ERT: The proposed reform agenda for anti-discrimination law has been on the table since around 2000. What do you think have been the main drivers for this agenda?

John Wadham: We have had anti-discrimination legislation for a long time in this country; you can trace it back to even before 1965. But certainly since 1965 it has been very patchy, it doesn’t cover all of the issues that I think most people now feel need to be covered. It was never integrated with human rights and it’s obviously necessary to ensure that we have strong robust equality legislation that people understand. One of the concerns that we have is whether the Green Paper [the Discrimination Law Review] is going to be adequate or not. Is it just going to be bolted together? Why is it necessary to have an Equality and Human Rights Commission? Because for precisely the same reasons we need single equality legislation, there needs to be a single place where people can go to, there needs to be a single body promoting Human Rights and Equality and it is important we are able to ensure that those people who need our help are given it. Lastly of course that the agenda for promoting equality, for opposing discrimination and for promoting human rights are in one place.

Barbara Cohen: The European directives! If the UK was not required to enact legislation on grounds that were not already covered, for example, sexual orientation, religion or age, I doubt there would have been much discussion about reform of anti-discrimination law. There have been meetings since 2002 about how the UK was going to accommodate the requirements of the new Directives. Unfortunately, the government chose to do it through Regulations, under the European Communities Act 1972 rather than by introducing primary legislation, and the result is what I would describe as a legal mess. By using the

The Equal Rights Trust interviewed Barbara Cohen, independent discrimination law consultant and John Wadham, Group Legal Director at the Equality and Human Rights Commission.
ERT: There has been a lot of debate surrounding both the merging of existing public duties and their process or outcome focus. In respect to the latter, do you believe that the positive duties should be outcome or process focused? What is the benefit of this approach?

Barbara Cohen: There is no benefit of something that only has a process. But we must recognise that the general equality duties aren’t process focused, they are outcome focused. The problem lies within the specific duties under the Race Relations Act in particular, where there is a duty to prepare a race equality scheme and to state arrangements for certain processes; it is the scheme that is supposed to indicate how an organisation is going to meet both the general duty and the specific duties, but without an obligation to carry out processes in order to do so.

I think a positive example is the equality duties under section 75 of the Northern Ireland Act 1998. The Northern Ireland Equality Commission (ECNI) recently did a review of how well the duties were working. Schedule 9 of the Northern Ireland Act 1998 requires some very particular processes, including equality impact assessments. The review found that in applying these duties nobody was asking for a change, nobody was saying ‘ah this is too process-driven’. Nobody has disputed the fact that you need to do equality impact assessments. And that was the position of public authorities, not just the NGOs and the ECNI.

So it seems to me that if the duty must be only outcome focused, which is what the government seems to be saying in its Green Paper, the question is ‘what outcomes’? Who designs the outcomes, based on what information? Perhaps what you should say is that the equality scheme needs to set some kind of objective or aim. So that the scheme says, ‘this is where the authority is trying to get to’, then the regulations can indicate the kinds of processes an authority is expected to use in order to achieve the outcomes you have set. The
real danger from the government proposals in the Green Paper is that authorities could pick and choose the easiest possible outcomes, and then they could just revert back to old ways of having a multiracial cultural event twice a year, for example, supporting gay pride or Chinese New Year.

Generally people want to be told how! They want to be told that this is what you are expected to do in order to get there and in my experience public authorities find it more burdensome if they aren’t really clear about what they need to do. Ultimately, I think that you should have a combination of the two. If you only had processes it would be a wasted exercise, but I think people who complain it is too process orientated have failed to have regard to the general equality duties which are not!

John Wadham: I think it is obviously important that we can use these to make a difference, - if they’re just process focused and not outcome focused then of course they’re less likely to make a difference. But you need to link the outcome to the process because people working in large public sector organisations need to understand exactly what they need to do to make a difference. I think there is an issue about transparency and fair process, but at the end of the day you need to ensure that the delivery of services is reaching everyone that should receive those services – and currently they’re not.

ERT: Do you believe that the transfer of a public sector positive duty to the private sector would be a successful endeavour?

Barbara Cohen: Not in the same form. From the outset you have to remember that this and previous governments signed up to a number of international treaties with commitments to equality in different kinds of ways, and they have passed legislation which says that they are trying to build equality into our society. Therefore, the government has made the public sector publicly accountable for what it does to achieve equality. However, the private sector is in business for business. They don’t have the same kind of public accountability – while they are accountable to their shareholders, they are never accountable to the public as a whole.

Would the duties as currently enacted under the various laws work for the private sector?

Positive Duty in British Equality Law

Within British law all public sector organisations listed under the respective Schedules of the Race Relations Act, Sex Discrimination Act and Disability Discrimination Act fall under a positive public duty to have ‘due regard’ to their General Duty.

General Duty

A General Duty under British equality law is a statutory obligation of listed public sector organisations to have due regard to the requirements of the respective equality act. For example, section 71(1) of the Race Relations (Amendment) Act 2000 states that, “everybody or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, 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.”

Specific Duties

The Specific Duties set the process by which a public sector organisation is to attain the requirements of the General Duty. This includes the creation of an ‘Equality Scheme’ containing details of how the organisation is going to fulfil its other specific duties, such as impact assessment, consultation, monitoring, staff training and ensuring access to information and services.
But I do think that the State is entitled to say to the private sector, "you are a part of a society that has signed up to non-discrimination and equality, so you have to monitor who you employ and the users of your services." They can do it formally or informally. The point is to make sure they look at their practices to see whether there appears to be some element of discrimination, some disparity wider than should be expected to occur.

If, as a private business, in the services you are providing, or if in the people you are employing there ought to be a particular mix which there isn't, then it is up to you to figure out what has gone wrong and develop proposals for remedying it. In Northern Ireland for religion, political opinion and gender this has to be reported to the ECNI. However, in Great Britain to get all private businesses to report to a single commission would be totally impractical. I think it is worth looking at the new Companies Act 2006 which at the moment requires quoted companies in their business reports to report on work force matters but this could be extended by ministerial order. There is a need for required regulation of the private sector but not the same kind of statutory duties as on the public sector.

John Wadham: Well there are two separate issues. The first is that the public sector has to have clear rules about procurement. It needs to be clear what the procurement rules are and that people can insist that where significant amounts of public money is spent, that public money is going to organisations that have a clear record on the delivery of services and internal processes that respect equality.

The second issue is, should there be an equivalent of the public sector duty across the private sector and the Commission's position is that there should. Whether it should be exactly the same or not is something we have debated, but we do think that there should be at least some process. The reason for that is obviously the very significant numbers of people employed in the private sector. If you ask the private sector organisations who are best in their fields and who are delivering their services and products across the whole of society, you will find that they are already doing something similar in relation to this.

So our proposal will be to take examples from some of the best private sector organisations and to use those in relation to some of the others doing less well. We hope that will improve the processes across the private sector generally.

ERT: It has been argued by some that the hierarchy of protected grounds has hindered the successful application of the right to equality and non-discrimination. One area where this issue has been particularly contentious is in respect to reasonable adjustments. To what extent is it viable to extend the reasonable adjustment concept to all strands and not just disability?

Barbara Cohen: If you look at the Disability Discrimination Act 1995, reasonable adjustments apply in two different ways. They apply in a proactive way – in an anticipatory fashion – to non-employment - access to goods, facilities and services; and then in relation to employment – in a more reactive way – with a duty to make an adjustment for the individual. For the non-employment (anticipatory) reasonable adjustment you have to do some advance thinking; it seems to me that this type of reasonable adjustment involves the same kind of thinking that you would have to do in providing equality of opportunity. Certainly in the public sector I can’t see very much difference between an antici-
patory duty of reasonable adjustment and the duty to promote equality of opportunity within the statutory equality duty.

I think to extend the individual adjustment is potentially problematic, because in an employment situation, where it now applies to disability, if someone has particular needs and the employer has a duty to provide reasonable adjustments to meet those needs of that person, there is no obligation on the employer to change the organisation, they just need to make it possible for that particular person to do that particular job.

There has been some discussion of reasonable adjustments for individual employees of different religious faiths. I suppose my approach is a much more pragmatic one, along the lines of an anticipatory adjustment or a sensible, realistic approach to equality of opportunity.

So, if an employer recognises that they have a work force which has different kinds of faiths and observances and says that in addition to public holidays everyone is entitled to a select number of days off for religious observance, this treats all faiths with respect, avoids individuals needing to ask for special treatment and causes very little disruption to the workplace since religious holidays don’t come out of the blue. Generally they can be predicted within a day or two, even for a lunar based holiday. You could describe this as an anticipatory adjustment. I feel the thinking behind reasonable adjustment is useful but I don’t think that it should be strictly stretched across for all the different grounds.

John Wadham: We have said in our response to the DLR Green Paper that there needs to be a more sensible approach to positive action measures. We would want to have a role in trying to help promote these measures. Equality is not just about treating people exactly the same, needs and circumstances are different. It is quite important that in some circumstances there should be an absolute bar on treating people differently; in other circumstances the legislation should require people to adjust their processes to accommodate difference. So you have to have both elements in any system to promote equality and protect from discrimination.

ERT: The phenomenon of multiple discrimination has recently received attention as an issue in need of targeted action. In the UK some have argued that effective protection from multiple discrimination requires a redefinition of discrimination. Others believe that the exigencies of proof, particularly the use of comparators, needs to be loosened. What approach in your opinion is best for UK law?

Barbara Cohen: I think first of all that one of the most important parts of law is that people understand what their rights are, so that they can feel confident that this is what they are entitled to receive from anyone with whom they have a formal relationship covered by legislation. So I think the new equality legislation should be stated as covering ‘protected grounds’ which would mean race, sex, sexual orientation etc. or ‘any combination of those grounds’. Thus protected grounds from the outset would include a combination; this ensures that direct and indirect discrimination and harassment etc. would apply to a combination of grounds, which is very often people’s real experience.

On the issue of the rigidity of any comparator requirements, one real example described by one of my colleagues at the DLA was a situation of an employer who would not employ a Muslim man because he was perceived to
be a terrorist, whereas they employ Muslim women and they employ lots of men. So the discrimination was at the complete intersection of religion and gender: it wasn’t because he was a Muslim and it wasn’t because he was a man, it was because he was a Muslim man. The issue of the comparator is not the starting point but it is one of the aspects of the evidence that is used to establish discrimination. The government maintains that discrimination on multiple grounds is still a difficult issue; it isn’t difficult at all! Their arguments fall down on the realisation that it would be much easier for an employer to defend one case of multiple discrimination than two cases on separate grounds.

John Wadham: We have said in relation to our response to the DLR that it is not working at the moment and it needs to change. I think a significant amount of the change needs to relate to the process whereby people are able to use the system to demonstrate (if it is the case) that they have been discriminated against on more than one ground. That may require legislative changes but actually it is about the process rather than about strict law, but of course we may need to see some changes in that as well.

ERT: One recognised weakness of the current enforcement of UK anti-discrimination law has been that in respect to goods and services, the County Court system (which hears these cases) is ill-equipped to deal with the demands of equality law. Do you believe that there is a genuine argument for a unified equality tribunal system?

John Wadham: I’m not sure about this and the reason I’m not sure is because it happens to be the case that a significant amount of discrimination is discrimination within the work place. It also happens to be the case that the way in which we deal with disputes in the work place is via a tribunal system where there are no costs, or generally speaking costs are not part of the process.

Now in relation to goods and services the problem is that it’s plugged into the rest of the court system. So I see why some people argue that what you should do is move everything to the tribunal system. But then I’m not sure what you would do if somebody was being threatened with eviction and at the same time they were claiming that this was discriminatory. Because, in such circumstances, the only people who have experience of the housing law and the housing process are the County Courts. So the next question might be, ‘ok, why don’t you change the rules on costs in relation to equality cases’? Well, I think equality is very important but I know that other people think that the right to defend yourself from an eviction is equally important so why are there costs in relation to one and not the other: I don’t think it’s simple at all.

Barbara Cohen: Within the DLA there are some people – particularly with experience of bringing disability cases to the county court – who feel very strongly that the County Court is letting down applicants. As my experience of the County Court has been under the Race Relations Act – where there has always been a requirement to have lay assessors sitting with a judge – I don’t agree that the County Court is ill-equipped to deal with the demands of equality law.

I think that there are some arguments about practice and principle. On principle, I don’t agree that discrimination issues are so unique that they should be isolated into a separate institution. One of the things we know is that discrimination occurs across all the kinds of activities that we are engaging with all the
time. And if people have got issues about housing, education, policing or access to commercial services, it seems to me that the institutions that are already established to deal with other forms of wrongs in those areas should be expected to deal with discrimination within those areas also. You don’t want to deskill judges, you want to up-skill judges and make them understand that discrimination is another factor which disadvantages people in terms of full participation.

I have to say that in having conversations with other colleagues I’m not satisfied that someone who is not allowed into a disco or a restaurant due to discrimination has suffered more than a person who has to go to the County Court because their landlord has turned off their gas, electricity or their water. Some people talk of having equality tribunals, but then suggest that when complicated issues such as common law breach of police powers is part of the case, then the case should go back to the County Court. Employment tribunals work because you have got a set of judges that understand the employment situation and the respective discrimination aspects.

The real issue is that of simple civil litigation in the County Court and whether there are ways for better access to justice not just for discrimination cases but for other kinds of cases affecting ordinary people who don’t have means and who don’t have lawyers. Now, with the cut in legal aid you will almost never get a lawyer to do a simple discrimination case in the County Court. As far as I can tell there is almost no one to offer advice about how to make an application. There is advice available for employment cases but this doesn’t exist to the same extent for non-employment cases. So there is a huge gap in terms of the guidance and information available to people who want to go to the County Court.

I don’t agree that there should be a single equality tribunal but many do. Talking to people who sit as judges in the employment tribunal they say, ‘if you think the employment tribunal gets it right all the time, you’re wrong, the answer is they don’t.’ The rate of success for race discrimination cases in the employment tribunal in a recent year was 16%. Is that a great win? I’m not sure! I feel people have grabbed at the problems without thinking more fully about the whole of the justice system. I don’t think that discrimination is different from so many other civil wrongs that it should be treated in an entirely different way.

**ERT: Is there scope in the current reform process for more sophisticated and progressive enforcement mechanisms which can produce structural and institutional change?**

**Barbara Cohen:** Absolutely, the resistance of this government to incorporating anything which would begin to bring the UK law in line with the European Directives requirements – for sanctions to be effective, proportionate and dissuasive – is really disheartening. In Northern Ireland the Industrial Tribunal can make a recommendation not only to rectify the position of the complainant but one which impacts on other persons. Most times in the Employment Tribunal the person (the claimant) is no longer employed so the power to make a recommendation to protect the claimant is of little use.

It seems to me that it could become complicated in terms of determining who would ensure that the recommendation going beyond the claimant would be carried out, as the tribunal doesn’t want to have to keep monitoring hundreds of cases. So we need to think of a mechanism for this. The tribunal needn’t make an organisationally sweeping recom-

The Equal Treatment Authority publicises the findings of their work much more widely. So there are lots of other methods which operate as deterrents; often in the UK bad publicity is one of the greatest incentives to initiate change.

John Wadham: One of the things the Commission is trying to do and will try to do in the future is about prevention rather than cure. There are thousands and thousands of employment tribunal cases and people need to be properly represented at those, but it would be much better if rather than seeking compensation it was possible to try and avoid the discrimination in the first place. I think in the longer term the Commission will be using its enforcement processes and looking for policy changes. Given how important equality is, we need to change how people deal with it to try and ensure that we don’t get into a situation where people are being discriminated against. It seems to me that this is the answer in the long term, rather than only picking up the cases when it’s too late.

ERT: The UK has been seen by some as a leading jurisdiction in the legal protection against discrimination. What legal steps do you think the UK needs to take to retain its forerunner status in the current revision of the law?

John Wadham: Well I think for a long time it’s probably true that the UK had more sophisticated, better developed and more significant anti-discrimination legislation, at least in some strands. Obviously in relation to race and gender to begin with although it took a long time before we dealt with disability. And of course in the last three or four year’s issues such as sexual orientation, age, religion and belief were implemented first by Europe not by the UK domestically. And it’s probably likely that any new developments will come out of the EU. But I do think that we will have a chance with the new equality act to take the lead again. And that is something the Commission will be working with the Government on to try and improve and produce the best possible new equality bill that we can.

Barbara Cohen: I think to be a forerunner the statutory duty on public authorities needs to be extended to cover all grounds, it needs to be very clear and needs to have a combination of outcomes with some kind of required processes. Also there needs to be clarity in relation to positive action. The UK needs to incorporate public procurement within the equality framework, because not just in the UK but everywhere there is increased privatisation of public services. I think that there needs to be effective enforcement mechanisms within the legislation, as financial disincentives to discrimination don’t seem to be entirely effective. As a minimum it needs to incorporate the legislation within the European Directives and remove the existing gaps which it hasn’t yet done.

Interviewer on behalf of ERT: Jarlath Clifford