

ARTICLE: The Equality Bill is published

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Introduction

Discrimination law is currently covered by various pieces of legislation and divided into different strands such as disability, race, gender, equal pay, etc. With so much legislation enacted on a piecemeal basis, the government wants to consolidate discrimination law into one all-encompassing piece of legislation.

Following numerous consultations, the Equality Bill was published on 27 April 2009. Its aim is to harmonise all the existing strands and to strengthen the law which supports equality. Detailed below some of are the most significant changes and how they will affect the existing law.

Concepts and definitions

Instead of different "strands" of protection, the Equality Bill contains a list of "protected characteristics". These characteristics are essentially identical to the existing strands, with only minor changes to the current definitions.

The definition of "direct discrimination" in the Bill still requires a claimant to show that they have been treated less favourably than a real or hypothetical comparator since this "reflects that discrimination is principally about equal rather than fair treatment". What has been changed in relation to direct discrimination is that, instead of less favourable treatment "on the grounds of" a protected characteristic, the wording is: "because of a protected characteristic". The government felt that this change of wording not only made discrimination law "more accessible to the ordinary user", but would also expand the definition to include association and perception claims (see below).

The definition of indirect discrimination currently varies depending on which strand is being relied upon. The Bill seeks to harmonise this with a single definition for all protected characteristics, as well as extending it to cover disability and gender reassignment. The harmonised definition also includes additional wording intending to protect "deterred applicants", being those individuals who are put-off from even applying for a job because they believe a provision, criterion or practice would in the future put them at a disadvantage.

Objective justification test

The objective justification defence currently exists in various forms across different strands. It permits an act of discrimination if the act is a proportionate means of achieving a legitimate aim. The government consulted on amending the wording to bring it in line with European wording (which is slightly different) but the government ultimately felt that this would be "problematic" and so the current wording is to be maintained. However, the Bill does replace the current justification test in relation to disability discrimination (which is a more subjective one) with the harmonised objective test, which places a higher burden on employers than before in relation to discrimination.

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Victimisation and harassment

Currently, a comparator is required to prove victimisation, (ie. the claimant has to show that they have been treated less favourably than another person). The Bill removes this requirement from its definition of victimisation.

Separately, there is also a clause which provides protection from victimisation for those "being involved in a relevant pay discussion". This is designed to bolster protection in relation to the provisions against pay secrecy clauses (see below).

The new harmonising definition of harassment is "unwanted conduct related to a relevant protected characteristic". This serves to extend the current definition of harassment by including harassment based on perception or association (see below). In addition, this new definition will also extend liability of employers for actions of a third party to cover all protected acts (currently this liability is only found in sexual discrimination).

Genuine occupational requirements and genuine occupational qualifications

Certain strands of current legislation allow a "genuine occupational requirements" defence, enabling an employer to employ only people with a particular characteristic due to the nature of the job. The Bill removes the need for the requirement to be "genuine" or "occupational", and instead requires that it is a proportionate means of achieving a legitimate aim – bringing it into harmony with the objective justification test (see above).

However, given that a requirement or qualification is unlikely to be proportionate unless it can be shown that it is genuine and occupational, this amendment may not be as significant as it first appears. What might have more practical impact is the removal of the genuine occupational qualification defence in relation to race and sex discrimination. This allows an employer to discriminate against candidates for jobs, promotions or training if someone of a particular gender or race would be more appropriate in that role – for example, Mexican waiters in a Mexican themed restaurant. For those employers who currently incorporate genuine occupational qualifications as part of their recruitment and promotion criteria, an overhaul of the relevant policies will be necessary.

Association and perception

The law is very confused on the issue of an individual being discriminated against because of their association with someone, or because they are perceived as having a characteristic which they do not. For example, a carer who is discriminated against because their responsibilities to a disabled relative interfere at times with their working life. Or a person who is perceived as being gay and discriminated against on that ground, but is in fact heterosexual.

The Bill extends protection from direct discrimination and harassment in relation to association or perception to all protected characteristics. The Government decided not to include explicit protection for carers within the Bill since it felt that carers would be protected by the association provisions. However, it is interesting to note that it is possible to interpret the Bill as not providing protection from direct discrimination or harassment where the employer treats all carers equally badly.

Positive discrimination

Previous reviews expressed the view that some inequalities are so deeply entrenched in social practice that greater balancing measures are needed to address them. With this aim, the Bill will allow employers to take proportionate yet discriminatory steps to redress inequalities within the workplace.

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In practice, this could include providing prayer facilities for a religious minority, or English language lessons for non-English employees. Furthermore, where an employer is faced with two equally qualified candidates, it would be allowed to choose a candidate on the basis that they belonged to an under-represented group. However, this provision is only applicable where there are two or more equal candidates – it would not permit the selection of a less well-qualified candidate on the basis of under-representation alone. The government has promised that guidance on this area will follow.

Transparency within equal pay

In order to promote gender equality within pay, the Bill prohibits secrecy clauses which prevent employees having “relevant pay discussions”. This is not the outright ban that was first proposed, but merely makes such clauses unenforceable against an employee. No doubt there will be subsequent arguments within the courts as to what amounts to a “relevant pay discussion”, and what does not.

In addition, there are provisions which give Parliament the power to require employers to publish information relating to pay. For the public sector, the government envisages requiring employers with 150 employees or more to publish annual details from 2011. In relation to the private sector, the boundary is employers with 250 or more employees. However the government has committed itself not to use this private sector power until 2013, and then only if sufficient progress has not been made already on a voluntary basis.

Matters left unresolved

The issues of multiple discrimination and representative actions were matters which, while addressed in consultations, were not included in the Bill.

As the law currently stands, a person cannot bring a single claim which incorporates two separate strands of discrimination law. For example, a Pakistani woman could not bring a claim under both sex discrimination **and** race discrimination – she would have to bring two separate claims. The government did not feel that the current law hindered potential claimants in any way, but it changed its views following consultation. It is currently consulting on this issue, with the proposals being to allow multiple discrimination claims from April 2011 or later.

Discrimination claims can currently only be pursued by the actual individuals who are claiming protection under the legislation. However there is some call for representative bodies such as trade unions to be able to bring claims on behalf of groups of individuals. Following previous consultation, the government has left the issue open and promises further consultation before a decision is reached.

If you would like further information on the Equality Bill or its effects on your workplace, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.