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Executive Director

Memorandum submitted by The Equal Rights Trust to the Public Bill Committee for the Equality Bill 2009

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Introduction

1. The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and a think tank, it focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. ERT is the only international human rights organisation which is entirely focused on the right to equality as such.
2. ERT welcomes the publication of the Equality Bill and the unified approach to equality it seeks to secure. We believe that the Bill is a necessary step to combating discrimination and reducing inequality in Great Britain. We particularly welcome it as an attempt to address inconsistencies between different pieces of existing anti-discrimination legislation.
3. In order to identify gaps and inconsistencies in the Bill and address some of its shortcomings ERT has benefitted from *Declaration of Principles on Equality* which was adopted and signed by 128 global human rights and equality experts, including many prominent experts from the United Kingdom. We should stress that the points raised in this memorandum concern what we see as the most significant issues with the Bill, not the only issues where we would seek improvements. The *Declaration of Principles on Equality* represents the vanguard of expert thinking on the right to equality, and as such we recognise the limited scope for its full application in this particular Bill.
4. ERT's concerns are:
 - i. People who are discriminated against because of characteristics other than those listed under clause 4 will not be protected by the Bill.
 - ii. People who face discrimination because of more than one characteristic will not be protected from direct or indirect discrimination or harassment through clauses 13 - 25.
 - iii. Positive action, which is necessary to address past structural and institutional inequalities, is *permitted* and not *required* by clauses 152 and 153.

Clause 4 (The Protected Characteristics)

5. ERT believes that the closed list of characteristics covered under clause 4 of the Bill does not address the severity of discrimination across Great Britain today. While we recognise that the Bill is intended to consolidate a number of scattered pieces of legislation it must also be an opportunity for modernisation. The present text of the Bill misses an important opportunity to expand the protection from discrimination to characteristics outside those listed in clause 4. The challenge of legislative drafting and approval may have created a reluctance to modernise the scope of anti-discrimination law to protect other characteristics from discrimination or incorporate an open list of protected characteristics of discrimination into the Bill. With a view to achieving a solution to this challenge ERT suggests the insertion of an additional paragraph to clause 4 based on Principle 5 of the *Declaration of Principles on Equality*¹ and the approach adopted by the South African legal system². The additional paragraph should state:

“Discrimination based on any other characteristic must be prohibited where such discrimination:

- (i) causes or perpetuates systemic disadvantage;*
- (ii) undermines human dignity; or*
- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited characteristic stated above.”*

6. Lessons learnt from reaching agreement on the text of the *Declaration of Principles on Equality* indicate that this compromise approach offers four significant benefits. First, it creates space for other characteristics which are not currently protected under clause 4, such as statelessness, fertility or genetic status, to be protected if future evidence produces a strong case that this is necessary. Second, the additional paragraph creates a very strict legal test that must be satisfied before a court or tribunal on a case by case basis. Third, this compromise approach will add clarity to the law by reducing the need for claimants to argue that the characteristic because of which they were discriminated falls within one of the listed characteristics in clause 4. For example, it would reduce the need for those suffering discrimination due to HIV status to argue their claim within the context of disability. Finally, this approach has the added benefit of minimising the need for future legislation to respond to discrimination on emerging characteristics which may become a social concern in Great Britain. In addition to this, under the Human Rights Act 1998, which entrenches the European Convention on Human Rights into British law, the prohibition of discrimination extends beyond the characteristics listed in clause 4 to include language and property status.

¹ Available at:

<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

² Article 1 (xxii) (b) of the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

Multiple Discrimination

7. ERT is concerned that multiple discrimination is not protected within Part 2, Chapter 2 clauses 13 – 25 of the Bill as it stands. As we set out in paragraph 5 above one goal of the Equality Bill must be modernisation. Therefore, to ensure that the Equality Bill is a modern comprehensive law clauses 13 – 25 must prohibit discrimination which is based on more than one protected characteristic. The developments currently taking place within the European Union suggest that multiple discrimination obligations will be placed on member states through the adoption of proposals for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.³ ERT believes that in order to put in place robust and modern law to combat discrimination and promote equality it is necessary to protect against multiple discrimination throughout clauses 13 - 25.
8. We recognise that the Government Equalities Office has opened a consultation to assess the impact of a multiple discrimination provision, however, we believe the proposal to extend multiple discrimination to direct discrimination only is too limited and ultimately counterproductive to the goal of creating consistency in this area of law. Enabling multiple discrimination claims to be made in relation to direct discrimination only will diminish the effectiveness of the legal protection which clauses 13 – 25 seek to secure. The need to tackle multiple discrimination beyond direct discrimination has been identified as a genuine concern by the European Commission:

“Some NGO respondents voiced their concern about children who are directly or indirectly subject to Multiple Discrimination. The discrimination that children are subject to because they are young is compounded by additional factors such as refugee or ethnic minority status, a disability and/or sexual minority orientation, etc. One of the respondents mentioned a study on ethnic discrimination of children with disabilities in the UK showing that information about disabled children in these groups is scarce and this may lead to these children “falling between two stools”.”⁴

9. The importance of extending multiple discrimination protection to forms other than direct discrimination has also been well documented by other policy experts.⁵ Uccellari, writing on the issue of indirect discrimination, states:

“If an employer requires that all staff work full time, women who statistically are more likely to have childcare responsibilities, will be less likely than men to be able to comply with this requirement. It is, however, also statistically true that black women

³ See, Report on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS).

⁴ European Commission. “Tackling Multiple Discrimination – Practices, policies and laws”, September 2007, p.37.

⁵ See, for example, Principle 5 and Principle 12 of the Declaration of Principles on Equality. Principle 12 states, “Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground. Particular positive action measures, as defined in Principle 3 [Positive Action], may be required to overcome past disadvantage related to the combination of two or more prohibited grounds.”

are more likely than white women to work full time. If protected groups are only defined according to single characteristics, in determining whether the requirement to work full time is indirectly discriminatory against women as a group, it will be necessary to access the number of men that can comply with the requirement to work full time and to compare this with the number of women that are able to do so. The inclusion of black women within the class of women will serve to weaken the statistical data in support of a white women's case.”⁶

10. ERT believes that a failure to prohibit multiple discrimination across clauses 13 - 25 will be a missed opportunity that will be seriously detrimental to the efficient and clear operation of anti-discrimination law in Great Britain. The text of the Equality Bill within clauses 13 - 25 should explicitly state that 'laws and policies must provide effective protection from multiple discrimination, that is, discrimination on more than one characteristic.'⁷

Positive Action (Clauses 152- 153)

11. The inclusion of clauses permitting positive action is a notable step within the Equality Bill. Clause 152 (2) and clause 153 (3) set out that the Act and Part 5 (of the Act), respectively, *does not prohibit* a person from taking proportionate positive action measures. ERT is concerned that this provision is inconsistent with the United Kingdom's obligations under international human rights law.⁸ We believe that in order to satisfy the United Kingdom's international human rights law obligations measures relating to positive action should be *required* not permitted by clauses 152 and 153 of the Equality Bill.

⁶ Uccellari, P. "Multiple Discrimination: How Law Can reflect Reality", *The Equal Rights Review*, Volume One, 2008, p. 33. See also Monaghan, K. *Equality Law*, Oxford University Press, 2007, paragraph 5.03.

⁷ See Principle 12 (Obligations Regarding Multiple Discrimination) of the *Declaration of Principles on Equality*.

⁸ The UN Human Rights Committee, which is the treaty body with the mandate to interpret the International Covenant on Civil and Political Rights, has stated that compliance with the equality obligations under the Covenant sometimes *requires* positive action. See UN Human Rights Committee, General Comment No. 18, Non-discrimination, 10 November 1989, paragraph 10 and UN Human Rights Committee, General Comment No. 28, Equality of Rights between Men and Women (Article 3), 29 March 2000, paragraph 3.