sector, see paragraph 51 above), through a series of complex Directives. They are not explored in detail here because though they are referred to in the CRE's Guidance on procurement described above (paragraphs 51-2), they are unlikely to be directly material to the business addressed by the Compact.

130. However, in short summary and for completeness, the EC Public Procurement Directives²²⁸ are concerned with giving effect to the principle of free movement of goods and services. The Directives and

²²⁷ Paragraphs 262 and 333, The Equality Bill – Government response to the Consultation” (cm 7454)(July 2008).

²²⁸ Recast Directives have been enacted by the European Council (2004/17/EC and 2004/18/EC) and these reflect the objectives of earlier Directives but make it clear that there is scope to take account of social issues in the procurement process where such issues are relevant subject to the contract and do not undermine value for money for the taxpayer. Given the broad meaning of value for money which includes longer term impact on the communities being served this does provide continued scope for using the race equality duty to promote equality of opportunity and good race relations through procurement policies.

EC Regulations addressing public procurement prescribe procedures for most contracts above certain value thresholds. The Public Procurement Directives guarantee equal treatment on grounds of nationality in the contracting process in relation, respectively to, works, supplies, services and utilities. They apply to contracts which exceed specified financial thresholds and require that a tendering process be transparent and that the selection of candidates in the award of tenders be based on objective criteria. They provide a complex regime for meeting the aims of the Directives. They now make specific reference to social considerations,²²⁹ reflecting earlier case law from the European Court of Justice.²³⁰

131. Thus Directive 2004/18/EC “on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts” provides in its Recitals that: “This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles” (of non-discrimination, transparency etc). Directive 2004/17/EC is to materially the same effect.

132. The backdrop to the Directives is, of course, the Treaty itself and as described above, this contains provision addressing legislative action on discrimination which has since occurred through the Equality Directives (paragraph 142 above). The Public Procurement Directives expressly provide that “non-observance of national provisions implementing the Council Directives 2000/78/EC²³¹ and 76/207/EEC²³² concerning equal

²²⁹ Article 26, 2004/18/EC.

²³⁰ *Gebroeders Beentjes B.V. v. the State (Netherlands)* Case 31/87, [1990] 1 C.M.L.R. 287; *Commission v France* Case C225/98.

²³¹ The *Framework Directive*..

²³² The *Equal Treatment Directive*.

treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct”.²³³ For reasons which are unclear, the Race Directive is not mentioned terms but the same must apply. The effect, therefore, is that though these Directives prescribe through complex procedures the limits on a public authorities powers to contract with the private and voluntary sector, in particular in a way which takes account of non-commercial matters, they are unlikely to impede the ability, in most cases, of a public authority to promote equality objectives through the exercising of its procurement functions (so giving effect to the statutory Equality Duties).

(iii) EU Law (Charter of Fundamental Rights)

133. The EU Charter of Fundamental Rights (2000)²³⁴ contains important provisions addressing discrimination and equality.²³⁵ It provides, amongst other things, that:²³⁶

- Human dignity is inviolable. It must be respected and protected.²³⁷
- Everyone has the right to respect for his or her physical and mental integrity.²³⁸
- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.²³⁹

²³³ Recital 54, Directive 2004/17 and Recital 43 2004/18/EC.

²³⁴ Which now also forms part of the draft EU Constitution, the status and future of which is, as is well known, quite uncertain. However, the Charter remains in place and unaffected by the discussion on the constitution (though agreed the constitution will strengthen the role of the Charter).

²³⁵ Including under Chapter III, headed “Equality”.

²³⁶ Provision is made permitting the limitation of these rights in certain narrow circumstances: Article 52(1) provides, “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

²³⁷ Article 1.

²³⁸ Article 3(1).

²³⁹ Article 4.

- Everyone has the right to respect for his or her private and family life, home and communications.²⁴⁰
- Everyone is equal before the law.²⁴¹
- Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.²⁴²
- The Union shall respect cultural, religious and linguistic diversity.²⁴³
- Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.²⁴⁴
- The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.
- The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.²⁴⁵
- Every worker has the right to working conditions which respect his or her health, safety and dignity.²⁴⁶

134. By Article 52: “In so far as th[e] Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This

²⁴⁰ Article 7.

²⁴¹ Article 20.

²⁴² Article 21.

²⁴³ Article 22.

²⁴⁴ Article 24.

²⁴⁵ Article 26.

²⁴⁶ Article 31(1).

provision shall not prevent Union law providing more extensive protection.” The Charter then, in part, but not exclusively matches the rights in the EHRC. The full impact of the Charter, however, is as yet unclear.²⁴⁷ The U.K. Government has stated that the Charter is not intended to be legally binding on Member States²⁴⁸. However, the European Commission has taken a different view.²⁴⁹

135. Certainly it will inform the development of the case law under the Directives (above) and therefore domestic law.²⁵⁰ It emphasises the importance of fundamental rights – including non-discrimination rights – in EU law.

(iii) Council of Europe

136. The Council of Europe was established post the Second World War amidst anxieties about the rise of new dictatorships and the risk of relapse into further European war. The Council permits any European States to become a member provided it accepts the principle of the rule

²⁴⁷ Article 51 of the Charter provides that: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

²⁴⁸ HC Debates col 354, 11 December 2000.

²⁴⁹ See, *Europa* website, http://europa.eu.int/comm/justice_home/unit/charte/en/communications.html and see, Commission Communication, COM (2000) 644, 11 October 2000, available at http://europa.eu.int/comm/justice_home/unit/charte/pdf/com2000-644_en.pdf and Green Paper *Equality and Non-Discrimination in an Enlarged European Union* (COM (2004) 379 Final, 28.05.2004), 11, available at [http://66.249.93.104/search?q=cache:xUpugwqYNJoJ:www.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0379en01.pdf+COM+\(2004\)+379+Final,+28.05.2004&hl=en&gl=uk&ct=clnk&cd=1](http://66.249.93.104/search?q=cache:xUpugwqYNJoJ:www.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0379en01.pdf+COM+(2004)+379+Final,+28.05.2004&hl=en&gl=uk&ct=clnk&cd=1).

²⁵⁰ See, for example, *R v Secretary of State for Trade and Industry ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union*, Case C-173/99 [2001] IRLR 559 (Advocate General Tizzano, paragraphs 26-27); *Allonby v Accrington and Rossendale College and others*, Case C-256/01 [2004] ICR 1328; [2004] IRLR 224 (Advocate General Geelhoed, paragraph 53). The Charter has been repeatedly cited in the opinions of the Advocates-General and has on several occasions influenced the conclusions of the Court of Justice of the European Communities. The opinions of the Advocates-General are not binding on the Court, but suggest legal solutions that are likely to influence it. In some cases the reference to the Charter has been marginal, but in other the Advocates-General have used it to interpret fundamental rights, though noting that it is not legally binding. The Charter's lack of legal status does not mean, however, that it has no effect. Advocate-General Tizzano, Léger and Mischo have stated that ‘the Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States,’ *Europa* web site, at <http://europa.eu.int/scadplus/leg/en/lvb/l33501.htm>.

of law and guarantees human rights and fundamental freedoms to everyone under its jurisdiction.²⁵¹ The Council of Europe is quite distinct from the European Union.²⁵²

137. Unless incorporated into domestic law (as in the case of HRA, see below), the legal measures described below do not form part of domestic law. However, they bind the U.K. as a matter of International law (and reflect the U.K.'s 'promise' on the issues covered by these legal measures). This is important because the Council of Europe has emphasized the importance of the voluntary sector (non-governmental organizations – 'NGOs'), as discussed above (paragraph 113).

(i) EHRC

138. One of the Council of Europe's first tasks was to draft a legally binding Human Rights Convention for Europe, conferring enforceable rights upon individuals against States. This became the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] (ECHR).²⁵³ As with other international instruments, the Convention had no binding force at domestic level before it was incorporated. However, the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ("ECHR") contains the rights and freedoms now contained in the HRA (described above under paragraph 93), in particular Articles 8, 9, 14 and 17.

139. In addition there are certain relevant Protocols to the Convention which have not been incorporated into the HRA and to which have not been

²⁵¹ <http://www.coe.int/>.

²⁵² There are a number of "soft law" measures enacted by the Council of Europe (www.coe.int). In 1993 (following the Vienna Summit meeting of the Heads of State and of Government of the Member States of the Council of Europe in October 1993) on the issue of racism in particular the Council of Europe established a European Commission against Racism and Intolerance (ECRI) comprising independent experts who receive country by country reports from each of the Member States of the Council of Europe. ECRI then analyses those reports and makes suggestions and proposals as to how to tackle the problems identified (see, European Commission against Racism and Intolerance, Second Report on the United Kingdom, adopted on 16 June 2000, CRI (2001) and CRI (2005) 27).

²⁵³ ETS No: 005.

signed or ratified by the U.K. This means they do not form part of U.K. law or bind the U.K. and so are not addressed in this review.²⁵⁴

(ii) European Social Charter

140. The U.K. is also a party to the Council of Europe's counterpart to the ECHR, the European Social Charter (1961).²⁵⁵ This addresses economic and social rights (employment, health, social security, right of the family to social, legal and economic protection). The UK has signed and ratified the Social Charter, though with reservations.²⁵⁶ However, the U.K. has not incorporated the Charter so its relevance is limited.²⁵⁷ It binds the U.K. as a matter of international law and helps therefore in defining the obligations of the U.K., though is not enforceable in the domestic courts.

²⁵⁴ These rights include those contained in Protocol No. 12 which provides a more compelling anti-discrimination right. It extends to ensuring that there is no discrimination in any area governed by law, not just those areas falling within the ambit or scope of the other rights set out in the ECHR ("1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."). The Protocol entered into force on 1st April 2005. The U.K. government has not so far signed or ratified Protocol No. 12 and they have indicated that they do not presently intend to ratify it (Lord Bassam of Brighton (11 Oct 2000: Column WA37)). For a critique of the reasons given by government for not ratifying Protocol No. 12 see Equal Opportunities Review (2002) 105, 21-24). In the event that it is ratified by the U.K., the U.K. will be bound by it as a matter of international law and individuals will be permitted to petition the ECHR in reliance on it. However, it will not have any direct domestic force unless it is expressly incorporated, as many of the other Convention Rights have been, through the HRA.

²⁵⁵ See Preamble, ETS No. 035. Signed by the UK on 18 October 1961 and ratified on 11 July 1962. The Charter came into force in 1965: <http://conventions.coe.int>.

²⁵⁶ See [HTTP://CONventions.coe.int](http://CONventions.coe.int)

²⁵⁷ Compliance is secured by a requirement to report at two-yearly intervals on the application of such provisions of the substantive provisions that they have accepted and at "appropriate intervals as requested by the Committee of Ministers' reports relating to those provisions which they have not accepted". As with other treaties, such reports are examined by the Committee of Experts Part 4. The revised Social Charter of 1996 (incorporating the Additional Protocols of 1988, 1991 and 1995) (1/7/1999) has yet to be ratified by the U.K., though has been signed by the U.K., and therefore does not bind the U.K.. Importantly, the UK has not ratified²⁵⁷ the Charter and therefore it does not bind the UK. Unlike the original Charter, the Revised Charter does contain an explicit non-discrimination guarantee. Part V, Article E provides that: "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status." This provision is materially the same similar same as that contained in Article 14 of the ECHR and it is therefore likely to be interpreted in much the same way.

141. The Charter recognises does not contain a specific non - discrimination guarantee.²⁵⁸ However, it does address discrimination both in its preamble and in the substantive provisions. Its preamble provides that “the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin”.²⁵⁹

(iii) The Framework Convention for the Protection of National Minorities [1995]

142. The UK is a Party to the Framework Convention for the Protection of National Minorities [1995].²⁶⁰ It provides that:

“Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”.²⁶¹

143. Such rights as are provided for by the Convention might be enjoyed “individually as well as in community with others.”²⁶² The Convention contains an explicit non- discrimination provision, guaranteeing “to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.”²⁶³

144. This is an important Treaty in the protection and promotion of minority rights. The UK is a party to it but it has not been incorporated into UK

²⁵⁸ Though specific provision is made in relation to disability: Article 15.

²⁵⁹ The Revised Social Charter (CETS No: 163) is intended to replace the Social Charter. Importantly, the U.K. has not ratified the Charter and therefore it does not bind the U.K.. Unlike the original Charter, the Revised Charter does contain an explicit non - discrimination guarantee. Part V, Article E provides that: “The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.” This provision is materially the same similar same as that contained in Article 14 of the ECHR and it is therefore likely to be interpreted in much the same way. The U.K. signed the Revised Social Charter on 7 November 1997.

²⁶⁰ Having signed and ratified it on 1 February 1995 and 15 January 1998 respectively; <http://conventions.coe.int>.

²⁶¹ Article 3.

²⁶² Article 3

²⁶³ Article 4(1)

law²⁶⁴ and so binds the U.K. as a matter of international law and helps define the obligations of the U.K., though is not enforceable in the domestic courts.

145. The Committee of Ministers (that has supervisory responsibilities in respect of the Convention) has resolved that the U.K. “ensure that public authorities adopt a more determined approach to combating discrimination and promoting equal opportunities, including in their functions and in their employment practices; pursue further existing initiatives to protect and enhance the development of the languages and cultures of the peoples of Wales, Scotland and Northern Ireland; identify further ways of encouraging full participation of persons belonging to minority ethnic communities in elected bodies; step up meaningful dialogue with the broadest possible spectrum of representatives of minority ethnic communities, both at national and local levels.”²⁶⁵

146. Again this may be of some importance to those voluntary groups representing or providing certain services to certain BME groups where they are concerned to promote or provide services to minority language speakers, amongst other things.

(iv) The European Charter for Regional or Minority Languages [1992]

147. The U.K. Government has also signed and ratified²⁶⁶ the European Charter for Regional or Minority Languages [1992]. This addresses languages that are:

“traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's

²⁶⁴ The UK signed on 1 February 1995 and ratified on 15 January 1998. Compliance is secured by the requirement that State parties submit within one year of entry into force of the Convention in the country concerned, and every five years thereafter, a report containing full information on legislative and other measures taken to give effect to the Convention. An advisory committee of experts analyses the reports and gives an opinion – and may receive information from other sources to be sent – for submission to the Committee of Ministers. The Committee of Ministers then considers its conclusions and may adopt recommendations in respect of the state party concerned.

²⁶⁵ Resolution CM/ResCMN(2008)7.

²⁶⁶ 2 March 2000 and 27 March 2001 respectively; <http://conventions.coe.int>.

population; and different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants”.²⁶⁷

148. The Charter contains a number of objectives and principles (and a framework for achieving them) in the fields of, amongst others, education, judicial proceedings, public services relating to minority language use and protection. Its adoption followed increasing concern over the situation of regional or minority languages within Europe and the recognition that Article 14 of ECHR whilst laying down the principle of non-discrimination did not create a system of positive protection for minority languages and the communities using them.²⁶⁸

149. Again this is likely to be relevant to the treatment of minority groups and voluntary organisations addressing those using minority languages.

(c) International legal framework (UN)

150. International Treaties and Conventions (save in certain circumstances which are of no relevance to this paper) and not enforceable domestically unless they have been incorporated into domestic law. The Conventions described below have not been incorporated into domestic law. However, they inform the meaning given to EU²⁶⁹ and domestic

²⁶⁷ Article 1(a).

²⁶⁸ European Charter for Regional or Minority Languages [1992]. Explanatory Report, <http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=148>.

²⁶⁹ Recital 3 of the *Race Directive* 2000/43/EC refers to the ECHR, the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on the Elimination of all forms of Discrimination Against Women; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; Recital 4 of the *Framework Directive* 2000/78/EC refers to the ECHR, the Universal Declaration of Human Rights; the International Convention on the Elimination of all forms of Discrimination Against Women; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (and also International Labour Organisation Convention No. 111) and Recital 2 of the *Gender Goods and Services Directive* refers to the ECHR, the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on the Elimination of all forms of Discrimination Against Women; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

law²⁷⁰ and are therefore important to that extent. They also emphasize again the important role of voluntary organisations in a democracy.²⁷¹

151. One of the four principles on which the United Nations was founded is that of non-discrimination. The U.N. Charter of 1945 proclaims that the United Nation's purposes include "...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1). The specific content of those rights has been codified and clarified in a number of human rights instruments since. In 1948 the General Assembly adopted the Universal Declaration of Human Rights (UDHR). The Declaration is underpinned by the concept of equality as a fundamental right with its preamble recognising the inherent dignity and "the equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world". The Declaration begins in Article 1 with the pronouncement that all human beings are "born free and equal in dignity and rights". Article 2 provides that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without any distinction of any kind, such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status ...". The Declaration is not itself a legally enforceable document but the principle of non-discrimination that it enunciated has emerged as a core standard of international human rights law.²⁷²

152. In 1966 two Covenants were adopted by the U.N. to give legal force to the UDHR. These are the International Covenant on Civil and Political

²⁷⁰ *R v Chief Immigration Officer, Heathrow Airport ex parte Bibi* [1987] 1 WLR 979, 984; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771; *Regina (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55; [2005] 2 AC 1; *A v Secretary of State for the Home Department* [2005] 2 AC 68. For a full discussion see, R Clayton and H Tomlinson, *The Law of Human Rights* (2000, OUP), particularly paragraph 2.09 et seq.

²⁷¹ See, United Nations: The relationship between Member States and civil society, including non-governmental organizations Report to the President of the 60th General Assembly (2005).

²⁷² See, for example, *Barcelona Traction Case (Second Phase)*, ICJ Reports (1970) at 514-517. And see, *Namibia (South West Africa) Case* (1970), ICJ Reports, (1971) at 57.

Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

(i) The ICCPR

153. The International Covenant on Civil and Political Rights (ICCPR) was adopted by the General Assembly in 1966 and came into force in 1976. The U.K. is a State Party to the ICCPR.²⁷³ As its' title indicates, the ICCPR deals with civil and political rights, the so-called "first generation" human rights. Article 2 of the ICCPR obliges States to "ensure to all individuals ... the rights recognised in the Covenant". There a number of provisions in the ICCPR addressing equality and non-discrimination. The prohibition on non-discrimination is accorded special weight in the ICCPR.²⁷⁴ Article 26 provides that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

154. In their General Comments²⁷⁵ the Human Rights Committee has provided guidance as to the meaning of "discrimination" for the purposes of the ICCPR: "[T]he Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." This, then, covers all forms of discrimination, (direct, indirect, institutional and structural). Further, the enjoyment of rights and freedoms on an equal

²⁷³ Having ratified it on 20 May 1976.

²⁷⁴ Article 4(1).

²⁷⁵ General Comment 18, Human Rights Committee, 37th session, 1989.

footing “does not mean identical treatment in every instance”; “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.” Where people are treated differently based upon “reasonable and objective” criteria, such differentiation is not prohibited by the ICCPR.²⁷⁶ This, then, permits race/gender etc specific services to overcome disadvantage association with those characteristics.

155. The Committee has observed that “the Covenant sometimes expressly requires [State Parties] to take measures to guarantee the equality of rights of the persons concerned”. Further, the principle of equality enshrined within the ICCPR “requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”²⁷⁷ For example, it may be necessary under the Covenant for States to take affirmative action by “granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population”.²⁷⁸

156. Thus in respect of certain of the obligations under the ICCPR, States are under a *positive duty*, not a mere negative obligation, to secure them and this might obligate a State to introduce positive action measures (i.e. positive discrimination) or race/gender etc specific services.²⁷⁹

²⁷⁶ Thus, for example, the distinction between State subsidies for students at private and public schools has been found to be reasonable under the Covenant: “the State Party cannot be deemed to be under an obligation to provide the same benefits to private schools; indeed, the preferential treatment given to public sector schooling is reasonable and based on objective criteria” (*Lindgren v Sweden* (298-99/1988) paragraph 10.3).

²⁷⁷ See paragraph 10. of General Comment 18 of the Human Rights Committee, and Harris and Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law*, (1995) at 578.

²⁷⁸ See General Comment 18 of the Human Rights Committee, paragraph 10; General Comment 23, Human Rights Committee, 50th session, 1994.

²⁷⁹ See for example, paragraph 3, General Comment No. 28: Equality of rights between men and women (Article 3): 29/03/2000CCPR/C/21/Rev.1/Add.10 including: “The right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including

157. Under the ICCPR, the factors mentioned in Article 2 (race, religion, national or social origin etc) may not bar persons from participating in public affairs.²⁸⁰ Article 18 provides for the right to freedom of thought, conscience and religion. Article 27 of the ICCPR provides protection for ethnic, religious or linguistic minorities so that persons belonging to such minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.²⁸¹

(ii) The ICESCR

158. The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) is the counterpart to the ICCPR and protects so-called “second generation” economic, social and cultural rights. The ICESCR entered into force in 1976 and the U.K. is a party.²⁸² Under the ICESCR States Parties undertake to “take steps ... to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.²⁸³ Those rights include, the right to work; the right to social security; the right to an adequate standard of living; and the right to education. Article 2(2) provides that in relation to the socio-economic and cultural rights recognised in the ICESCR, the Covenant requires States Parties to: “undertake to guarantee that the rights enunciated...

appropriate affirmative action.” See further, General Comment 18, Human Rights Committee, 37th session, 1989.

²⁸⁰ Article 25(1).

²⁸¹ Article 27 does not confer any rights to self-determination. Such a right is proclaimed in Article 1 of the ICCPR. But the ICCPR draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to *peoples* and is not a right given legal force under the right to individual petition. Article 27, on the other hand, relates to rights conferred on *individuals* as such and is included in those rights that are justiciable under the right to individual petition (General Comment 23, Human Rights Committee, 50th session, 1994). See too, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135, 92nd plenary meeting, 18 December 1992). The U.K. has not introduced legislative measures explicitly protecting minorities to the extent that is apparently required by Article 27. To the extent that such protection exists, it is limited to (certain) linguistic minorities (e.g. Welsh language Act 1993). See, further, *Chapman v U.K.* [2001] ECtHR (application no 27238/95).

²⁸² Having ratified it on 20 May 1976.

²⁸³ Article 2(1)

[are]... exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2(2)).”²⁸⁴

159. The Committee on Economic, Social and Cultural Rights, a body specifically created under the ICESCR to ensure compliance with the Covenant, has indicated that positive action will not violate the ICESCR: “.. special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring protection in order to ensure the equal enjoyment of economic, social and cultural rights are not considered discrimination, provided that such measures do not lead to the maintenance of separate rights for different groups and are not continued after their objectives have been achieved. This applies, for example, to affirmative - action program[s].”²⁸⁵ Further, such may be required: “This provision not only obliges Governments to desist from discriminatory behaviour and to alter laws and practices which allow discrimination, it also applies to the duty of State Parties to prohibit private persons and bodies (third parties) from practicing discrimination in any field of public life.”²⁸⁶

(iii) CERD

²⁸⁴ A limited exception is made for developing countries and non-nationals: Article 2(3).

²⁸⁵ Fact Sheet No.16 (Rev.1), the Committee on Economic, Social and Cultural Rights, at <http://www.unhchr.ch/html/menu6/2/fs16.htm>.

²⁸⁶ Fact Sheet No. 16 (Rev.1), the Committee on Economic, Social and Cultural Rights, at <http://www.unhchr.ch/html/menu6/2/fs16.htm>. See too, for example, Article 7 (a) of the Covenant requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. Article 3, in relation to Article 7 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members (General comment No. 16 (2005) ‘The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7c6dc1dee6268e32c125708f0050dbf6/\\$FILE/G0543539.DOC](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7c6dc1dee6268e32c125708f0050dbf6/$FILE/G0543539.DOC)).

160. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is the UN's most important enactment on racial discrimination. It was signed in 1965 and entered into force in 1969. It is the oldest and one of the most widely ratified United Nations human rights conventions.²⁸⁷ The UK is a State party to CERD²⁸⁸. Article 2(1) declares that: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

161. Further, CERD requires State Parties to give a broad undertaking to secure equality before the law and in particular guarantee the right to "security of person and protection by the State against violence or bodily

²⁸⁷ <http://www.unhchr.ch/html/menu6/2/fs12.htm>.

²⁸⁸ Having ratified it on 7 March 1969.

harm, whether inflicted by government officials or by any individual group or institution”.²⁸⁹

162. “Racial discrimination” is defined in CERD as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁹⁰

163. CERD expressly permits “positive action” “taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.”²⁹¹ Such positive action is not discrimination for the purposes of CERD “provided ... such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”.²⁹² Further, as with the ICCPR and ICESCR, CERD imposes positive obligations upon State Parties. A special feature of CERD is that it aims to secure substantive equality. Article 1(4) permits States to take special measures, “for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection”. Furthermore, positive measures are *required* in certain circumstances, so that ‘State Parties *shall*,²⁹³ when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and

²⁸⁹ Article 5.

²⁹⁰ Article 1.

²⁹¹ Article 1(3).

²⁹² Article 1(3).

²⁹³ My emphasis.

fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”²⁹⁴ The Convention provides that such “special measures” shall “not be deemed racial discrimination” simply because they do not apply to all races.²⁹⁵ Accordingly, appropriate affirmative action and race specific services (to overcome disadvantage) will not constitute discrimination under CERD.

(iv) CEDAW

164. The main U.N. provisions addressing gender are seen in the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). This was adopted by the U.N. General Assembly in 1979, entered into force in 1981 and is the most significant and comprehensive international instrument addressing women’s rights and the elimination of gender-based discrimination. The U.K. became a party in 1986.²⁹⁶ CEDAW is concerned with achieving equality between women and men and therefore requires States Parties to prohibit sexual discrimination by embodying “the principle of equality of men and women in their national constitutions or other appropriate legislation”.²⁹⁷ Under CEDAW States are also obliged to eliminate all discrimination against women, and to adopt laws or other measures “including sanctions where appropriate, prohibiting all discrimination against women”.²⁹⁸

165. CEDAW establishes the Committee on the Elimination of Discrimination against Women²⁹⁹ and in common with the other major U.N. human rights treaties, provides for a system of State reporting to monitor compliance.³⁰⁰ CEDAW acknowledges that women are a disadvantaged

²⁹⁴ Article 2(2).

²⁹⁵ Article 1(4).

²⁹⁶ Having ratified it on 7 April 1986.

²⁹⁷ Article 2(a).

²⁹⁸ Article 2(b)

²⁹⁹ Article 17.

³⁰⁰ Article 18. On 15 July 2004 the Lord Chancellor announced the completion of the Interdepartmental Review of International Human Rights Instruments. As part of this review the UK decided to accept the Optional Protocol to the Convention on the Elimination of all

group and that their vulnerability to discrimination is increased when they belong to a racial or ethnic minority group³⁰¹, recognising therefore “intersectional” or “multiple” discrimination (addressed further below). Importantly, the Committee has expressed concern at the disadvantaged situation of women belonging to ethnic minorities, particularly in the context of unemployment, lower levels of education and training, lower wages and salaries and fewer benefits as compared to white women. It has recommended that steps be taken to ensure the elimination of direct and indirect discrimination against ethnic minority women, including through positive action in recruitment, awareness campaigns and targeted training, education, employment and health-care strategies. It has also expressed concern about the “high number of ethnic minority women in prison and the fact that many women have been imprisoned for drug-related offences or because of the criminalisation of minor infringements, which in some instances seem indicative of women's poverty”.³⁰²

(v) Disability Rules and Convention

166. As to disability, the U.N. has developed and adopted³⁰³ “Standard Rules on the Equalization of Opportunities for Persons with Disabilities” (1993). Although not a legally binding instrument, the Standard Rules represent a strong moral and political commitment by States to take action to attain equalization of opportunities for persons with disabilities. The rules serve as an instrument for policy-making and as a basis for technical and

forms of Discrimination Against Women allowing individuals to petition the committee (reflecting the U.K.'s position in relation to the other main U.N. Conventions): see <http://www.dca.gov.uk/hract/ngo/reviews/appendix5.pdf>. The Foreign Secretary signed the Optional Protocol in December 2004 and a three-month ratification period followed. As to the State, the U.K. has submitted its fifth periodic report in 2003, United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): 5th Periodic Report of the United Kingdom of Great Britain and Northern Ireland (June 2003), Available at http://www.womenandequalityunit.gov.uk/eu_int/CEDAW5.doc.

³⁰¹ See for, example, the Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras.278-318. (Concluding Observations/Comments).

³⁰² Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras.278-318. (Concluding Observations/Comments).

³⁰³ Adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993.

economic cooperation.³⁰⁴ They include, for example, the requirement that “States should take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution”; that “States should ensure that responsible authorities distribute up-to-date information on available programmes and services to persons with disabilities, their families, professionals in the field and the general public. Information to persons with disabilities should be presented in accessible form”; that States should ensure that public education programmes reflect in all their aspects the principle of full participation and equality; and that “States should invite persons with disabilities and their families and organizations to participate in public education programmes concerning disability matters.”³⁰⁵

167. Further, the most recent equality Convention agreed by the UN³⁰⁶ General Assembly addresses disability.³⁰⁷ The Convention on the Rights of Persons with Disabilities and Optional Protocol entered into force on 3 May 2008. The purpose of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”³⁰⁸ The general principles underpinning the convention are described as “respect for inherent dignity, individual autonomy including the freedom to make ones own choices, and independence of persons” and the “full and effective participation and inclusion in society” and “respect for difference and acceptance of disability as part of human

³⁰⁴ <http://www.un.org/esa/socdev/enable/dissre00.htm>.

³⁰⁵ Rule 1.

³⁰⁶ After many years of negotiation by an Ad-hoc committee. For the resolution establishing an Ad Hoc Committee to consider proposals for a ‘comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination’, see 56/168. Resolution adopted by the General Assembly [on the report of the Third Committee (A/56/583/Add.2)].

³⁰⁷ *The text was agreed on 27 August 2006 and the draft Convention is expected to come before the UN General Assembly for final adoption later in 2006. The Convention will then be open for signing and ratification by all UN member countries, with 20 ratifications needed for it to enter into force.. See ‘Draft Convention on the rights of persons with disabilities and the Draft Optional Protocol to the International Convention on the Rights of Persons with Disabilities to be adopted simultaneously with the Convention’, see <http://www.un.org/esa/socdev/enable/index.html>.*

³⁰⁸ Article 1.

diversity and humanity.”³⁰⁹ The Convention requires State parties to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” and to “take all appropriate steps to ensure that reasonable accommodation is provided”.³¹⁰ The Convention addresses women and children with disabilities in particular.³¹¹ It guarantees the rights life.³¹² The Convention promotes autonomy through its provisions.³¹³ It requires, *inter alia*, States to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures.....include the identification and elimination of obstacles and barriers to accessibility.”³¹⁴

(vi) CRC

168. Other relevant Treaties (containing equality guarantees) include the Convention on the Rights of the Child (CRC). The CRC was adopted by the United Nations General Assembly in 1989 and the Convention came into force a year later in 1990. The U.K. is a State Party.³¹⁵ Under the Convention a broad range of children’s rights are recognised including the right to life³¹⁶; the right to education³¹⁷; the right to protection from economic exploitation³¹⁸; the right to survival and protection and the right to be free from torture or other cruel, inhuman or degrading treatment or punishment.³¹⁹ Further, Article 2(1) provides that States Parties have a duty to respect and ensure the rights in the Convention to each child

³⁰⁹ Article 3

³¹⁰ Article 5.

³¹¹ Article 6 and 7.

³¹² Article 10.

³¹³ See, for example, ‘living independently and being included in the community’ (Article 19).

³¹⁴ Article 9.

³¹⁵ Having ratified it on 16 December 1991.

³¹⁶ Article 6.

³¹⁷ Article 28.

³¹⁸ Article 32.

³¹⁹ Article 37.

within their jurisdiction “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. In addition, Article 2(2) provides that States Parties shall take all appropriate measures to ensure that children are protected “against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”. Article 14 provides that “States Parties shall respect the right of the child to freedom of thought, conscience and religion”³²⁰ and “respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child”. Article 30 provides protection for members of minority groups by requiring that “in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language”.³²¹ BME children, may, of course, experience very specific forms of discrimination.³²²

169. The Convention establishes the “Committee on the Rights of the Child”³²³ which monitors the implementation of the Convention. The Convention puts in place a reporting system typical of the U.N.

³²⁰ Typically, the freedom ‘to manifest one’s religion or beliefs may be subject ... to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others’ (Article 14(3)).

³²¹ Guidance about the meaning of these terms can be found in the discussion on Article 27 of the ICCPR, above.

³²² *R (on the application of ‘AC’, A Minor, by his litigation friend) v Secretary of State for Justice, and others intervening* [2008] EWCA Civ 882 (Judicial review resulting in the quashing of the Secure Training Centre (Amendment) Rules 2007 - held that it was wrong that the Race Equality Impact Assessment which should have been produced to inform the government before it made the decision to introduce the 2007 Rules was only produced to validate the decision that had already been taken).

³²³ Article 43.

monitoring bodies.³²⁴ Under that system States Parties submit reports in which they detail the measures they have taken to comply with their Convention obligations. As to the U.K. the Committee have expressed concern about the position of children belonging to certain minority groups. In particular, it has recently expressed the view that “the principle of non-discrimination is not fully implemented for all children in all parts of the State party and that there is unequal enjoyment of economic, social, cultural, civil and political rights, in particular for children with disabilities, children from poor families, Irish and Roma travellers’ children, asylum-seeker and refugee children, children belonging to minority groups, children in care, detained children and children aged between 16 and 18 years old”.³²⁵ The Committee has made a number of recommendations regarding the U.K., including that it monitor the situation of such children; develop comprehensive strategies containing specific and well-targeted actions aimed at eliminating all forms of discrimination and amend nationality law to allow transmission of nationality through unmarried as well as married fathers.

(d) Cross Strand Issues

170. As has already been referred to above, many issues which affect the BME community will be “cross strand” issues. The BME community is not an homogenous community – it has older and younger people in it; women and men; people of different racial groups and people of different sexual orientation, amongst others. The experiences and needs of younger BME people will be different in some respects to those of older BME people. “Intersectional” or “multiple” forms of discrimination (the unique experience of disadvantage which may arise because of the intersection of certain characteristics – for example, race and sex – or because the cumulative or additional effect of certain characteristic - for example, race and sex) and these phenomena are now well known.

³²⁴ Article 44.

³²⁵ Concluding observations: United Kingdom of Great Britain and Northern Ireland: CRC/C/15/Add.188, 9 October 2002.

171. In the U.K. for example, Pakistani and Bangladeshi women are at very high risk of disadvantage in the work place experiencing a more significant pay gap³²⁶ than other women and higher levels of unemployment, placing them in a different position to other women. This is attributable at least in the main to discrimination in the labour market experienced differently by Pakistani and Bangladeshi women as compared to other women and as compared to Pakistani and Bangladeshi men.³²⁷ And it is not explained, as is sometimes suggested by the fact that such women are new to the UK labour market. Far from it, the employment penalty associated with being a Pakistani or Bangladeshi women has been persistent, documented for over 30 years, and not mitigated by being born and brought up in the U.K.. As has been observed: “Alarming, there is little sign that employment penalties are reduced in the second generation”.³²⁸
172. Further, recent research confirms that Black boys— that is, Black African/Caribbean boys - continue to suffer educational disadvantage and discrimination, not experienced by Black girls and other ethnic groups.³²⁹ The attainment of both black and Pakistani boys lags behind the average. African Caribbean boys fall further behind the average each year they spend at school.³³⁰
173. Black men too experience racism at the hands of the police and other State agencies in certain Member States, including the U.K.³³¹
174. Numerous studies have also highlighted the link between domestic violence (and therefore gender) and mental health issues.³³²

³²⁶ “Fairness and Freedom: The Final Report of the Equalities Review” (2007), 66, 68-9.

³²⁷ “Ethnic Minorities and the Labour Market: Final Report”, Cabinet Office, March 2003.

³²⁸ *Ibid.*

³²⁹ “Fairness and Freedom: The Final Report of the Equalities Review” (2007).

³³⁰ <http://www.cre.gov.uk/Default.aspx?LocID-0hgnew042.RefLocID-0hg00900c002.htm>.

³³¹ “The Racial Justice Gap: Race and the Prison Population” (2004) Briefing Smart Justice.

³³² Domestic violence is the most prevalent cause of depression or other mental health difficulties in women. See, for example: Humphreys, Cathy (2003) *Mental Health and Domestic Violence: A Research Overview*. Paper presented at the ‘Making Research Count’ seminar on domestic violence and mental health, Coventry 2003. Between 35% and 73% of

175. The “Base-line Study”, forming part of the backdrop to this Paper, identifies certain of those issues, for example mental ill health and its impact disproportionately (and differently) on certain parts of the BME community.
176. The legislative schemes described above, however, address race, gender, disability, age etc discretely (though will to a large extent change when the Single Equality Act is enacted). Nevertheless to give proper effect to their provisions and to the Equality Duties, the needs of all parts of the community must be had regard to. A public authority which meets the needs, through its services, of young BME men but not BME women of domestic violence, for example, may fall foul of the SDA and the Gender Equality Duties.
177. Further, other legal instruments which bind the U.K. recognise multiple and intersectional forms of discrimination, as described above.
178. The Equality Directives (paragraph 114 above) recognise that different grounds may intersect in a way which causes very specific disadvantage or intersectional discrimination. Accordingly, Recital 14 of the Race Directive provides that:

abused women experience depression or anxiety disorders, at least three times higher than the general population. See, for example, Bowstead, Janet (2000) *Mental health and domestic violence: Audit 1999* (Greenwich Multi-agency Domestic Violence Forum Mental Health Working Group); ReSisters (2002) *Women speak out* (Leeds: ReSisters); Department of Health (2003) *op.cit.*. Abused women are five times more likely to attempt suicide; one third of all female suicide attempts can be attributed to current or past experience of domestic violence. Stark and Flitcraft (1996) *Women at risk: Domestic Violence and Women's Health* (London: Sage); Mullender, Audrey (1996) *Rethinking domestic violence: The Social Work and Probation response* (London: Routledge). Black and minority ethnic women are more likely to self-harm or attempt suicide as a result of domestic violence: 50% of women of Asian origin who have attempted suicide or self harm are domestic violence survivors. Chantler, K, et al. (2001) *Attempted suicide and self-harm: South Asian women* (Manchester: Women's Studies Research Centre, Manchester Metropolitan University); Newham Asian Women's Project: (1998) *Young Asian Women and Self-harm: A mental health needs assessment of young Asian women in East London* (London: Newham Inner City Multifund and NAWP)].

“In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”

179. Moreover it is clear that the purpose of the Framework Directive (2000/78/EC) as set out in Article 1 contemplates that all forms of discrimination on the protected grounds must be protected

“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

Particularly when Article 2(1) is read with it:

“For the purpose of this Directive the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”

180. The United Nations supervisory bodies do recognise intersectional discrimination so that, for example, CEDAW acknowledges that women are a disadvantaged group and that their vulnerability to discrimination is increased when they belong to a racial or ethnic minority group.³³³

Importantly, the Committee has expressed concern at the disadvantaged situation of women belonging to ethnic minorities, particularly in the context of unemployment, lower levels of education and training, lower wages and salaries and fewer benefits as compared to white women. It has recommended that steps be taken to ensure the elimination of direct and indirect discrimination against ethnic minority women, including through positive action in recruitment, awareness campaigns and

³³³ See for, example, the Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras.278-318. (Concluding Observations/Comments).

targeted training, education, employment and health-care strategies. It has also expressed concern about the “high number of ethnic minority women in prison and the fact that many women have been imprisoned for drug-related offences or because of the criminalisation of minor infringements, which in some instances seem indicative of women's poverty”.³³⁴

181. The European and International context therefore recognises the phenomena seen domestically of compound disadvantage association with multiple characteristics and requires that it be addressed. Domestically, our own anti-discrimination schemes will require that those forms of discrimination are addressed, amongst other things, to ensure that the Equality Duties are complied with.

(e) Future Legal Developments

182. The Government has published its proposals for reform of the anti discrimination legislation through a Single Equality Act. The context for these proposals derives from the Discrimination Law Review (DLR) which was established in light of the Government's manifesto commitment to a Single Equality Act³³⁵ to “assess how our anti-discrimination legislation can be modernised to fit the needs of Britain in the 21st Century. This work will consider the approaches that are effective in eradicating remaining discrimination but avoid imposing unnecessary, bureaucratic burdens on business and public services”.³³⁶

183. The Green Paper following the Discrimination Law Review was published in June 2007: “*Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*”. Following consultation, on 26 June 2008, the proposals for the Bill itself were

³³⁴ Concluding Comments of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland. 01/07/99. A/54/38, paras.278-318. (Concluding Observations/Comments).

³³⁵ See Joint DTI and Cabinet Office Release at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&NavigateFromDepartment=False>.

³³⁶ *Ibid.*

contained in the White Paper, “Framework for a Fairer Future – The Equality Bill” (Cm 7431).

184. The White Paper sets out, amongst other things, the proposals for a new statutory equality duty – a single duty – as follows:

“The Equality Bill will contain a new streamlined Equality Duty to replace the race, disability and gender equality duties, which will also cover gender reassignment, age, sexual orientation and religion or belief.

What this means in practice is that the duty will require public bodies to consider how their policies, programmes and services affect different disadvantaged groups in the community. We will be discussing with relevant organisations how the new duty will work in practice, especially in relation to religion or belief.

The new Equality Duty will be more effective than the existing three separate duties because there will be one streamlined process instead of three different ones. It will help public authorities to focus their efforts on outcomes, rather than on producing plans and documents. We will be consulting on what processes will be required of public bodies through secondary legislation and which public bodies will be subject to the requirements. A number of public bodies have already implemented single equality schemes.

We will work with a range of public bodies and build on the good practice which already exists to ensure that the design of the new Equality Duty can be used flexibly and effectively by all the different kinds of public bodies, in proportion to their size, their resources and the challenges they face, to make a positive difference to people’s lives without being too bureaucratic.”

185. Further, the Government has since published its response to the Consultation process (“The Equality Bill – Government response to the Consultation” (cm 7454) (July 2008), containing further details about its proposals confirming that it intends to introduce a (general) duty across strands and on all public authorities.

186. These changes are imminent and will have the effect that the equality considerations to which a public authority will have to have regard, including central and local Government, will extend beyond race, gender and disability to sexual orientation, religion and belief and age. The age duties will not cover children (as mentioned above, paragraph 128) but are likely to prove important in any event.

187. As to EU law, the Commission has published its proposals for a single Directive addressing equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)426 final). It anticipates building on the existing Article 13 Directives (the Race and Gender Directives 2000/43/EC and 2004/113/EC respectively). It will therefore address discrimination outside the fields of employment and occupation. Its scope will match that of the Race Directive and therefore cover both the public and private sector in: social protection, including social security and health care; social advantages; education; access to and supply of goods and services which are available to the public, including housing. Member States will have two years to implement the Directive once enacted. The Directive will require significant legislative change both to the scope of our anti-discrimination legislation and the concepts used within it – though it is anticipated that many of the lacunae will be addressed by the Single Equality Act. It is likely that, as with the other Equality Directives, that it will recognise intersectional and multiple forms of discrimination. It is clear that it will address positive action across all the strands, thus it will provide that:

“This provision is common to all Article 13 directives. It is clear that in many cases, formal equality does not lead to equality in practice. It may be necessary to put in place specific measures to prevent and correct situations of inequality. The Member States have different traditions and practices regarding positive action, and this article lets Member States provide for positive action but does not make this an obligation.”³³⁷

³³⁷ Proposed Article 5.

D. Best Practice

188. There is a vast amount of material addressing best practice in the field of equality. There is much statutory and non-statutory guidance issued by the CRE, EOC and DRC. Some of this has been addressed above, as it arises.
189. In addition, the Equality Standard (2007), referred to above (paragraph 51) “is a tool to combat the institutional processes that lead to discrimination as part of the culture, administration and governance that can be found in many public organisations.”³³⁸ As the Standard acknowledges, “Prevailing assumptions and practices can set up barriers that prevent fair access to services and equal employment opportunities, which in turn can discriminate against people on the grounds of age, disability, gender, race, religion or belief and sexual orientation. Working with the Equality Standard will enable local authorities to mainstream equality, which will ensure that discriminatory barriers are identified and removed.”³³⁹ The Standard has been extended to address six equality strands: age, disability, gender, race, religion/belief and sexual orientation and the “Standard works alongside these public sector duties to promote excellence in the management of equality outcomes.”³⁴⁰
190. The Standard acknowledges that an overall approach to addressing inequality can help address intersectional forms of discrimination – “individuals do not fit into one neat box, but instead may be affected by more than one aspect of discrimination”³⁴¹ – and that generic services may not always be appropriate: “Taking a generic approach should not, however, lead to the view that all the equality strands can be dealt with as a single issue – the specific barriers will vary and each strand requires separate consideration.”³⁴² The Standard complements the statutory

³³⁸ 4.
³³⁹ 4.
³⁴⁰ 1.
³⁴¹ 4.
³⁴² 4.

Equality Duties and does not detract from the duty to comply with them.³⁴³ The Standard is intended to:

- “· Provide a systematic framework for mainstreaming equality leading to the continuous improvement of outcomes
- Help local authorities to meet their obligations under the law · Develop and integrate equality policies and objectives that can be driven through performance management
- Encourage engagement with stakeholders inviting challenge and involvement in all management and decision making processes associated with service improvement and accessibility
- Encourage the development of anti-discrimination practice and community outcomes appropriate to local circumstances
- Provide a basis for tackling all forms of institutionalised discrimination
- Provide a timetable for integrating sexual orientation, age, religion and belief.”

191. As the standard makes clear: “Successful implementation ...will depend on a partnership between the council and the community and should involve:.....**Community/** to provide external accountability; **Voluntary Sector** to work with and inform the equality planning process to participate in service design, delivery and scrutiny.” As the Standard explains and directs: “Working with community groups in the design and delivery of services will require much more than a consultation exercise; there should be positive engagement.” The Standard therefore now requires authorities to develop a participation strategy, which; “describes the ways in which it will invite local groups to work with the authority; defines the criteria for selecting those groups; describes the resources that will be allocated to capacity building within the groups; produces a set of objectives and terms of reference for the group; describes the mechanisms for reporting the group’s activities and contribution to council policy and practice [and] describes the feedback that the group

³⁴³ 4.

will receive from the authority”.³⁴⁴ Engaging with, supporting and capacity building in the voluntary (including the BME voluntary) sector is therefore crucial for compliance with the Standard.

192. The Standard indicates that “policies to support social inclusion and community cohesion should complement equality and diversity objectives. The objectives of these policies usually coincide but action on social inclusion and community cohesion should be subject to equality impact assessment and should be continuously monitored for impact once implemented”.³⁴⁵ This makes it clear that social cohesion policies will not always meet all needs appropriately and they will need to be monitored accordingly. “Social inclusion and community cohesion” is addressed further below.

193. The Standard sets out rigorous guidance for the impact assessment of policies and the steps that need to be taken to achieve each level in the Standard.

194. Further, some guidance has emerged in consequence of the Report of the Commission on Integration and Cohesion, “Our Shared Future” (2007).³⁴⁶ The Report recorded the findings of the Cattle Report that: “[P]eople from different groups were not mixing and were leading “parallel lives”. The report made recommendations on subjects such as local community cohesion planning, cross-cultural contact, citizenship, work with young people and ‘myth busting’.”³⁴⁷ The Report makes clear that promoting community cohesion: “is about addressing multiple issues at the same time – taking action on a single issue will only make a small difference, so there needs to be both mainstreaming work and targeted policy interventions. If cohesion is going to improve, local actions need to be taken to improve individuals’ personal circumstances, to change

³⁴⁴ 16.

³⁴⁵ 18.

³⁴⁶ http://www.integrationandcohesion.org.uk/Our_final_report.aspx. And indeed from earlier reports, including the Cattle Report – Community Cohesion: A Report of the Independent Review Team.

³⁴⁷ Para 1.5.

individuals' perceptions and to address area wide issues. Taken together, this means no simple statements can be made about integration and cohesion."³⁴⁸

195. Despite some suggestions made otherwise from time to time, the Report did not advocate generic services in all cases as part of "bridge building" between communities. It recognises the need to ensure that equality is promoted and that services will be required, depending upon the issue to be addressed.

196. The Department for Communities and Local Government's "*Cohesion Guidance for Funders, Consultation*" (2008) sets out the Government's proposed Guidance (subject to consultation) for funding activities, so as to promote cohesion between communities. As the foreword states:

"This consultation document is an important part of the response to the Commission. It follows the recommendations the Commission made about what it termed "single group funding" – and the idea that funders should not automatically award grants to third sector activities organised on the basis of single identities, but should consider how their funding can be used to provide opportunities for interaction. I am aware of concerns raised about this recommendation, particularly from third sector organisations worried about funding for the specific and targeted projects they run for marginalised groups. This document therefore seeks to set out how we believe funders can help deliver cohesion. We now have strong evidence for how meaningful interaction between people of different backgrounds can directly build cohesion. And that means that now is the time for all funders to consider this question when awarding grants and look for opportunities to maximise such interaction. And to ensure that when funding a single issue or single identity activity, the clear business case for it is communicated effectively to other communities not benefiting from it. The outcome should not be the loss of services targeting particular communities. This guidance does not aim

³⁴⁸ Para 2.15.

to cancel projects working specifically with young black men to tackle gun crime, for example. Nor does it preclude work with Muslim communities to prevent violent extremism, or work supporting victims of hate crime, or services specifically targeting women. These projects can and should continue, and the good work of the third sector in approaching alienated and excluded parts of our communities should be recognised. But we need to make the best use of funding, so we can deliver both equality of opportunity and cohesion."

197. As is clear, again, it is not anticipated that single strand, specific, services will not be appropriate or should not be funded. It is merely said that there must be a business case for them and, where appropriate, they should be used to promote cohesion. Thus, the "consultation is about guidance on both the funding of mainstream activities and the funding of activities which are targeted towards particular groups within society. Both of these provide opportunities to promote cohesion, where they provide people with opportunities to make links with other people from different backgrounds."³⁴⁹

198. Some services, as the consultation paper acknowledges, will simply not be relevant to community cohesion at all, including some single strand services:

"This guidance will have a bearing on work with any grouping which may be relevant to cohesion (dependant on the local context, as in different settings different factors may be relevant). However it should not be taken to place any barriers in the way of support for particular groups where cohesion is not a relevant issue: for example, single group work with victims of domestic violence would not be an area where there should be an expectation of or preference for bridging activities."³⁵⁰

199. Conversely single groups, may promote community cohesion where "[a]pparently 'single' groups may actually encompass people from, for

³⁴⁹ Para 7.

³⁵⁰ 11.

example, a wide range of ethnic or cultural backgrounds".³⁵¹ Further, promoting "integration and cohesion", as the Report makes clear, may, in some instances, require specific or targeted services to specific racial groups. As set out at page 11:

"The complexity of influences on cohesion means that improving cohesion is about addressing multiple issues at the same time, as taking action on a single issue will only make a small difference. Integration and cohesion therefore needs to be about both mainstreaming (for instance ensuring that physical regeneration schemes take account of the need to build social integration and cohesion) and targeted interventions (for instance, conflict resolution work with young men from different backgrounds)."

200. There is, then, no conflict between the desire to promote community cohesion and/or integration and the requirements of section 71(1) RRA (and the other statutory Equality Duties) and the facility for race specific services under section 35 RRA (and the other positive action provisions under the other anti-discrimination enactments).

E. The Compact Code and its Compliance with the Law

201. The Compact Code contains broad aspirational commitments comprised largely of generalities. It is so loosely drafted that it cannot be said that it is inconsistent with or contravenes the law.

202. However, in my judgment, the Code does not give sufficient weight to the *duties* upon local and central Government under equality law.

203. As has been set out above in detail,

- Public authorities, including central and local Government, are presently prohibited by law from discriminating against groups

³⁵¹ Para 12.

defined by reference to race, gender, disability status, sexual orientation and religion and belief (to this list will be added age, when the Single Equality Act is enacted);

- The prohibition against discrimination extends to direct discrimination (less favourable treatment connected to the protected grounds just mentioned) but also to indirect discrimination³⁵² (the same treatment – for example, the provision of generic services or funding criteria) which disadvantage certain racial groups;
- The RRA (and the other anti-discrimination enactments) contains provisions allowing positive action and, in particular, race specific services (which might be provided specifically to BME communities by BME groups);
- The U.K.'s international obligations permit and may require positive action to be taken in certain circumstances to ameliorate disadvantage experienced by particular BME groups;
- BME groups are not one dimensional, homogenous groups and the experience of multiple and intersectional forms of discrimination will require to be addressed compliance with equality law is to be fully achieved;
- Public authorities, including central and local Government, are under statutory duties to have proportionate (*due*) regard to the need to achieve certain equality objectives, including the need to eliminate unlawful racial discrimination; and to promote equality of opportunity and good relations between persons of different racial groups;
- Engaging with, supporting, and capacity building in the BME voluntary and community sector may help promote the achievement of the equality duties by central and local Government;
- The duty to have proportionate (*due*) regard to the need to achieve certain equality objectives applies to grant funding and

³⁵² Amongst other forms of discrimination.

public procurement more generally and therefore informs the decisions made by central and local Government regarding the funding of voluntary and community groups, including BME voluntary and community groups;

- Public authorities, including central and local Government, are under statutory duties to undertake equality impact assessments on their existing and proposed policies (before the adoption of any proposed policy) to discern their impact on different racial groups and thereafter to have proportionate regard to the need to achieve the negative (elimination of discrimination) *and* positive (promotion equality of opportunity and good relations) outcomes specified in the equality duties;
- Public authorities, including central and local Government, are under statutory duties to have proportionate (*due*) regard to the need to achieve certain gender and disability equality objectives. These duties will be joined by similar duties soon addressing sexual orientation, religion and belief and age;
- The gender and disability equality duties will also need to be complied with in addressing the issues that arise for BME voluntary and community groups, reflecting diversity within the BME communities;
- Public authorities, including central and local Government, are under statutory duties to undertake equality impact assessments on their existing and proposed policies (before the adoption of any proposed policy) to discern their impact on women and men and disabled people to ensure that their equality duties are properly met;
- The provision of targeted services may promote equality and good relations and community cohesion;
- Engaging with, supporting, and capacity building in the BME voluntary and community sector may help secure compliance with the U.K.'s domestic, regional and international human rights obligations.

204. In my judgment, therefore, whilst the existing Code is not on its face inconsistent with domestic, regional and international equality law;

- It fails to give appropriate emphasis to the prohibition on (direct and indirect) discrimination by public authorities;
- It fails to give appropriate emphasis to the duties on Government (central and local) to have “due regard” to the equality objectives set out in the statutory equality duties under the Race Relations Act 1976; the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995;
- It will fail to give appropriate emphasis to the duties on Government (central and local) to have appropriate regard to the equality objectives which will be included in the Single Equality Act, when enacted, relating to sexual orientation, religion and belief and age;
- It fails to give appropriate emphasis to the duties on Government (central and local) to undertake equality impact assessments on existing and proposed policies, including those relating to grant funding and procurement;
- It fails to address intersectional/multiple forms of discrimination;
- It fails to give appropriate emphasis to the opportunities that exist in equality law to create and deliver community (BME) specific services;
- It fails to give appropriate emphasis to the requirement that sometimes arises in equality law to create and deliver community (BME) specific services;
- It fails to give appropriate emphasis to the recognition that BME targeted services may promote equality and good relations and community cohesion;
- It fails to give appropriate emphasis to the fact that voluntary and community (BME) services might themselves help the achievement of Government’s (the U.K.’s) obligations in regional and international human rights law.

F. Options and Recommendations

205. The Code as it is currently framed has proved to be helpful in promoting the BME voluntary and community sector.³⁵³ However, it is in real danger of becoming irrelevant because of the weaknesses within it, and in particular the far from robust way in which it addresses Government's promise to the BME voluntary and community sector, through the undertakings recorded in it. I have set above (paragraph 204) the inadequacies in the present Code.

206. In view of those inadequacies, thought should be had to strengthening the Code so as to ensure that it properly reflects the legal obligations on those operating in this sector (most particularly, central and local Government). I set out below, proposals for the same. These proposals must, of course, be consulted upon to ensure that they meet the needs and aspirations of the parties to the Compact. However, they are designed to ensure that the Code is more robust and more appropriately reflects the obligations on central and local Government in relation to BME communities and the BME voluntary and community sector.

G. Annex (re - draft of sections of the Code).

207. The suggested re – draft of sections of the Compact BME Code is attached. This takes account of the matters addressed above.

KARON MONAGHAN QC

³⁵³ It was expressly referred to in the case of *R (on the application of Kaur and Shah) v London Borough of Ealing* Case No. CO/3880/2008.