

**THE PROPOSALS MADE BY THE EUROPEAN COMMISSION
IN RELATION TO ARTICLE 13 OF THE EC TREATY**

JUSTICES COMMENTS.

Introduction

1. **JUSTICE** welcomes this opportunity to respond to the request from Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords' European Union Committee ("the Committee"), for comments on the proposals based on Article 13 of the EC Treaty to combat discrimination which have recently emanated from the European Commission. In preparing these submissions **JUSTICE** would like to acknowledge the assistance of Robin Allen Q.C., Barrister, and Mark Bell, Lecturer in Law, University of Leicester.

2. The comments, which follow, discuss firstly the place of Article 13 in the EC Treaty and secondly the overarching considerations of subsidiarity and proportionality. Finally they go on to a more detailed consideration of the content of the proposals.

Article 13

3. Article 13 EC significantly enlarged the scope of the powers of the European Community to secure that the further development of the community was based on substantive human rights principles. The Article can be seen as a response by the Member States to at least two major factors. The first of these was a realisation that has grown over the last 20 years that the power to legislate in the field of sex equality was inadequate to deal with important areas of discrimination such as

sexuality. Secondly the Community had been increasingly concerned about the extent of race hatred and discrimination, which had been manifested in many ugly incidents across the Community. These concerns remain.

4. The Community has long had a competence to deal with discrimination on grounds of nationality of a Member State in relation to free movement issues. However, it was plain that this competence was insufficient to deal with the degree of race hatred, discrimination and segregation that was being reported across member states.
5. The augmentation of the community's powers in this field, not just in relation to sexuality and race, but into the fields of age and disability, flowed from a lengthy campaign by a diverse group of NGO's actively supported by the European Parliament¹.
6. Once the inadequacies of the then existing powers in relation to discrimination were realised, Member States were persuaded that a competence in relation to other areas was also critical. Thus the relationship between race and religion is well known, since some religious groups have racial identities but not all. Accordingly religion had to be included to cover issues such as vilification of Muslims as well as holocaust denial and similar activities.
7. The connection between age and sex discrimination was becoming increasingly obvious. Moreover there was a developing debate on age

¹ See Bell and Waddington, *"The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article"* [1996] 25 ILJ 320.

discrimination since it was well known that the age profile of Europe was changing rapidly. Finally the need for and appropriate mechanisms for the protection of persons with disabilities has also been increasingly discussed. All of these issues are connected with those twin themes of the community's interest in social affairs: social cohesion and inclusion.

8. One aspect of Article 13, which had been the subject of particular comment, is the contrast with Article 14 of the European Convention on Human Rights (ECHR). Whereas the latter provision is not limited in its material scope, Article 13 is. It is plain that the Member States did not wish to confer a general competence on the Council to legislate a general non-discrimination provision. In limiting the material scope of Article 13 for action by the Council the emphasis is placed on the specific problems of discrimination identified by these protected grounds.

Subsidiarity and proportionality

9. In due course the Council will have to decide whether community action meets the tests of subsidiarity and proportionality. These tests require that the objectives of the proposed action cannot be sufficiently achieved by Member States action in the framework of their national constitutional systems and that therefore they can be better achieved by action on the part of the community: see Article 5 of Protocol 30 to the Treaty of the European Community. Secondly any legislation must meet the identified problem with a proportionate response. The comments below aim to keep these considerations in mind.

10. The Committee will already have read the comments on the draft directives in the explanatory memoranda produced by the Commission which accompany the draft directives. **JUSTICE** considers that these address the significant issues in relation to subsidiarity.

Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

11. The Committee will have noticed that the Race Directive is general in application, but limited in material scope to race alone.
12. Some criticism has been expressed about the introduction of a Directive having this general effect but only being limited to discrimination on grounds of race. **JUSTICE** does not agree with those criticisms for two general reasons.
13. Firstly a specific focus on race is absolutely vital at this stage of the development in the community. Secondly, for political reasons, by limiting the scope of the general Directive to race alone, where the need for a widespread protection against discrimination is perhaps most needed, the debate will become more focused and sharpened.
14. Social cohesion is a specific ground identified by Protocol 30 to the Amsterdam Treaty as justifying community action. The extent of race discrimination and racial hatred across Europe must not to be underestimated.

15. This reflects many different issues, particularly the marginalized existence of third country nationals, asylum seekers, and those who have achieved citizenship of Member States but whose families are recent immigrants. The current troubles in the Balkans have re-emphasised the potential for race issues to pose severe challenges for the Community and even to destabilise it.

16. One recent study of racially motivated crime in three major European cities emphasised the need for action at community level. The authors stated that:

“Many of the interviewees in [Frankfurt] expressed the view that an increased European dialogue would help all policy actors to improve their policies and procedures”

and

“Racism ... is widespread across Europe and to combat it effectively ... structures [are needed] ... that transcend national bodies, because in electoral campaigns at national level the parties of the extreme right exploit the issue ...”²

17. Much other work has been done to demonstrate this need: for instance the Report of the “Consultative Commission on Racism and Xenophobia for the Cannes European Council (Kahn Commission)” and see also the Report on “Racial Violence and Harassment in Europe” by Dr Robin Oakley.

18. As part of the EC Year against Racism in 1997 the EC commissioned a survey to measure the extent of racist attitudes and xenophobia within the

² “Racially Motivated Crime – Responses in Three European Cities: Frankfurt, Lyons and Rome” by Jolanda Chirico, Anjana Das and Colette Smith, edited by Ann Dunnett and published by the Commission for Racial Equality 1997.

EC³. Of this sample a third felt that they were “not at all racist”, a third felt that they were “a little racist” and the remaining third expressed quite or very racist feelings. Nearly one in ten of the interviewees admitted to being “very racist”. However, the most positive aspect of this survey is that 86% of these people said that they opposed “any discrimination based on a person’s race, religion or culture”, 77% of those questioned thought that designating 1997 as the European Year Against Racism was “a good decision” and 84% of those questioned considered that the “European Institutions should take a stronger role in the fight against racism”

19. More recently the 1998 Annual Report of the European Union Monitoring Centre on Racism and Xenophobia, “Looking Reality in the Face” has highlighted the situation regarding racism and xenophobia in the European Community in every country. The need for active legislation is emphasised.
20. The Draft Communication from the Commission contains useful Annexes that give an overview of the protection against race discrimination that is found in other Member States. These show that the protection is by no means universal. Thus Greece, Austria, Portugal and Luxembourg have limited or no statutory provisions, though some constitutional protection is found in Portugal and Greece, while in Luxembourg and Austria this is only of a limited effect. Mark Bell has said⁴ :-

³ See: European Commission Employment and Social Affairs. 1997 European Year against Racism : Closing Conference Report 1998 and Conor A Gearty, “ The Internal and External ‘Other’ in the Union Legal Order : Racism, Religious Intolerance and Xenophobia in Europe”, in P Alston (ed.) *European Union and Human Rights* (OUP, 1999).

⁴ “*The new Article 13 EC Treaty : a sound basis for European anti-discrimination law?*” M Bell (1999), *Maastricht Journal of European and Comparative Law*, Vol 6(1), p5-28.

“there are only two Member States which lack any specific legislation forbidding racial discrimination in the workplace, namely Greece and Austria. This is not to say that a new directive would be of little impact on the other Member States. There are many Member States in which the ban on discrimination is incomplete or difficult to use in practice. For example, it is only in the UK, the Netherlands, Belgium, Ireland and Denmark that existing laws explicitly forbid indirect discrimination on grounds of race or ethnicity. In Germany, the ban on discrimination does not apply to job applicants, but only to persons already in employment.⁵ In many Member States, problems of proof prevent the effective enforcement of the legislation. For instance, in Italy, racial discrimination is prohibited as a result of Article 13 of Law 903/1977⁶ amending Article 15 of Law 300/1970⁷. However, evidential problems have meant that in practice only a small number of cases have been initiated.⁸”

21. It is also noteworthy that it has been estimated that as much as two-thirds of the Community's ethnic minorities are third country nationals⁹. It is therefore significant that the directive is not limited in its scope to citizens of the European Union alone, but includes third country nationals¹⁰.

22. **JUSTICE** therefore consider this draft directive is of particular importance for the United Kingdom. This is not because the draft Directive would impose heavy obligations on this country. Rather it is because the disparity between the protection enjoyed here and elsewhere in the

⁵ Anon. (1995) *“Preventing racism at the workplace: Germany”* Working Paper No. WP/95/43/EN, Dublin: European Foundation for the Improvement of Living and Working Conditions, at p. 42.

⁶ L. 9 dicembre 1977, n. 903 - Parità di trattamento tra uomini e donne in materia di lavoro. (reproduced in Scognamiglio, R (1980) *“Codice di diritto del lavoro - annotato con la giurisprudenza - 1° Parte Generale, Tomo 1, Disciplina Legislativa”* 2. ed. Bologna: Zanichelli, at p. 243).

⁷ Legge 20 maggio 1970, n. 300 - Norme sulla tutela della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento; G.U. n. 131, 27-5-1970, p. 3404.

⁸ Forbes, I & Mead, G (1992) *“Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community”* Equal Opportunities Study Group, University of Southampton. Research Series No. 1. London: Department of Employment; at p. 52.

⁹ T.Hervey, “Migrant Workers and their Families in the European Union: the pervasive market ideology of Community Law” in Shaw and More, “New Legal Dynamics of the European Union,” Oxford Clarendon Press 1995 p 101.

¹⁰ Paragraph 10 of the preamble to the Directive.

Community would be reduced and the good practice that has been established in this country would be shared more widely.

23. It is well recognised that the United Kingdom has some of the most effective laws and well established practices for combating discrimination on grounds of race. While much can still be done to improve those laws the United Kingdom can be justifiably proud of the lead it has taken in this field. However it is vital that the high standards set by the United Kingdom should neither be a cause for complacency by other Member States nor give rise to social migration into the UK to take advantage of those laws.
24. When Committee asks: “*Will action at community level produce clear benefits that are unlikely to be achieved by Member States acting alone or through informal co-operation?*” The answer must be an emphatic yes. Community Directives operate not only to raise awareness and to encourage further legislative developments within the member states, but also to establish common standards of protection.
25. The Committee asks “*is the Commission’s approach in the directive, based on minimum common standards, the most appropriate one?*” Again the answer is yes certainly. Common anti-discrimination provisions help to safeguard freedom of movement within the EU in two ways. They ensure that those of ethnic minority origin who move from the UK to other member states enjoy basic minimum human rights standards wherever they may go. Secondly it diminishes or removes variations in the level of protection available to vulnerable groups in other member states thereby removing a ground for social migration by minorities in search of a better legal protection.

26. Nevertheless it is a disappointment, and indeed in the view of **JUSTICE** a mistake, that this draft does not make the link, that has already been identified, with religious discrimination. The Starting Line Group made this case in their "Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union"¹¹. It is now widely recognised in the Great Britain that the Race Relations Act 1976 is defective in that it does not cover direct religious discrimination. Indeed the Home Office is currently awaiting the outcome of research that it has commissioned on this issue.
27. Turning to the detail of the draft directive **JUSTICE** has the following comments to make.
28. Article 1 is the purpose clause. Here it is noteworthy that equal treatment is not defined expressly to prohibit differences of treatment based on nationality or even national origins. This is an omission, which the UK has already had to address in the race relations legislation. Our current Race Relations Act 1976 does cover discrimination on grounds of nationality but the previous legislation did not¹². While direct discrimination on grounds of nationality will almost invariably be indirect race or ethnic discrimination, the omission of any protection against discrimination on grounds of nationality does create confusion.
29. This omission, which was certainly deliberate,¹³ was a result of a desire to limit the scope of the directive in areas that have already been the subject

¹¹ Edited by Isabelle Chopin and Jan Niessen, and published by the Commission for Racial Equality 1998

¹² Ealing v. Race Relations Board [1972] AC 342

¹³ See the explanatory memorandum at COM (1999) 566 P.6

of Community legislation¹⁴, but it is likely to create confusion in operation. Moreover since the scope of Article 39 EC (formerly Article 48 of the EC Treaty) is limited to free movement of workers and the scope of Article 12 EC (formerly Article 6 of the EC Treaty) has been worked out on a case by case basis, it cannot be certain that the scope of these provisions in the field of nationality discrimination is equivalent or greater than the existing measures.

30. Article 2 defines the major concepts of discrimination direct and indirect discrimination. Harassment is dealt with here in Article 2(3). The explicit inclusion of harassment as a kind of discrimination is to be welcomed. Experience in the UK has shown that harassment can normally be dealt with in the definitions of direct discrimination however the absence of a comparator can lead to conceptual difficulties in the interpretation of UK law. These will be avoided by this specific inclusion.
31. The definition of indirect discrimination draws on the Burden of Proof Directive but has a wider impact. It also has a wider impact than the definition in domestic law.
32. Firstly unlike domestic law, this Article includes in its definition of indirect discrimination a “practice” that operates adversely for a racial group. By contrast domestic law in section 1(1)(b) of the Race Discrimination Act 1976 operates where a “requirement” or “condition” but not a mere practice is established. This has been interpreted in the UK as requiring a “must” and not merely a preference. It is widely thought that the black letter law of domestic legislation has created an unnecessary bar to

¹⁴ See Articles 12 and 39 and secondary legislation

success: **Barking and Dagenham v. Camara** [1988] ICR 865¹⁵. So this inclusion is welcome.

33. The second important difference lies in the approach to the proof of indirect discrimination. Under the RRA this test is almost formulaic. It requires the proof that a numerical proportion of those of the relevant racial origin who can comply with the requirement or condition in question is “considerably smaller” than the numerical proportion of those not in that group who can comply with it. Accordingly in the absence of statistical information there will be difficulties of proof and even where there are such statistics the assessment of what is considerably smaller is difficult.
34. The draft directive takes a different approach. It is enough that the provision or practice in issue is *liable to have* an adverse effect. This approach follows the constant jurisprudence of the European Court of Justice in the field of free movement:

*“A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect...”*¹⁶

35. This definition is certainly easier to use. It also ensures that issues of substantive disadvantage can be challenged at an early stage before they have had much effect (so there will be few statistics) but when it is clear that they have the potential to cause real disadvantage. It is usually relatively clear what are the relevant statistics when the differential impact of a requirement or condition on men and women is being assessed. It is

¹⁵ See also cases cited there such as *Perera v. Civil Service Commission (No2)* [1983] IRLR 166 and *Meer v. Tower Hamlets* [1999] IRLR 399.

¹⁶ See *O’Flynn v. UK Case 237/94* [1996] ECR I-2617

less easy when the impact is being assessed on those who are lesbian or gay because statistics on this are not necessarily available.

36. Article 3 defines the material scope of the draft directive. It is wider than the existing provisions in relation to sex since it covers “social protection and social security, social advantages, education including grants and scholarships, access and supply of goods and services and cultural activities”.
37. It seems that this probably does cover access to healthcare, housing, and even access to mortgages. There is a clear resonance with domestic legislation here. It would be as well if this were clarified.
38. The expression “social advantage” has a wide community law meaning and includes almost any advantage flowing from the state or even from private organisations. The advantages are economic or cultural advantages.
39. Article 4 makes provision for defences to claims on the ground that there is a genuine occupational qualification. This parallels UK provisions and is wholly unexceptional.
40. Article 5 provides that member states may “maintain or adopt measures intended to prevent or compensate for disadvantages suffered....” It is important to note that this is only a permissive clause, it does not state that member states must adopt such measures so that it is up to each member state to decide both whether and what measures would be appropriate to their needs.

41. **JUSTICE** believes that positive action measures should be used to remedy structural disadvantage and to work towards an equality of outcomes for those who have been subject to discrimination. However, positive action measures should be :-

- put in place to remedy a specific and defined disadvantage,
- time limited and
- subject to monitoring and review in order to assess whether they have been successful and whether they have re-adjusted the defined disadvantage.

42. There is a difference in the wording of this provision and the wording of Article 141(4) EC (formerly Article 119 of the EC Treaty) which was introduced by the Amsterdam Treaty. However this does not seem to be significant. The critical omission is the absence of any limitations to this provision. It seems likely that the European Court of Justice would hold that positive action steps taken by a member under this provision would have to be objectively justified. This would mean that they would have to be crafted with the aim identified in the Article, be requisite for achieving that aim and generally proportional to that aim. The Court of Justice has stated that in justifying legislative measures member states have a broader discretion, which ought to mean that, this provision could be used flexibly. The Race Relations Act 1976 contains limited powers for positive action in relation to training: sections 37 and 38. These sections are certainly within this Article.

43. Undoubtedly some ethnic minority groups in the UK do suffer disadvantage for historical reasons and it is likely that refugees from

ethnic disputes in the Balkans will do also. The purpose of such a provision is to ensure that the special needs of such persons can be met, they can reach a similar level as the rest of society and their social integration can be expedited.

44. Article 6 permits Member States provisions in respect of equal treatment to be more favourable than those laid down by the directive, but any existing provisions cannot be reduced because the directive permits a less onerous provision. This is unobjectionable.

45. Article 7(1) places a duty on Member States to ensure that they have judicial and/or administrative provisions in place to enforce the obligations provided under the directive. Significantly this is expressed to include the position “even after the relationship in which the discrimination is alleged to have occurred has ended”.

46. This formulation has clearly been defined to include acts and omissions that occur post dismissal. Here there is a well-recognised lacuna in domestic legislation at least in the Race Discrimination Act 1976¹⁷. This lacuna is being challenged by further litigation in order to establish whether the same provisions can apply to race discrimination. It is likely that as presently interpreted the Race Relations Act 1976 will need to be amended in order to comply with this.

47. There has been some criticism of the reference to “administrative procedures”: see the comments of Professor Evelyn Ellis to the

Committee. **JUSTICE** agrees that a mere administrative enforcement of such basic rights is unacceptable. It may be that this is intended to reflect the bifurcation in the Civil codes, in for instance France, between matters that go before the courts and matters that go before the administrative tribunals. However **JUSTICE** agrees that it would be preferable to follow the wording of the Equal Treatment Directive (76/207/EEC) and to require judicial process¹⁸.

48. Article 7(2) makes provision for “associations, organisations or other legal entities” to be entitled to pursue any judicial and/or administrative procedure to enforce obligations under the directive. This would involve an extension of the current UK provision. The Commission for Racial Equality can bring some actions, however there are currently no mechanisms for group actions in the Employment Tribunals. Though it should be said that where significant numbers of persons have a common issue to litigate the Tribunals have managed to utilise the powers that they do have to some practical effect to avoid repetition. Trade Unions cannot bring actions on behalf of their members however. Legislative changes would therefore be necessary to achieve this in the UK.
49. **JUSTICE** considers that such a provision would make access to the law more cost effective and relevant to many groups.
50. Article 8 reverses the burden of proof. This provides that once “facts from which it may be presumed that there has been direct or indirect discrimination” are established the burden of proof shifts onto the

¹⁷ Compare *Coote v Granada Hospitality* [1998] IRLR 656 (sex discrimination) and *Adekeye v Post Office no 2* [1997] IRLR 105 (race discrimination).

¹⁸ See also the comments of R. Allen in ‘Article 13 and the Search for Equality in Europe: an Overview’ in *Europaforum Wien Anti-discrimination: the way forward* (Wien; Europaforum 1999) on the necessary conditions for an effective equality law.

Respondent to prove that there has been no breach of the principle of equal treatment.

51. This provision is identical with the Burden of Proof Directive (see Article 4 of Directive 97/80) which will shortly have affect in the UK in relation to sex discrimination. The Government's Better Regulation Task Force has already recommended that this be extended to race cases to ensure that the Race Relations Act 1976 and the Sex Discrimination Act 1975 remain similar¹⁹. Currently domestic law reverses the burden of proof in relation to indirect discrimination cases only. However the case law of the House of Lords shows that in cases of direct discrimination an inference should be drawn in the absence of an explanation for differential treatment of persons of different racial origin²⁰. Accordingly this would require some small legislative amendment but it is not in any sense objectionable.
52. Article 9 – deals with Victimisation. This Article is similar to the provision in section 2 of the Race Relations Act 1976 except that the scope of the directive is wider than the scope of the Act. It appears to be limited to acts of victimisation which are consciously 'motivated'. In the UK the House of Lords held that a conscious motivation is not necessary²¹, so our law goes further than this.
53. Article 10 – requires Member States to publicise both the provisions of the directive and any provisions that they have made in order to implement the directive. This is an essential for any effective anti-discrimination legislation.

¹⁹ *Better Regulation Task Force : Anti-discrimination Legislation Review*, May 1999, ISBN : 0 7115 0379 6.

²⁰ See *Zafar v. Glasgow City Council* [1998] IRLR 36

²¹ *Nagarajan v London Regional Transport* [1999] IRLR 572.

Article 11 – requires member States to promote a social dialogue between the two sides of industry and is unexceptional.

Article 12 – does not agree with Professor Ellis that this provision goes further than the steps that are currently within the powers to assist litigants. It employs a number of Complaints Officers to receive and process complaints. Where appropriate it grants assistance to complainants and in some cases it will commence formal investigations.

56. Article 13 – requires Member States to comply with the directive and Article 15 requires Member States to implement the directive within two years of the date of its adoption.

Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation.

57. **JUSTICE** wishes to emphasise that it also welcomes the proposal to extend the areas covered by Community anti-discrimination laws. Article 14 of the European Convention on Human Rights (ECHR) will become directly enforceable within the UK when the Human Rights Act 1998 is implemented on October 2nd 1999. This already provides for protection against discrimination on a wide range of grounds in the implementation of Convention rights. These grounds are certainly wider than those identified in Article 13. However, article 14 has effect only within the fields covered by other Convention rights. **JUSTICE** has long considered that the absence of laws to protect those who are discriminated against on grounds of age, sexuality, religion or belief at work is a serious omission

in the provisions of domestic law. This draft directive would have the effect of forcing the legislature to address these omissions.

58. Article 1 provides that the principle of equal treatment should apply in the following fields:-

- a. Access to employment and occupation, including promotion,
- b. Vocational training,
- c. Employment conditions, and
- d. Membership of certain organisations

to all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

59. The UK does have provision covering disability, racial and ethnic origin, and some provisions that cover transsexuals.

60. There is protection against discrimination in the field of employment on grounds of religion in Northern Ireland but not in the rest of the UK²². Anomalously, similar provision for protection of religious discrimination in the rest of the UK exists if the members of that religious group also constitute a racial group. Additionally, Article 9 of the ECHR will soon be directly enforceable. This will provide protection for freedom of thought, conscience and religion and for the manifestation of ones religion or beliefs.

²² Fair Employment and Treatment (Northern Ireland) Order 1998

61. The comments made in relation to the draft race directive as to the concept of discrimination apply equally to this directive. However there are some additional points that need to be made.
62. Firstly, there is a special provision dealing with disability in Article 2(4). This requires reasonable accommodation to be made in relation to a person's disabilities in order to guarantee respect for the principle of equal treatment. This approach is very similar to that taken by the Disability Discrimination Act 1995 in the UK. However it is a limited requirement and does not operate under the directive where it "creates undue hardship". Experience in the UK teaches that it is necessary to give clear guidance as to the circumstances in which the duty to make reasonable accommodation does not operate. This guidance can be seen both in the Act itself and in the detailed Codes of Practice that have been published. It is plain that a balance has to be struck between the cost to the employer or other person and the social cost to the disabled person. There will often be little common ground between these parties as to what should be done and what is the real nature of the hardship. Accordingly courts and tribunals have no point of reference apart from these Codes of Practice. **JUSTICE** recommends that a clearer statement of the level of hardship that has to be proved is necessary. It recommends the approach taken in the Disability Discrimination Act.
63. Secondly, the draft Directive requires that steps to protect against indirect discrimination should be taken. The UK legislation on disability does not expressly cover indirect discrimination. However it has been argued that the provisions that deal with the duty to make reasonable adjustments are effective to cover cases of indirect discrimination. This is the approach that the Government has taken so far in relation to the recommendations

of the Disability Task Force. It is possible however that this part of the draft directive would require some amendment to the domestic legislation. **JUSTICE** does not consider that such an amendment would have a major (if any) effect on the substantive protection of disabled persons in this country.

64. In the field of age discrimination there are no legal provisions in the UK at the moment unless it can be shown to be indirect sex discrimination. The government issued a voluntary Code of Practice in June 1999, however, a recent survey by the Employers Forum on Age has shown that this has had little impact on employers²³. **JUSTICE** believes that legally enforceable provisions to protect people against age discrimination are desirable.
65. Sexual orientation is not covered as an expressly prohibited ground of discrimination under UK law. It has been held that discrimination on grounds of sexual orientation does not amount to sex discrimination under Article 141 of the EC Treaty²⁴. However, it is a ground for discrimination contrary to article 14 of the ECHR²⁵. **JUSTICE** considers that a clear legally enforceable provision prohibiting discrimination on grounds of sexual orientation is both necessary and desirable.
66. Articles 6, 7, 8, 11,12,13, 14 and 15 are substantially the same as their counterparts in the Racial and Ethnic Minority Directive and we would refer you to our earlier comments in paragraphs 44-51, and 54-56 (above).

²³ *“Report on a survey of senior decision makers in small and medium enterprises”* Employers Forum on Age, 1999.

²⁴ *Grant v South-West Trains Ltd* [1998] IRLR 206.

²⁵ *Affaire Salgueiro da Silva Mouta v Portugal*, case no 33290/96, 21.12.99.

67. Article 9 is identical to article 8 of the proposed Race directive, however, it includes a provision excluding criminal procedures.
68. Article 10 deals with victimisation and is very similar to the parallel provision in article 9 of the proposed Race directive. However, it provides protection when the adverse treatment is simply “as a reaction to a complaint’ whereas article 9 talks about the treatment being “*motivated directly or indirectly* as a reaction”. **JUSTICE** believes that the version in article 10 should be the preferred wording in both proposed directives as intention can be very difficult to prove.

Proposal for a Council Decision to establish a Community Action programme of measures to combat Discrimination.

69. Article 1 proposes a Community Action Programme to combat discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (the same as the grounds covered in the proposed employment directive).
70. This programme will encompass:-
- a. the analysis of factors related to discrimination, including through the collection of statistics, studies and the development of indicators and benchmarks, and the evaluation of anti-discrimination law and practice,
 - b. transnational co-operation and networking at European level. And
 - c. awareness raising.

71. **JUSTICE** welcomes the community action programme as a means of countering discrimination in the Member States, however, it notes and regrets the absence of any provision in this programme, or in either of the two proposed directives, of any systematic and ongoing mechanism to monitor and evaluate individual Members States implementation of these directives. The European Parliament Social Affairs Committee proposed an obligation to establish periodic action plans to assist in the establishment of equal treatment across the EU. These would then be subject to scrutiny by the Commission²⁶.

²⁶ European Parliament, Committee on Employment and Social Affairs, “*Working document : a framework for action on non-discrimination at EU level based on Article 13 of the Amsterdam Treaty*”, 25.3.99, PE 229.570/fin.