

# The Equality Act 2010: Main Concepts

Sue Ashtiany<sup>1</sup>

Well it happened. In the last days of the UK Labour administration in April 2010, Parliament managed to complete the passage of the Equality Act and get it onto the statute book. This doesn't necessarily mean that the whole Act will actually come into force: the new Coalition Government has hinted that it doesn't like some aspects, such as compulsory reporting of gender pay in companies. But it does look as though most of it will be in force by October 2010 or April 2011.

The background for this immense piece of legislation was the government White Paper in 2008, "*Framework for a fairer future*".<sup>2</sup> The paper set out the Labour Government's belief that equality was "necessary" for individuals, society and the economy. The aim was to declutter the law bringing together 9 major pieces of legislation<sup>3</sup> and around 100 statutory instruments and more than 2,500 pages of guidance and codes of practice. The aim was also to strengthen the law. The White Paper identified persisting equality gaps. The gender pay gap stood at 12.6%, disabled people were 2½ times more likely to be out of work, people from minority ethnic communities were 15.5% less likely to find work than their "white" counterparts, 62% of people over 50 felt discriminated against in the job market and 60% of lesbian and gay school children experienced homophobic bullying; we needed to step up progress to meet equality goals. The "*New Opportunities*" White Paper published in January 2009 committed the then Government to considering

legislation to address social disadvantage associated with socio-economic inequality.<sup>4</sup> So the Act was intended not only to restate, clarify and harmonise the law, but also to provide more powers and responsibilities towards greater equality.

The Act is big: 218 Sections and 28 Schedules. It creates a unified framework based around key concepts which it then applies across the whole piece. Many of the 28 Schedules contain important substantial provisions dealing with specific issues. In addition, there is a 215 page Guidance Booklet which is intended to assist users of the Act in navigating their way through it. The Guidance does not have statutory force. The first Commencement Order has given powers to the Equality and Human Rights Commission to introduce statutory Codes of Practice under the Act which do not have the force of law but will be taken into account in tribunals and courts for determining whether there has been compliance.

One of the most interesting and potentially wide ranging reforms is the new public law duty to have due regard to socio-economic disadvantage when making strategic decisions about how to exercise public functions.<sup>5</sup> This duty only applies to core government and administrative bodies and there is some doubt as to whether it will be brought into force by the new Government as the Conservatives do not support it.

The Act establishes key concepts which are applied uniformly across state, commercial and civil society bodies. Apart from some exceptions for national security and some completely private spaces, nothing is excluded in principle from the ambit of the Equality Act. There are eight "characteristics" which are "protected" (PCs): age, disability, gender re-assignment, marriage and civil partnership, race (there is power to include 'caste'), religion or belief, sex, and sexual orientation.<sup>6</sup> The Act also protects from discrimination because of pregnancy and maternity, but this special category is treated differently from the PCs as the protection derives from a separate legal basis in EU law. So for example there is protection for breastfeeding mothers in public<sup>7</sup>, and a specific provision that treating pregnant women and those on maternity leave *more* favourably than men is permitted.<sup>8</sup> But indirect discrimination protection does not apply.<sup>9</sup>

In addition, the Act protects against discrimination because of "dual characteristics" where neither PC alone has led to discrimination.<sup>10</sup> So an Asian woman who is unable to show that she has been discriminated against either as a woman or as an Asian, may be able to show that she suffers discrimination because of being both a woman and Asian. This dual characteristic discrimination is specifically intended to make it easier for "minorities within minorities" to bring claims. Two thoughts: first, it may not come into force -- it has caused some unease about burden of litigation. Second, if it does, there is a real and perhaps unforeseen litigation consequence. Many people who have one protected characteristic also have another and surely it would be almost irresponsible of a legal adviser supporting the best interest of his/her client not to claim dual discrimination in all such cases?

There are a number of categories of prohibited conduct. Direct discrimination is now less favourable treatment **because of** a PC.<sup>11</sup> The old definition was "**on grounds of**" a PC.<sup>12</sup> Although no substantive change is intended, the two concepts are not necessarily contiguous, and it could be argued that a "because of" test supports the line of authorities that are focussed on the reason for the treatment as against a "but for" proximity test.<sup>13</sup> Equality legislation is principally binary, so that preferential treatment of one sex, or one religion, etc. is outlawed except in very narrow circumstances. However there is no prohibition on more favourable treatment of the disabled as against those who are not; and justification of direct discrimination because of age is permitted where it is a proportionate means of achieving a legitimate aim ("PROMALA").<sup>14</sup> "Associative discrimination" protection is now extended to all PCs. So if A experiences discrimination not because of their own status but because of the PC of someone of sufficiently close proximity to them, A now has a claim even if he/she does not have any claim based on their own status.

The Act also sharpens and arguably extends the indirect discrimination provisions where the application of a provision, criterion or practice has or would have a detrimental effect. They specifically include disability cases and they are wider in scope because they apply even in cases of anticipatory discrimination, where the detriment has not yet been felt by the complainant. The PROMALA defence is replicated as before.<sup>15</sup>

An important conceptual change is in the provisions for harassment and victimisation which are in separate sections outside the definition of "discrimination", because neither requires a comparator, whether actual or hypothetical.

Harassment provisions are strengthened and broadened. Under the Act any unwanted conduct that is "relevant to" a PC and has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment will be unlawful.<sup>16</sup> The test is not person-specific and is broader than hitherto. "Relevant to" is potentially very broad.

As before, harassment also includes sexual harassment, i.e. "conduct of a sexual nature"<sup>17</sup>, and also either sexual harassment or conduct "related to" sex or gender reassignment which occurs as a result of rejection of or submission to sexual conduct.<sup>18</sup> In deciding whether the conduct has the effect referred to, all of the following must be taken into account:

- a) The perception of the complainant;
- b) The other circumstances of the case;
- c) Whether it is reasonable for the conduct to have that effect.<sup>19</sup>

This test is arguably more robust than under the current laws.

The victimisation provisions have changed completely. Victimisation occurs where the complainant suffers retaliatory detriment for doing something in connection with the Act (a "protected act"). The new provisions no longer require the complainant to show that they have been treated "less favourably" than someone who has not done a protected act. Instead they now provide that victimisation occurs where A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act.<sup>20</sup> So there is no need to find an actual or hypothetical comparator. Protected acts are defined broadly to include any action under or by reference to the Act; and it is made clear

that corporate entities cannot claim victimisation.

At sections 108-112 there are a set of important and somewhat new definitions of ancillary discrimination provisions. These also deal with specific situations involving more than one alleged discriminator. Section 108 covers relationships that have ended. It provides protection from unlawful discrimination, harassment and victimisation arising out of or in connection with a previous association, such as employment. So this means that without limitation in time, an individual should be protected from retaliatory action that is closely connected with the previous relationship. In addition, the requirement to make reasonable adjustments for the disabled will continue after the end of the relationship if the substantial disadvantage continues and the relationship is treated as still existing.<sup>21</sup>

Section 109 replaces similar provisions in previous legislation. It is intended to make employers and principals legally liable for acts of those over whom they have control. Other than offences under the Act, where there is strict liability, the employer or principal has a defence if it can show that it took "all reasonable steps".

Section 110 is new. It makes the employee (or agent) who does something unlawful under the Act *personally* liable as well as the employer/principal unless he/she can show that s/he reasonably acted in reliance on a statement that the act in question was not a contravention. There is a new offence of "knowingly or recklessly" making the statement in question, which attracts a fine not exceeding level 5 of the standard scale (currently GBP 5000).<sup>22</sup>

Under Section 111 it is unlawful for A to cause, instruct or directly or indirectly induce B to do something unlawful towards C provided that A is in a position to commit an unlawful act under the Act: *both* B and C can complain.

Knowingly helping someone else to contravene the Act is itself unlawful under Section 112. There is a defence of reasonable reliance on a statement by the other person, and an offence if the statement is made knowingly or recklessly.

All these ancillary provisions apply in all situations and are not limited to the world of work. Together with the primary provisions they arguably provide a very comprehensive framework of protection.

The Act makes big changes on disability protection. First, in addition to protection from direct discrimination, the Act now provides for protection from indirect disability discrimination.<sup>23</sup> In addition, the Act sets out to make it easier for a disabled person to show unlawful discrimination in other circumstances. So there is a new provision that unfavourable treatment of a disabled person which is not a PROMALA and is "*because of something arising in consequence of B's disability*" is unlawful discrimination. The section does not apply if A can show that he/she did not know and could not have been "expected to know" that B had the disability.<sup>24</sup> This is intended to remove the problems created by the 2008 decision of the House of Lords in the case of *Malcolm v Lewisham*.<sup>25</sup> The court found that to determine whether a disabled person had been discriminated against for a "disability-related" reason, you had to compare him/her with someone to whom the same reason applied but not related to disability. So for example if a blind person want-

ed to take a guide dog into a restaurant, the fact that the guide dog was closely associated with the blindness was irrelevant: the question was how the restaurant treated other people who just wanted to take their dogs in with them.

Finally, the Act prohibits pre-employment health questions unless they are to assist the selection process or in respect of an intrinsic element of the post or for diversity management.<sup>26</sup> And the duty to make reasonable adjustments is overhauled very thoroughly to make it both clearer and more effective. There are now three requirements:

- where a provision, criterion or practice puts a disabled person at a substantial disadvantage, reasonable steps have to be taken to avoid the disadvantage;
- where a physical feature (widely defined) puts a disabled person at a substantial disadvantage, reasonable steps have to be taken to avoid the disadvantage;
- where a requirement would, but for the provision of an auxiliary aid, put a disabled person at a substantial disadvantage, reasonable steps have to be taken to provide the auxiliary aid.<sup>27</sup>

There are new provisions for positive action and new and revised exceptions.<sup>28</sup> The general positive action provision applies to all situations in and out of the workplace. If A reasonably thinks that:

- people who share a PC suffer a disadvantage connected to the characteristic;
- people who share a PC have needs that are different from the needs of persons who do not share it; or

- participation in an activity by persons who share a PC is disproportionately low, then that person or body can take any action which is not direct/indirect discrimination and is a proportionate means of achieving the aim of:

- enabling or encouraging people who share the PC to overcome or minimise that disadvantage;

- meeting those needs; or

- enabling or encouraging persons who share the PC to participate in that activity.

This is permissive only, save that there is also a positive *duty* for public bodies to eliminate disadvantage and promote equality. Therefore the existence of the power coupled with the duty may lead to more active changes than hitherto. There is also a specific provision permitting the recruitment or promotion of an equally qualified person in situations where people with that PC are disadvantaged or are not participating sufficiently, provided there is no general policy to favour such people.

Finally, regarding the exceptions, there is a general exception for an occupational requirement (OQ) the application of which is a PROMALA, where the person to whom it is applied either does not meet it or there are reasonable grounds for being satisfied that s/he does not meet it. This applies across all the PCs.<sup>29</sup>

There are specific religion or religion-related exceptions. Some exceptions in respect of certain PCs are permitted for employment "for the purposes of" an organised religion.<sup>30</sup> They must engage the compliance principle, i.e. so as to comply with the doctrines of the religion and also the non-conflict principle, i.e. so as not to conflict with strongly held convictions of a significant number of the religion's followers. So for example a church can specify that it will not have a priest who is female or one who has re-married while his first wife was still alive.

In addition, there is a further religious belief OQ which "has regard" to the "ethos" of a particular organisation. In these cases, having a particular religious belief can be an OQ provided that the application of the requirement is a PROMALA and the person to whom it is applied does not have the belief or is reasonably seen as not having it.<sup>31</sup>

Apart from these cases, the only other exceptions relate to age discrimination.<sup>32</sup> These range from permitting a default retirement age, to age-related provisions in pensions schemes and age-related national minima in wages.

The Equality Act 2010 is an accomplished and potentially far-reaching reform of equality law in Britain. We wait to see how much of the Act is actually brought into force in the coming months.

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<sup>1</sup> Trustee of The Equal Rights Trust; Government Ambassador for Diversity in Public Office; Vice President of the Industrial Law Society; former Equal Opportunities Commissioner.

<sup>2</sup> Presented in June 2008 Cm 7431.

<sup>3</sup> Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act

1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Part 2 of the Equality Act 2006, and Equality Act (Sexual Orientation) Regulations 2007.

<sup>4</sup> *New Opportunities: Fair Chances for the Future*, Presented to UK Parliament by the Minister for the Cabinet Office by Command of Her Majesty, January 2009.

<sup>5</sup> Section 1 of the Equality Act 2010.

<sup>6</sup> Section 4.

<sup>7</sup> Section 13 (6) (a).

<sup>8</sup> Section 18.

<sup>9</sup> Section 19 (3).

<sup>10</sup> Section 14.

<sup>11</sup> Section 13.

<sup>12</sup> See, for example, section 1 of the Sex Discrimination Act 1975 or section 1 of the Race Relations Act 1976.

<sup>13</sup> See, for example, the decision of the House of Lords in *Shamoon v Northern Ireland Constabulary* [2003] UKHL 11.

<sup>14</sup> Section 13 (2) of the Equality Act 2010.

<sup>15</sup> Section 19.

<sup>16</sup> Section 26 (1).

<sup>17</sup> Section 26 (2).

<sup>18</sup> Section 26 (3).

<sup>19</sup> Section 26 (4).

<sup>20</sup> Section 27.

<sup>21</sup> Section 108 (4).

<sup>22</sup> Sections 110 (4) and 110 (5).

<sup>23</sup> Section 19.

<sup>24</sup> Section 15.

<sup>25</sup> *Malcolm v Lewisham* [2008] UKHL 43. The House of Lords was the UK's highest court which has been renamed the Supreme Court since December 2009.

<sup>26</sup> Section 60.

<sup>27</sup> Section 20.

<sup>28</sup> See sections 158 and 159.

<sup>29</sup> See Schedule 9, part 1.

<sup>30</sup> See Schedule 3, part 7, sub-schedule 29.

<sup>31</sup> Schedule 9, part 1, sub-schedule 3.

<sup>32</sup> See, for example, section 197.