Equality Act 2010: the future of fairness?

The Equality Act 2010 received Royal Assent on 8 April in much the same form as it was introduced in October last year. The cull of controversial clauses that many expected to see at the final stage of the Act's passage through Parliament did not materialise. However, even as MPs were agreeing to the Act in its entirety, the Conservatives indicated that, were they to be handed power in the next Parliament, they would not bring all of its provisions into force. In this article we review the main changes that the Act will introduce to discrimination and equal pay law and highlight the measures that will depend on the result of the General Election.

When the Equality Bill was unveiled in April 2009, it was accompanied by a White Paper, the title of which encapsulated the Government's ambitious aim for this landmark piece of legislation: 'A Fairer Future'. The Bill has now reached Royal Assent at a time when fairness is very much on the Government's agenda. The Labour Party is playing that card strongly in the General Election, with the slogan 'A future fair for all' and promises of improved fairness in almost all spheres of life. And the manifesto naturally points to the Equality Act 2010 as one of the administration's key achievements of the last five years.

The fairness agenda in the Equality Act is obvious from the outset, with S.1 creating a new obligation on public authorities to consider inequalities of outcome that may result from 'socio-economic disadvantage' when making strategic decisions. As we explain in this article, it is unclear whether the duty will have an impact on public sector employment policy. The employment-specific measures in the Act also underpin the Government's assertion that 'everyone has the right to be treated fairly and the opportunity to fulfil their potential'. In the White Paper, the Government outlined what it saw as the key measures directed at achieving this. These included introducing gender pay and equality reports; extending the scope for employers to take positive action; strengthening the powers of employment tribunals; protecting carers from discrimination; and strengthening protection from discrimination for disabled people. In this article, we consider the extent to which these and other aims of the Act are likely to be achieved.

When it comes to interpreting and applying the Act, various guides have been published or are in the pipeline. The Equality and Human Rights Commission has already begun consulting on draft Codes of Practice, which will offer statutory guidance on the Act's employment and equal pay implications. We will refer to the draft Codes where relevant in this article, with the caveat that the detail may change before the Codes and the Act are brought into force. Note that S.42 of the Equality Act 2006 preserves the Codes of Practice issued by the separate commissions that were subsumed into the EHRC when it came into being in October 2007. Those Codes, which cover race, sex and disability discrimination only, remain in force until revoked by statutory instrument. Therefore, they remain potentially relevant under the Equality Act 2010. Note also that, at the time of going to press, Explanatory Notes to the 2010 Act had not yet been published. Any references in this article to Explanatory Notes are references to those published alongside the Bill as introduced in Parliament.

It should be remembered that the new Act is not solely an employment measure. In addition to the socio-economic duty, which may have employment implications, it covers some decidedly non-employment areas, such as discrimination in the provision of goods and services, public procurement, discrimination in private members' club rules, and protection for mothers breastfeeding in public. These topics are outside the scope of this article. Instead, we focus on the main substantive changes proposed in respect of current employment law.

The present Government's intention is to bring the main provisions of the Act into force in October 2010. The socio-economic duty, the integrated public sector equality duty and the dual discrimination provisions will be held back until April 2011, and the private sector gender pay reporting obligations will not come into force until 2013 at the earliest.

Definitions

In this section we focus on the protected characteristics covered by the Equality Act and the various forms of unlawful discrimination. Of particular note are the new provision on dual discrimination and the extension of direct discrimination and harassment to cover associated and perceptive discrimination.

Protected characteristics

One of the key aims of the Act is to harmonise discrimination law across the variety of different 'strands' that currently exist. These are all brought together in S.4 as 'protected characteristics', i.e. the grounds on which discrimination will be deemed unlawful.

The characteristics, listed alphabetically, are the same as those currently protected by discrimination legislation: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. The Government rejected calls for characteristics such as genetic predisposition or Welsh-speaking to be added to the list.

Sections 5–12 then set out explicitly what is meant by each of these characteristics (except pregnancy and maternity, dealt with separately in S.18). On the whole, these definitions replicate those currently in force. In some cases, however, the definition is modified – for example, in relation to disability and race (for further details, see the relevant sections below).

Additionally, S.7, which defines the protected characteristic of gender reassignment, replaces similar provisions in the Sex Discrimination Act 1975 but changes the definition by no longer requiring a person to be under medical supervision to come within it. Under S.7, a 'person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.

The various kinds of discrimination are then defined by reference to the protected characteristics. Although these definitions largely replicate those currently found in the equality enactments, there are some important differences in wording that widen the scope of discrimination protection. We consider the definitions separately below.

Direct discrimination

Section 13 defines direct discrimination as follows: 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Thus, the Act retains the requirement for a real or hypothetical comparator who does not share the relevant protected characteristic (except in relation to pregnancy and maternity discrimination – see below).

Whereas the current legislation contains various definitions of direct discrimination using the phrase 'on grounds of', S.13 adopts the phrase 'because of'. According to the Explanatory Notes, this wording was chosen for the sake of clarity, making it more accessible to the 'ordinary user', and does not change the legal meaning of direct discrimination. However, the Discrimination Law Association, in its submission to the Equality Bill Committee, expressed concern that this new formulation may be read by some 'as requiring the kind of conscious motivation or intent not currently required… for proof of discrimination'.

As is currently the case, there is no requirement for a comparator in pregnancy and maternity cases. S.18 provides that an employer discriminates against a woman if, during the protected period of her pregnancy and statutory maternity leave, he treats her 'unfavourably' because of the pregnancy or an illness resulting from it; because she is on compulsory maternity leave; or because she exercises or seeks to exercise the right to ordinary or additional maternity leave. As originally drafted, this provision stated that discrimination would occur where the woman was treated 'less favourably than is reasonable'. However, the Government accepted the view of the TUC, and others, that the effect of the reasonableness requirement was to weaken the existing protection against pregnancy and maternity discrimination.

Where a woman is treated unfavourably because of pregnancy or a pregnancy-related illness, and the decision to treat her in that way was taken during the protected period but not implemented until after the end of that period, the treatment is nevertheless to be regarded as occurring during the protected period – S.18(5).

Association and perception. The new definition of direct discrimination in S.13 makes no reference to the protected characteristic of any particular person. In some cases, this will mean improved protection from discrimination by comparison with the current equality enactments. In respect of sex, disability, gender reassignment and age, direct discrimination is currently defined in such a way as to require the complainant to have one of those protected characteristics him or herself, with the result that a claim will not generally succeed where the treatment is based on the protected characteristic of a third party. (In light of European case law, however, the EAT has interpreted the Disability Discrimination Act 1995 so as to overcome that apparent limitation – see the section on disability, below.)

For example, whereas the Employment Equality (Age) Regulations 2006 SI 2006/1031 define direct age discrimination as occurring where A treats B less favourably than others 'on grounds of B's age', the reference in S.13 to treatment 'because of [age]' removes the need to consider whether the complainant's age was the reason for the treatment complained of. This broader wording means that so-called 'associative discrimination' is covered. If A treats B less favourably because B cares for an elderly relative, A can be held to have discriminated against B *because of age*, even though B's age is not the reason for the treatment.

In addition, the wide definition of discrimination encompasses so-called 'perceptive' discrimination; that is, discrimination because of a person's perceived characteristic. Under the Act, the perception that a person is disabled, for example, will be a potential ground of unlawful discrimination. Note that the Age Regulations already cover perceived (but not associative) discrimination.

An exception is made in respect of marital or civil partnership status. S.13(4) provides that, as is currently the case under S.3 SDA, an individual may only claim discrimination in employment on the basis of marriage or civil partnership if the treatment is because the complainant is married or a civil partner. A perception that he or she is married or a civil partner, or his or her association with someone who has married or civil partnership status, will not suffice.

By way of an exception to the prohibition on associative age discrimination, the Act permits employers to restrict benefits relating to the provision of child care to children of a particular age group – para 15, Part 2, Schedule 9. This exception, according to the Explanatory Notes, 'will allow employers to continue to offer employees child care facilities based on the age of a child [up to and including age 16] without being open to a challenge of direct discrimination from other employees'.

Dual discrimination. The absence of a right to bring discrimination claims combining protected characteristics has been perceived as a problem for some time, and was highlighted by the Court of Appeal in Bahl v Law Society and ors 2004 IRLR 799 (Brief 768). The Government first considered introducing protection from multiple discrimination in its 2007 discrimination law review consultation document, 'Framework for fairness: Proposals for a single Equality Bill for Great Britain', and in April 2009 the Government Equalities Office published a discussion document, 'Equality Bill: Assessing the impact of a multiple discrimination provision'.

The result is dual discrimination in S.14 of the Act, which allows a claim to be brought in relation to a combination of two protected characteristics – making 'dual discrimination' a more appropriate term than 'multiple discrimination'. The new provision only allows claims of direct dual discrimination to be brought; indirect discrimination, harassment and victimisation are not covered.

Under S.14, it is discriminatory to treat someone less favourably because of a combination of two of the following protected characteristics: age; disability; gender reassignment; race; religion or belief; sex; or sexual orientation. For such a claim to succeed, it is not necessary that there is sufficient evidence to support a claim of direct discrimination 'because of each of the characteristics in the combination (taken separately)' – S.14(3). However, separate single-strand claims on the same grounds could be brought alongside a claim of dual discrimination – so, for example, a black woman subjected to less favourable treatment might bring a S.14 claim based on race and sex, as well as separate race and sex discrimination claims in the alternative.

Not all protected characteristics are covered by the dual discrimination provisions – marriage and civil partnership, and pregnancy and maternity, are excluded. During consultation, the Government heard no evidence of any problems arising in practice from a combination of these characteristics and others. Another relevant consideration is that, as pregnancy and maternity claims do not involve a comparator (see above under 'Direct discrimination'), it would be difficult to combine them with a claim based on a protected characteristic which does entail such a requirement.

The Explanatory Notes indicate that the prohibition on dual discrimination applies in circumstances 'where the single-strand approach may not succeed'. They give the example of a black woman who has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to equally qualified white female and black male employees in the same or a similar role, the woman may need to rely on S.14 to demonstrate that she has been subjected to less favourable treatment because of the combined characteristics of race and sex.

The EHRC's draft Employment Code of Practice gives further examples, including that of a manager at a child care centre who does not employ a gay man because she assumes that the safety of the children who attend the centre will be compromised. If she would not have applied the same preconceptions to a gay woman or a straight man, the treatment will be an act of dual discrimination based on the combined characteristics of sexual orientation and sex.

It should be noted, however, that the single-strand approach may already offer adequate protection to the claimants in both of the above examples. In order to succeed in a direct discrimination claim, all the claimant has to do is show that the protected characteristic was an effective cause of the alleged treatment; it need not be the only cause, or even the main cause. Thus, the gay man in the second example might be able to establish both sex discrimination (based on a comparison with a gay woman) and

discrimination because of sexual orientation (based on a comparison with a straight man). In these circumstances, it is difficult to see why he would also need to bring a dual discrimination claim.

An employer has a defence to a dual discrimination claim if he can show, in reliance on another provision of the Act or any other enactment, that the treatment in question 'is not direct discrimination because of either or both of the characteristics in the combination' – S.14(4). This is intended to cover the situation in which at least one of the protected characteristics is covered by an occupational requirement or other statutory exception.

The new provision on dual discrimination is likely to result in a significant increase in employment tribunals' workload. In its 2009 discussion document, the Government Equalities Office estimated that 7.5 per cent of discrimination cases will include claims of dual discrimination, and that there will be a 10 per cent increase in discrimination cases once S.14 is in force.

Indirect discrimination

Section 19 of the Act extends the scope of indirect discrimination to cover disability and gender reassignment, and harmonises the various definitions of indirect discrimination found in the existing equality legislation (which have already been substantially brought into line with each other in the employment field following the wording of the relevant EU Directives). For further comment on the new prohibition on indirect disability discrimination, see the section on disability below. There is no explicit provision in the Act for indirect discrimination against pregnant women or women on maternity leave. This will continue to be dealt with as indirect sex discrimination.

Section 19 defines indirect discrimination as occurring when:

- A applies a provision, criterion or practice ('PCP') to B
- A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic
- the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic
- the PCP puts, or would put, B at that disadvantage, and
- the PCP is not a proportionate means of achieving a legitimate aim.

The new definition extends to claimants who *would* be put at a particular disadvantage by the relevant PCP. This reflects a 2008 amendment to the Race Relations Act 1976 and makes it clear that the Equality Act protects a person who is deterred by a discriminatory PCP from seeking employment for which he or she is otherwise qualified. The amendment does not, however, cover purely hypothetical situations, such as where an individual has no intention of seeking employment or is not qualified to undertake the job in question. This is because a person who had no intention of applying for a job, or was not otherwise qualified for it, would be unable to demonstrate a disadvantage.

Objective justification

In most cases, the current test for objectively justifying indirect discrimination and direct age discrimination in the employment field is whether or not the PCP is a 'proportionate means of achieving a legitimate aim'. (A different test applies to indirect discrimination on grounds of colour or nationality, but the Equality Act will remove that anomaly.) The relevant EU Directives, however, use different wording, stating that the PCP must be 'objectively justified by a legitimate aim and the means of achieving that aim [must be] appropriate and necessary'.

The Government has chosen to retain the current test of objective justification in S.13(2) of the Equality Act (direct age discrimination) and S.19(2) (indirect discrimination). It has adopted the same test of justification in relation to discrimination arising from disability – see the section on disability, below.

Giving its reasons for the decision not to use the European wording, the Government stated in its consultation response: 'We consider that the wording "appropriate and necessary" is problematic in domestic discrimination legislation because of the extreme exigency associated with "necessity" in domestic law. If this wording were to be used there might be a risk that this would be interpreted by the courts as an overly-strict requirement (for example, in order to satisfy the test the PCP would have to be the only possible means of achieving the legitimate aim). We therefore believe it is better to require that the justification be a "proportionate means of achieving a legitimate aim", and we propose to harmonise the test on this basis.'

Harassment

Under the current anti-discrimination legislation, there is a free-standing definition of harassment in the employment context covering all strands except marriage and civil partnership, pregnancy and maternity, and colour and nationality under the RRA. In addition, the SDA protects employees whose employer knowingly fails to protect them from

repeated harassment by a third party such as a customer or a supplier. Protection against third-party harassment does not currently exist in relation to the other equality strands.

Section 26 of the Equality Act extends protection from harassment in the employment field to colour or nationality, but not to marriage and civil partnership, or pregnancy and maternity. While this may seem a curious omission, these grounds are not covered by European law, and it seems that no respondents to the consultation pressed for change on this.

The wide approach taken with regard to direct discrimination (see above) has also been adopted with regard to harassment, so that the victims of harassment do not have to possess the 'protected characteristic' themselves. Under S.26(1)(a), a person (A) harasses another (B) if A engages in unwanted conduct 'related to a relevant protected characteristic' which has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Thus, as with direct discrimination, the Act prohibits harassment based on association and perception.

The link that must be proved between the protected characteristic and the offensive conduct is, arguably, weaker under the Equality Act than it is under the current law. Currently, harassment (except that related to disability and sex) must be *on grounds of* a particular characteristic, a formulation that implies a motivation in the mind of the alleged harasser – the characteristic must have been the *reason why* the harasser acted as he or she did. In some cases respondents have relied on this wording to argue that a person who uses racist or homophobic language towards another is not necessarily motivated by race or sexual orientation, and that the language used is simply a 'vehicle' for bullying that person – see, for example, the Court of Appeal's decision in English v Thomas Sanderson Ltd 2009 IRLR 206 (Brief 870). The new, wider definition of harassment, in so far as it covers conduct 'related to' a relevant protected characteristic, should mean that such arguments will invariably get the short shrift they deserve.

Section 40 extends the liability of employers for persistent harassment of their employees by third parties – currently only applicable to sexual and sex-related harassment under the SDA – to all the protected characteristics covered by the harassment provisions. This liability will arise if a third party harasses an employee in the course of the latter's employment; the employer knows that the employee 'has been harassed in the course of… employment on at least two other occasions by a third party' (whether or not by the same third party); and the employer has not taken reasonably practicable steps to prevent the harassment on this occasion. Thus, S.40 retains the controversial 'three strikes' provision that applies under the SDA.

Victimisation

Currently, in order for a claimant to prove victimisation, he or she must show that the employer has treated him or her less favourably than he treats or would treat other persons in the same circumstances, and did so by reason that the claimant has done or intends to do a protected act. Protected acts include bringing proceedings under discrimination law or making an allegation of discrimination.

The Equality Act takes a slightly different approach. S.27(1) provides: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.' The Act therefore removes the absolute need for the tribunal to construct an appropriate comparator. That said, in many cases, a comparison of the claimant's treatment with that of an appropriate comparator will still be an effective way of establishing the reason for the treatment.

Although the list of protected acts under S.27 is the same as under existing law, S.77, which bans pay secrecy clauses in employment contracts, adds a further protected act. S.77(4) provides that seeking, making or receiving a 'relevant pay disclosure' – i.e. a disclosure which relates to whether there is a connection between pay and having (or not having) a particular protected characteristic – are to be treated as protected acts.

Instructing and causing discrimination

Currently, it is unlawful for a person to instruct or induce someone to discriminate against, harass or victimise another person, or attempt to do so, in respect of certain protected characteristics – e.g. gender, race and disability – but not in respect of others, such as sexual orientation. In respect of age it is unlawful to instruct only.

Section 111 harmonises this area and extends protection to all protected characteristics, making it unlawful for a person (A) to instruct, cause or induce another person (B) to discriminate, harass or victimise a third person (C), or to attempt to do so. As well as allowing the EHRC to bring enforcement proceedings in relation to any breach, S.111 expressly allows B and/or C to bring proceedings if they are subjected to a detriment as a result of A's conduct, even where the instruction is not carried out.

Disability discrimination

The Government is taking the opportunity afforded by the Equality Act 2010 to attempt to remedy some of the deficiencies of the Disability Discrimination Act 1995 that have become apparent over the last few years. Among other things, the Act aims to overcome the 'Malcolm gap' in disability-related discrimination and extends the scope of indirect discrimination to cover disability.

Definition of disability

The new definition of disability, contained in S.6 of the Act, contains few significant changes from that found in the DDA. The existing guidance on determining whether a claimant has a disability – found in Schedule 1 to the DDA – is largely retained in Schedule 1 to the Act. However, the Government has opted to drop the requirement that, for an impairment to be considered to affect a person's ability to carry out normal day-to-day activities, it must affect one or more specified 'capacities', including mobility, manual dexterity, physical co-ordination, speech, hearing or eyesight. In the Government's view, this list 'served little or no purpose in helping to establish whether someone is disabled in the eyes of the law, and was an unnecessary extra barrier to disabled people taking cases in courts and tribunals'. Nor is the power in the DDA to exclude certain types of cancer from the definition of disability carried over into the Act, as the Government has no intention of exercising it.

Pre-employment health enquiries

Pre-employment enquiries about health issues are thought to be one of the main reasons why disabled job applicants often fail to reach the interview stage. S.60 of the Act, which was introduced at the Commons Report stage and substantially amended at the Lords Committee stage, is designed to address this problem.

Section 60 provides that an employer must not ask about a job applicant's health (including any disability) before offering him or her work or, where the employer is not in a position to offer work immediately, before including the applicant in a pool of persons to whom he intends to offer work in the future. The EHRC has power to enforce this provision. An employer does not commit an act of disability discrimination merely by asking about a job applicant's health, but the employer's conduct in reliance on information given in response may lead a tribunal to conclude that the employer has committed a discriminatory act. In these circumstances, the burden of proof will shift to the employer to show that no discrimination took place.

This is not quite a blanket ban on pre-employment health enquiries, however. S.60 does not apply to questions that are necessary to establish whether the job applicant will be able to comply with a requirement to undergo an assessment (such as an interview or selection test); whether a duty to make reasonable adjustments will arise in connection with any such assessment; or whether the applicant will be able to carry out a function that is intrinsic to the work concerned. The employer is also entitled to ask questions necessary to monitor diversity in the range of job applicants; to enable him to take positive action; or to establish whether the applicant has a particular disability, where having that disability is an occupational requirement. For more information on this last point, see under 'Disability as an occupational requirement', below.

Direct discrimination

As noted above in the 'Definitions' section, the new definition of direct discrimination by reference to a 'protected characteristic' in S.13 makes no reference to the protected characteristic of any particular person. The revised wording takes account of the European Court of Justice's decision in Coleman v Attridge Law and anor 2008 ICR 1128 (Brief 860) that the EU Equal Treatment Framework Directive (No.2000/78) protects those who, although not themselves disabled, nevertheless suffer direct discrimination or harassment owing to their association with a disabled person. In EBR Attridge LLP (formerly Attridge Law) and anor v Coleman 2010 ICR 242 (Brief 891), the EAT held that the DDA, despite its apparent limitations, was capable of being interpreted in line with the ECJ's decision. However, the new S.13 makes it clear that associative discrimination is covered without the need for employment tribunals to adopt a purposive, non-literal interpretation of the legislation. This means that carers of disabled people will enjoy protection from less favourable treatment that they receive because of that disability.

The Act attempts to retain the asymmetric approach to disability discrimination by providing that it is not discrimination to treat a disabled person more favourably than a person who is not disabled. This is achieved by S.13(3), which states: 'If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.' This would seem to cover a situation where, for example, an employer has made reasonable adjustments to a disabled employee's working hours. An employee who does not have that disability would not be able to argue

that he or she has suffered less favourable treatment, because of disability, by not being allowed to work the same hours.

Discrimination arising from disability

After the Green Paper on the Equality Bill was published, the House of Lords handed down its decision in Mayor and Burgesses of the London Borough of Lewisham v Malcolm 2008 IRLR 700 (Brief 857). In Malcolm – a housing case brought under Part III of the DDA – the House of Lords held that the appropriate comparator in cases of disability-related discrimination is a non-disabled person who is otherwise in the same circumstances as the disabled claimant. The decision threw into confusion the protection against disability-related discrimination in employment, provided for in Part II of the DDA, to which the long-standing comparator test set out in Clark v TDG Ltd t/a Novacold 1999 ICR 951 (Brief 635) previously applied. In Novacold, the Court of Appeal held, on the contrary, that the comparator need not be in the same or similar circumstances as the disabled complainant. So, for example, in a case where the employee was dismissed for sickness absence arising from a disability, the Novacold comparator would be a person who had not been absent from work (and would not have been dismissed), whereas the Malcolm comparator would be a non-disabled person who had also been absent, and who would accordingly have been treated in the same way as the disabled claimant.

The effect of Malcolm was to make disability-related discrimination harder, if not impossible, to prove. The Government has attempted to address that problem by means of S.15 of the Equality Act 2010, which introduces 'discrimination arising from disability'. Under S.15(1), a person (A) discriminates against a disabled person (B) if A treats B unfavourably 'because of something arising in consequence of B's disability', and A cannot objectively justify the treatment. A has a defence under S.15(2) if he did not know, and could not reasonably have been expected to know, that B had the disability.

Unlike disability-related discrimination, S.15 does not require the disabled person to establish that his or her treatment is less favourable than that experienced by a comparator. As a result, the provision avoids the main issue in Malcolm: namely, who that comparator should be. The Explanatory Notes state that S.15 is 'aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment'.

Indirect discrimination

As well as introducing a new type of discrimination arising from disability to fill the Malcolm gap, the Government has also opted to include disability among the protected characteristics covered by the indirect discrimination provisions in S.19. This decision was taken despite a number of responses to the consultation opining that the complex nature of indirect discrimination is not suited to disability. In short, indirect discrimination is established where a policy that an employer applies puts those who share a protected characteristic at a particular disadvantage when compared with those who do not share it. (For a full explanation of S.19 see 'Definitions', above.) S.6(3)(b) clarifies that in relation to disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability. Accordingly, for indirect discrimination purposes, the 'particular disadvantage' must affect those who share the claimant's particular disability. This overlooks the fact that even people who have the same disability cannot easily be treated as a homogenous class, since the way in which the same disability manifests itself will vary from person to person, making it difficult for a disabled person to demonstrate a group disadvantage.

In any event, it is difficult to envisage a scenario where the application of an employer's policy would be indirectly discriminatory, but would not also be caught by either discrimination arising from disability or the duty to make reasonable adjustments, which are substantially less complex than indirect discrimination, arguably easier to prove, and specifically tailored to the disability strand of discrimination. For these reasons, we envisage that few successful indirect disability discrimination claims will be brought.

Reasonable adjustments

The Act consolidates the various provisions in the DDA relating to reasonable adjustments and harmonises the statutory language. The duty to make adjustments, set out in S.20, comprises three aspects, the first two of which essentially replicate S.4A DDA: where a provision, criterion or practice (PCP) or a physical feature of premises puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the person to whom the duty applies must take such steps as it is reasonable to have to take to avoid the disadvantage – S.20(3) and (4). In a reflection of current practice, the third requirement, which currently applies only in respect of premises and goods and services, is extended to employment. This is that where, but for the provision of an auxiliary aid, a disabled person

would be at a substantial disadvantage, the duty is to take such steps as it is reasonable to have to take to provide that auxiliary aid – S.20(5).

Section 20(6), which was added at the Bill's Report stage in the House of Lords, provides that where the PCP or auxiliary aid relates to the provision of information, the steps which it is reasonable to have to take include steps for ensuring that the information is provided in an accessible format. Furthermore, S.20(7) makes it explicit that a person who is under a duty to make reasonable adjustments is not (subject to an express provision to the contrary) entitled to pass on the costs of compliance to the disabled person.

In relation to employment, the basic duties found in S.20 are supplemented by Schedule 8 to the Act. Part 3 of the Schedule provides that the duty will not apply where the employer could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at one of the three disadvantages identified in S.20 or, in the case of job applicants, that an interested disabled person is or may be an applicant for the job in question. The Government rejected suggestions that the duty to make adjustments should be anticipatory in nature, requiring employers to make changes before they know, or ought to know, of a specific employee's disability.

Disability as an occupational requirement

As we explain in the 'Exceptions' section, the law currently permits direct and indirect discrimination in recruitment and promotion, among other things, where having a protected characteristic is a genuine and determining requirement for the job in question. Currently, this does not apply to disability, but the Act includes disability within the exception. The Act also removes the need to show that the requirement is determining – the employer will only need to establish that applying the requirement is a proportionate means of achieving a legitimate aim. The Explanatory Notes state that 'an organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL'. This suggests a fairly low standard for 'occupational requirement', at least where disability is concerned – there is no need for a particular disability to be indispensable to a person's ability to perform a particular role.

Race discrimination

When it comes to streamlining and strengthening protection from discrimination, attention has mostly focused on what the Equality Act does in relation to disability, where potentially significant changes to the law's scope are in prospect. The Act's approach to the other strands of discrimination is more or less one of straightforward consolidation, bringing the current legislation together without noticeably raising the level of protection. However, the race discrimination provisions of the Act – while still principally aimed at tidying up – do make some minor improvements to the current protection.

Burden of proof

One key criticism made of the Race Relations Act 1976 has been that the protection it bestows varies according to the kind of race discrimination alleged. Specifically, the 'reverse' burden of proof – which is designed to make it easier for claimants to get a claim off the ground – only applies to certain kinds of claim under the RRA. This inconsistency has been highlighted by recent case law. In Okonu v G4S Security Services (UK) Ltd 2008 ICR 598 (Brief 849) the EAT held that because of the way the RRA is worded, the 'reverse' burden of proof does not cover claims of discrimination on the grounds of colour or nationality, but does cover all other race claims, such as those based on racial or ethnic origins. Okonu has since been disapproved with regard to colour discrimination – but not nationality discrimination – in Edozie v Group 4 Securicor plc and anor EAT 0124/09 (Brief 894), leaving the law in a state of some confusion. On a different point, the Court of Appeal in Oyarce v Cheshire County Council 2008 ICR 1179 (Brief 855) held that the more favourable burden of proof mechanism does not apply to claims of race victimisation, even though it applies to all other forms of discrimination under the RRA.

The Equality Act makes the protection from race discrimination consistent with the protection from all other kinds of discrimination. The 'reverse' burden of proof, which appears in a slightly revised form in the new Act at S.136, applies to 'any proceedings relating to a contravention of [the] Act'. Thus, all kinds of discrimination claim, claims of victimisation related to any of the protected characteristics, and claims of harassment are covered. This is a welcome amendment to the existing law, as the differences on this point in the RRA serve no purpose.

Caste discrimination

The House of Lords made a largely unexpected addition to the race discrimination provisions at Report Stage. The Government accepted an amendment moved by the Liberal Democrat Lord Avebury to include a power to make caste discrimination an aspect of race discrimination – the power appears as S.9(5) and (6) of the Act. The need for caste discrimination to be expressly covered was

debated at the Committee Stage. It was noted there that the Equality and Human Rights Commission, among others, thought such a power unnecessary, since there was a good case to be made for race discrimination already being capable of interpretation to include caste. However, Lord Avebury noted that in the absence of any specific mention of caste in domestic law, it would be a 'chancy and expensive business' for anyone to test this in the courts.

When the Equality Bill returned to the House of Commons for consideration of their Lordships' amendments, the Solicitor-General gave some indication of the circumstances in which the power might be exercised. The Government has commissioned the National Institute of Economic and Social Research to produce a report on the extent to which caste discrimination is a real problem. If the report, due to be published in August this year, shows evidence of a need to legislate, then secondary legislation recognising caste discrimination would be made following further consultation. The legislation would be subject to the affirmative resolution procedure.

Equal pay

Of all the strands of discrimination law, equal pay is arguably the one in most need of reform. Many commentators, including the EHRC, have argued that the individual 'complaints-led' approach to remedying sex discrimination in pay has reached the limit of its effectiveness. In March 2009, before the Equality Bill was published, the EHRC issued a press release arguing for five key equal pay reforms to be included. Three of the proposed innovations – a ban on secrecy clauses; gender pay gap reporting requirements; and pay discrimination claims based on hypothetical comparators – are now in the Act in one form or another. However, looking at the new provisions as they appear in the statute book, their potential to make any significant impact on the gender pay gap is in some doubt. We review these three areas below.

The EHRC's two other proposals were a means of taking representative actions in equal pay claims and a wider power for tribunals to make recommendations. The Government has been generally reluctant to go down the route of representative actions, and so its omission is no surprise. As to recommendations, S.124 permits tribunals to make general recommendations affecting the whole workforce, rather than just the complainant, as now. However, this power does not appear to apply to equal pay claims. For more details, see under 'Enforcement', below.

The existing mechanism for enforcing equal pay on an individual basis will largely stay the same under the Equality Act. The law currently divides claims of sex discrimination into two types. Claims of sex discrimination in contractual matters – including, but not limited to, pay – can only be pursued under the procedure laid down in the Equal Pay Act 1970. So, the claimant must identify an actual comparator of the opposite sex, in the same or associated employment, doing equal work but being paid more, as per S.1 of the 1970 Act. Claims of sex discrimination in non-contractual matters – including, for example, discrimination in selection or promotion – can only be pursued under the Sex Discrimination Act 1975. This division is maintained in more or less identical form in the new Act. Chapter 3 of Part 5 covers contractual claims, while Part 2 covers non-contractual claims. The one major change in approach is the acknowledgement, at least, of the possibility of bringing a contractual claim without a flesh-and-blood comparator – see under 'Hypothetical comparators' below.

The procedure for bringing and defending an equal pay claim is also largely replicated in the Act. One minor change is a rewording of the 'genuine material factor' defence. Currently, an employer can defeat an equal pay claim if he can show that a difference in pay is genuinely due to a material factor, which is not sex, differentiating the circumstances of the claimant from those of his or her comparator – S.1(3) EqPA. This defence is now expressed as the 'material factor' defence in S.69 of the 2010 Act – the Government has dropped the word 'genuine', taking the view that it added nothing.

Section 69 also expressly acknowledges something that, until now, has only been set out by case law; namely, that not only must a material factor not be sex, it must not involve indirect sex discrimination. Under the new Act, if the material factor operates to the disproportionate disadvantage of one sex over another, then it will expressly require objective justification – S.69(1)(b) and (2). In this regard, S.69(3) states that the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim, potentially justifying indirect discrimination. This enshrines something thus far acknowledged only by case law, that employers who implement a measure of pay protection while eliminating discrimination from their pay structures will be able to justify doing so, even though the protection temporarily prolongs the discriminatory pay practice.

Secrecy clauses

One of the key intentions announced in 'A Fairer Future – The Equality Bill And Other Action To Make Equality A Reality', the White Paper that accompanied the publication of the Bill, was to 'ban pay secrecy or "gagging" clauses which stop employees discussing their pay with their colleagues'. The White Paper went on to state that where colleagues work closely together but are paid different amounts, they should be able to compare those amounts if they wish. At first glance, then, the intention was to outlaw pay confidentiality clauses altogether. However, the actual prohibition set out in the Act is not nearly so wide-ranging.

Under the heading 'Discussions about pay', S.77 of the new Act renders unenforceable any contractual term that purports to prevent or restrict a person from sharing information about contractual terms with a colleague, *in so far as that person seeks to make a relevant pay disclosure*. A 'relevant pay disclosure' is one made for the purpose of finding out whether or to what extent there is a connection between pay and a particular protected characteristic – S.77(3). So, there is no general prohibition on clauses that hinder pay discussions, only clauses that hinder pay discussions aimed at establishing the existence of discrimination. This seems to miss the point of why confidentiality clauses are such a hindrance to pay equality. It is not so much that they prevent employees following up their suspicions about unequal pay, but that by shutting down any discussion of pay at all, such inequalities are highly unlikely to become apparent in the first place. Thus, from an equal pay enforcement point of view, it is regrettable that this provision does not go as far as the Government seemed to say it would.

By virtue of S.77(4), seeking or making a 'relevant pay disclosure' or receiving information disclosed therein is also a protected act covered by the victimisation provisions. So, an employee potentially has a remedy if his or her employer imposes sanctions for having discussed pay inequality. As with the restrictions on secrecy clauses, this only applies where the employer seeks to punish 'relevant pay disclosures' – salary discussions between colleagues unrelated to discrimination are not covered. That said, any employee facing victimisation or action for having breached such a clause could claim to have been seeking information about pay discrimination, which it would be difficult for the employer to disprove.

Gender pay reporting

As a first step towards forcing private sector employers to address pay inequality outside the context of tribunal equal pay claims, S.78 creates a power to make regulations requiring private sector employers with 250 or more employees to publish information about the differences in pay between their male and female employees. Although it is not made explicit in the statute, the Labour Government made it clear that it would not use this power before April 2013. The Government's aim is for employers to publish such information on a voluntary basis, and only to exercise the statutory power if sufficient progress on reporting has not been made. In January 2010, following consultation, the Equality and Human Rights Commission published its recommendations for how employers should go about measuring their gender pay gaps on a voluntary basis. The EHRC's proposals are set out in the box below.

Gender pay reporting – the voluntary approach

During the passage of the Equality Bill, the Government commissioned the Equality and Human Rights Commission to develop metrics for reporting and publicly sharing gender pay gap information on a voluntary basis. Following consultation with trade unions, employers' organisations and equal pay experts, among others, the EHRC has published its recommendations. It is proposing a 'menu' of voluntary measures, which organisations with 250 or more employees can choose from. These measures include:

- the single-figure difference between the median hourly earnings of men and women
- the difference between the average basic pay and total average earnings of men and women by grade and job type
- the difference between men's and women's average starting salaries.

The EHRC is also offering employers an option to include a 'narrative' of the causes of their organisation's gender pay gap. This narrative would have to be combined with one or more of the quantitative measures.

To encourage take-up of these reporting measures, the EHRC is offering a limited degree of immunity from investigation for firms that participate. While this immunity will not extend to discrimination cases, it will mean that participating companies will be unlikely to receive formal requests for further information during the next two years.

The Conservatives have made no secret of their opposition to the Government's proposed gender reporting measures. Throughout the Equality Bill debates they pushed their own approach, which was only to require an employer to conduct an equal pay audit on losing an equal pay claim in the tribunal. At the final debate on the Bill before Royal Assent, Mr Mark Harper MP indicated that the Conservatives, if elected, would not bring into force 'the mistaken way in which the Government [is] tackling equal pay'. Thus, even the limited way in which the current Government is seeking to impose gender pay monitoring is under threat.

As to the public sector, the Government noted in its consultation response that as part of the public sector equality duty, public bodies with over 150 employees will be obliged to publish annual details of their gender pay rates, as well as their ethnic minority and disability employment rate (see below for further details on the public sector equality duties).

Hypothetical comparators

As noted above, the current law's approach to equal pay – which is more or less preserved in the Equality Act 2010 – is founded on a comparison between the claimant and a real comparator of the opposite sex who actually does equal work. Case law has consistently rejected the argument that the right to equal pay can be established on the basis of a hypothetical comparator. In Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley 2008 ICR 1041 EAT (Brief 855), for example, Mr Justice Elias, then President of the EAT, noted that a hypothetical comparison involves too high a degree of speculation as to what a comparator would have been paid, and lacks the requisite 'concrete appraisal' of the work actually performed by both claimant and comparator. The Government, too, has consistently rejected the idea of hypothetical equal pay comparators. But for all that, the new Act does introduce something that looks like a hypothetical equal pay comparison in all but name.

The division between contractual equal pay claims and non-contractual sex discrimination claims is enforced by S.70 of the new Act, which provides that the S.39(2) prohibition on discrimination in the terms of employment has no effect in relation to a contractual term that falls to be dealt with under the equal pay provisions. So, contractual sex discrimination can only be dealt with under the equal pay provisions. However, under the heading 'Sex discrimination in relation to contractual pay', S.71 provides that this exclusion does not apply to a pay term in relation to which the equal pay provisions have no effect, in so far as the treatment of the complainant amounts to direct or dual discrimination. Thus, while it will not be possible for a complainant to bring an equal pay claim under the equal pay regime using a hypothetical comparator, it will be possible for him or her to bring a sex discrimination claim in relation to contractual pay under the direct discrimination and dual discrimination provisions. However, the equal pay regime, including matters such as the more generous time limits, would not apply to such claims.

The Explanatory Notes state that this section would cover the situation where a would-be complainant can show evidence of direct sex discrimination in relation to contractual pay but is prevented from bringing an equal pay claim by the lack of a comparator. Rather simplistically, the Explanatory Notes go on to indicate that this would be the case where an employer tells a female employee, 'I would pay you more if you were a man'. Of course, in no other kind of discrimination claim is such stark evidence of discrimination required – the 'reverse' burden of proof allows tribunals to draw an inference of discrimination from prima facie evidence. There is no reason to suppose that a direct pay discrimination claim should be treated any differently.

One potential area of interest arising out of this new right is whether the level of pay of a successor in employment might constitute evidence of direct discrimination. In the Bewley case (above), the EAT held that a would-be equal pay claimant could not compare herself with the better-paid man who replaced her in her job. Elias P considered that such a claim is precluded for the same reasons that preclude hypothetical comparators. Now that the requirement of an actual comparator may be dispensed with in certain circumstances, it may well be possible for equal pay arguments based on successor comparators to be resurrected.

Exceptions

The equality strands currently allow for strictly limited exceptions to the general principle of non-discrimination. The Act aims to simplify and harmonise the exceptions from the requirement not to discriminate. It applies a general 'occupational requirement' test consistently across all the strands. Ensuring consistency in the way exceptions are treated will, says the Government, 'make it easier for employers to decide if discriminatory acts are justifiable', with the result that they will reduce the amount they spend on legal advice.

The Act also preserves certain specific exceptions – for instance, it retains the default retirement age and

the specific exceptions in respect of organised religion currently found in the Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660. The new provisions covering these exceptions are contained in Schedule 9 to the Act.

General occupational requirement

Currently, a genuine occupational requirement (GOR) can be relied upon as a defence to direct and indirect discrimination by employers. This applies where being of a particular race or ethnic or national origin, religion or belief, sexual orientation or age is a 'genuine and determining' occupational requirement, provided it is proportionate to apply the requirement in the case in question. However, in relation to sex, gender reassignment, colour and nationality, there is no general GOR defence. Instead there are specific genuine occupational qualifications (GOQs), which serve a similar purpose. One GOQ, for example, is the need to employ a man or woman to ensure that a dramatic performance is authentic (sex); another applies where the job involves providing individuals of a particular racial group with personal welfare services (race). There is currently no GOR or GOQ defence for disability because the Disability Discrimination Act 1995 does not protect non-disabled people.

The Act contains a general 'occupational requirement' defence for all grounds of discrimination. The new general defence differs from the existing one in that it drops any reference to the occupational requirement being 'genuine and determining'. Furthermore, instead of the current requirement for it to be proportionate to rely on a GOR, applying an occupational requirement must be 'a proportionate means of achieving a legitimate aim'. This mirrors the objective justification test elsewhere in the legislation and, arguably, any requirement which is not 'genuine' or 'determining' would not be 'proportionate'. Like the current strands, the general occupational requirement defence in the Act only applies to direct and indirect discrimination. It does not apply to claims of harassment and victimisation.

Employers who currently rely on specific GOQs under the relevant legislation in order to discriminate in favour of a person of a particular sex, for example, should review their current recruitment criteria to ensure they comply with the new provisions. In particular, they should consider whether the requirement for a person with a particular protected characteristic is a proportionate means of achieving a legitimate aim.

Surprisingly, given the Government's stated intention in the consultation response, the new provisions cover disability. It is not clear why the Government has done this and it is certainly not clear what effect it will have, given that the direct discrimination provisions of the Act (see under 'Disability discrimination') expressly provide that it is not discrimination to treat a disabled person more favourably than a person who is not disabled.

The circumstances in which employers may apply the defence remain the same. Employers are allowed to treat job applicants differently because of a protected characteristic in the arrangements made for the purpose of determining who should be offered employment, or by refusing to offer or deliberately not offering employment. Employers may also rely on the exceptions when promoting, transferring or training persons for a post, or when dismissing employees. An employer cannot, however, discriminate against an employee in the terms of employment afforded or offered to him or her, or by subjecting him or her to any other detriment – para 1(2) of Schedule 9.

Schedule 9, Part 1: general occupational requirements

1(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work –

(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(Sub-paragraph (2) (referred to in sub-paragraph (1) above) lists the provisions of the Act, including those that apply to employees and job applicants making it unlawful to discriminate in relation to recruitment, opportunities for promotion, transfer or training, and dismissal.)

Religion or belief exceptions

Paragraphs 2 and 3 of Schedule 9 replicate the effect of specific defences under current law in respect of employment for the purposes of an organised religion and employments where there is an ethos based on religion or belief. The defences – which, like the general defence, apply only to direct and indirect discrimination in recruitment, promotion, transfer, training and dismissal – are set out below.

Organised religion requirement. Where employment is for the purposes of an organised religion, para 2 allows an employer to apply a requirement to be of a particular sex or not to be a transsexual person, or a requirement related to the employee's marriage, civil partnership or sexual orientation, but only if the requirement in question is applied so as to comply with the doctrines of the religion or to avoid a conflict with the strongly held religious convictions of a significant number of the religion's followers. 'Employment' in this context includes appointments to personal and public offices – para 2(7).

This exception replaces the general religion or belief GOR, which is worded differently. However, as under the current law, this exception will apply to a very narrow range of circumstances. So, for example, while it would apply to a requirement that a Catholic priest be a man, it would not apply to a requirement that a church youth worker or accountant be heterosexual.

Ethos based on religion or belief. The Act provides for an occupational requirement in respect of employment where there is an ethos based on religion or belief. Para 3 allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos, being of that religion or belief is a requirement for the work, and applying the requirement is a proportionate means of achieving a legitimate aim. This exception replaces the differently worded religious organisations ethos GOR, but it is likely that the effect of the new provision will be the same as under current law.

Armed forces

Paragraph 4 of Schedule 9 contains an exception which makes it lawful for the armed forces to apply requirements to employees and job applicants excluding women and transsexuals from service in the armed forces, provided the requirement in question is a proportionate means of ensuring the combat effectiveness of the armed forces. This provision replicates the effect of current exemptions, but narrows the scope of the existing combat effectiveness exception so that this applies only to direct discrimination in relation to recruitment and access to training, promotion and transfer opportunities. Para 4(3) also maintains the exemption for the armed forces from the work provisions of the Act relating to disability and age.

Organised religion – House of Lords amendments

The Bill originally defined employment 'for the purposes of an organised religion' as that which 'wholly or mainly involves: (a) leading or assisting in the observation of liturgical or ritualistic practices of the religion; or (b) promoting or explaining the doctrine of the religion'.

This definition was removed during the Committee stage in the House of Lords following an amendment tabled by Conservative peer Baroness O'Cathain. Her amendment was intended to preserve the exception for religious bodies, as set out in existing legislation – such as the Sex Discrimination Act 1975 – where employment for the purposes of organised religion is not defined. She argued that the new definition had the effect of narrowing this exception.

The Baroness tabled a couple of further amendments – also approved by the House of Lords – essentially removing a requirement of proportionality that had been introduced into the organised religion exception by the Equality Bill. Again, this was in an attempt to return to the status quo, since there is no such proportionality requirement under equivalent provisions in existing discrimination legislation.

These amendments may cause problems for a future government, bearing in mind the Reasoned Opinions sent by the European Commission last November. These asserted, among other things, that domestic law exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are too broad, in contravention of the EU Equal Treatment Framework Directive (No.2000/78). Preserving the domestic law status quo in this area means that the contravention, as the Commission sees it, will continue.

Employment services

As under current law, the providers of employment services will not be found to have discriminated where one of the occupational requirements in Part 1 applies to the work in question or where it was reasonable for them to rely on a statement by the hirer that an exception applied – para 5. The provision of employment services includes the provision of vocational training and guidance in a number of situations set out in S.56.

Exceptions relating to age

The Act contains a number of exceptions in relation to the age strand, which replicate the current exceptions. So, it will still be lawful to discriminate on the ground of age in relation to retirement of employees at age 65 or over; benefits based on length of service; the national minimum wage; redundancy pay; and life assurance for people taking early retirement on account of ill health (Part 2 of Schedule 9). In addition, the Act creates a new exception from the prohibition of age discrimination in employment for benefits which relate to the provision of child care, and to which access is restricted to children of a particular group – for example, a workplace crèche for children aged two and under. This exception has been introduced to take account of associative discrimination, where parents may assert that they have been directly discriminated against because of their association with a child who does not fall within a specified age group. Such claims will not be possible.

It also contains a power for a Minister of the Crown to specify age-related exceptions relating to contributions to personal pension schemes. Exceptions to the non-discrimination rule in relation to age in respect of employer contributions to personal pension schemes are currently set out in Schedule 2 to the Employment Equality (Age) Regulations 2006 SI 2006/1031.

Other exceptions

A number of other exceptions, set out in Part 3 of Schedule 9, replicate the effect of current exceptions governing non-contractual payments to women on maternity leave (such as discretionary bonuses), payments dependent on marital/civil partnership status, and the provision of services, etc to the public. There is also an exception in respect of some forms of discrimination in relation to insurance contracts, which replaces a similar provision in the SDA. This covers gender reassignment discrimination, marriage and civil partnership discrimination, pregnancy and maternity discrimination, and sex discrimination.

Positive action

Positive action has been permitted by the discrimination legislation for some time, and its scope is now reasonably well understood. Employers are entitled to direct training at, and encourage applications from, groups they reasonably consider to be under-represented in their particular industry. What is not currently permitted is any kind of positive action in selection – a person's protected characteristics must not form any part of the employer's decision-making in recruitment and promotion.

The Equality Act maintains the current approach with regard to training and encouraging applications, which are covered by a new general power to take positive action set out in S.158, and adds scope for employers to take positive action when recruiting, or selecting for promotion (S.159). When in force, S.159 will allow an employer to treat a person with a protected characteristic more favourably if he reasonably thinks that people with that protected characteristic suffer a disadvantage connected to the characteristic, or that 'participation in an activity' (i.e. employment in a certain sector) among people with that particular characteristic is disproportionately low. The more favourable treatment must be aimed at enabling or encouraging persons with the particular protected characteristic to overcome or minimise the disadvantage, or to participate in the activity. However, S.159(4) provides that this option will only be available where:

- the person in question is 'as qualified as' other applicants to be recruited or promoted
- the employer does not have a policy of treating persons of the particular under-represented or disadvantaged group more favourably in connection with recruitment or promotion than persons who do not share the relevant protected characteristic; and
- the more favourable treatment is a proportionate means of achieving the aim of overcoming or minimising the disadvantage, or encouraging participation.

This section has generated a lot of negative media coverage, but looking at the very limited scope of this provision, it is obvious that the potential injustice that some media commentators have claimed it capable of causing has been overstated. The provision does not allow for 'quotas' or selection regardless of merit, nor will employers be obliged to use this power – the measure is entirely voluntary. Accordingly, individuals cannot challenge someone merely for not taking positive action. Although an unsuccessful minority candidate might argue that an employer's failure to avail himself of S.159 is evidence of a discriminatory approach to recruitment, we think this argument is unlikely to find much favour.

Many employers will be wary of taking positive action even when the conditions set out above are satisfied, fearing a challenge from the unsuccessful candidate. One big area of uncertainty is the meaning of 'as qualified as', a phrase on which the Act does not elaborate. The Government indicated in debate that it would not be limited to academic qualifications, so work experience, skills and competencies should also be considered. Furthermore, the EHRC's draft Employment Code of Practice counsels a broad approach, with the employer 'preparing an objective

set of criteria that relate to the job or post and then conducting an objective assessment or evaluation of each candidate against that set of criteria and against each other'. There will be no need for the candidates to match each other identically on a point-by-point basis – an overall approach will suffice. Employers thus have some leeway to make a case that a candidate is as qualified as another according to their chosen criteria. However, it will rarely be a clear-cut issue, meaning that employers are unlikely to feel confident going down this route.

Given the uncertainty surrounding the breadth of S.159, the Conservatives moved an amendment to change 'as qualified as' to 'equally qualified to', hoping that this would be clearer. The amendment was rejected. The Conservatives have since indicated that, if successful at the polls in May, they will not bring the positive action provisions of the Act into force.

Public sector duties

The Act brings together the existing public sector equality duties covering race, disability and gender under a new single equality duty which is extended to age, sexual orientation, and religion or belief, as well as making it clear that it covers pregnancy and maternity (currently only implicitly covered by the gender duty) and gender reassignment in full (currently only partly covered). It will not apply to marriage and civil partnership. The Act also places a new duty on certain public bodies to consider socio-economic disadvantage when taking strategic decisions about how to exercise their functions (see below under 'Socio-economic duty' for further details).

In its response to the consultation on the Equality Bill, the Government referred to the noticeable number of public authorities that are already adopting an integrated approach, not just for race, sex and disability, but also in relation to gender reassignment, age, religion or belief and sexual orientation. Bringing the duties together into a single duty will, it said, 'provide significant rationalisation benefits, promote the development of more personalised public services which better meet people's diverse needs, and place the achievement of equality outcomes at the heart of our public services'.

The public sector equality duties in current legislation specify which bodies are subject to the duties in different ways. The Race Relations Act 1976 uses a list, while the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975 apply the disability equality duty and the gender equality duty to those which have functions of a public nature. The Act combines the two approaches. S.149 sets out the general equality duty, which will require public bodies to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act, advance equality of opportunity and foster good relations across the protected characteristics. Schedule 19 to the Act lists the public authorities covered by the duty. This is supplemented by S.149(2), which also imposes the duty on others that exercise public functions, but only in respect of those public functions. Subsections (3)–(5) expand on what it means to have due regard to the need to advance equality of opportunity and foster good relations. Further details of S.149 are set out in the box below.

Specific duties

The Government has decided to retain the overall structure of the existing duties, i.e. a general duty underpinned by specific duties designed to support performance of the general duty. Currently, most but not all of the public authorities subject to the general race, disability and gender duties are also subject to the specific duties. Under the new regime, the Government anticipates 'that the vast majority of bodies subject to existing specific duties will also be subject to the new specific duties'.

The specific duties are not detailed in the Act, which instead gives a power to impose specific duties by secondary legislation (S.153). Furthermore, S.155 makes it clear that a Minister may impose specific duties on a public authority 'in connection with its public procurement functions'. Approximately £175 billion is spent each year by the public sector on goods and services and some public authorities already use their public sector equality duties to drive equality when putting out work for tender by asking potential contractors, for example, for a gender breakdown of their workforce. According to the Government, it is 'well-established that public procurement can and should be used to support social policy objectives, including equality… Whilst there are pockets of good practice in using public procurement to promote equality, we believe public procurement should be used more consistently to help achieve equality objectives.'

In addition, the Government expressly stated in its consultation response to the Bill that public bodies with over 150 employees will be under a specific duty to publish annual details of their gender pay, their ethnic minority employment rate, and their disability employment rate. It goes no further than those characteristics because it does 'not think the time is right to require public bodies to report employment rates for all characteristics protected under the equality duty'. For example, some organisations 'may not yet have achieved a culture in which employees are ready to be asked to provide personal information

Public sector equality duty: S.149

(1) A public authority must, in the exercise of its functions, have due regard to the need to

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are – age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

about matters such as their sexual orientation or religion or belief'.

The Government's proposals for the specific duties, including procurement and equality data reporting, were issued for consultation in June 2009. The Government Equalities Office has now published 'Equality Bill: Making it work – Policy proposals for specific duties. A Policy Statement' (January 2010), which summarises the responses and makes a number of changes to the specific duties set out in the consultation (see www.equalities.gov.uk). The next step will be the issuing of draft regulations by the Government for consultation – the aim being that the general and specific equality duties will come into force in April 2011.

A related document, 'Equality Bill: Making it work – Ending age discrimination in services and public functions', was also issued for consultation last year and invited views on developing policy for exceptions to the ban on age discrimination. A policy statement setting out the Government's approach has since been published on the Equalities Office website in January 2010. The age-specific exceptions canvassed therein build on those that already exist in the Equality Act and cover two main areas: financial services and other services, including commercial services such as group holidays. A national review into the action needed to tackle age discrimination in the health and social care sectors was also carried out last year and its recommendations on age-based differentiation also appear in the policy statement. The Government plans to issue draft regulations on the exceptions covered by the consultation and the national review in the autumn.

Enforcement

A failure by a relevant body to fulfil a public sector equality duty does not give rise to a cause of action under private law. However, the duties are enforceable by way of judicial review – the position under the current law.

Socio-economic duty

In an attempt to address inequality that arises from a person's social class or family background the Government has introduced, in S.1 of the Act, a 'socio-economic duty' on certain public bodies. This requires them to consider whether they can do more to help people fulfil their potential by addressing social barriers. It is not dissimilar in principle to the equality duty (see above), but is more limited in its scope.

The duty is expected to come into force in 2011. However, Conservative MP Mark Harper told the Commons on 6 April 2010 that his party will not enact this provision if it wins power in the forthcoming election. This follows an unsuccessful attempt by the Conservatives to remove the socio-economic duty from the Bill at the House of Lords Report stage. Should the Government survive the election, it plans to produce formal guidance in the summer of 2010, which will be subject to a 12-week consultation period. In the meantime, 'The Equality Bill: Duty to reduce socio-economic inequalities – a guide', published in January 2010, explains the background to the duty and how it might operate for the different types of public body that it covers.

Section 1 of the Act requires specified public bodies, including Government departments, local authorities, NHS bodies and police authorities, when making strategic decisions, to have 'due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'. 'Strategic decisions' are not defined in the Act. However, the guide states that they are those that determine how an organisation goes about its business, including setting priorities and targets, allocating resources, and commissioning services. As to 'due regard', the guide cites Lord Justice Dyson in the Court of Appeal in R (Baker and ors) v Secretary of State for Communities and Local Government and anor 2008 EWCA Civ 141, in the context of the race equality duty, to the effect that 'it is the regard that is appropriate in all the circumstances'. This involves a balancing act between the effects of the disadvantage to the affected group and the factors relevant to the authority's functions, which includes its financial constraints.

Like the new single equality duty, the socio-economic duty will not give rise to legally enforceable rights and remedies for individuals (although individuals are not prevented from applying for judicial review). The key difference is that while the equality duty applies to all the functions of a public body, the socio-economic duty applies only to its 'strategic decisions'. The guide envisages that the duty may have some application in the employment field. It notes that a local authority's employment strategy may involve a strategic decision, and that Ministers and central government departments already actively trying to recruit more women, people from ethnic minorities and disabled people may also want to consider how they can attract people from different socio-economic backgrounds. Given that employment policy is potentially within the remit of the duty, the public bodies covered may therefore need to consider the duty in relation to staff training and development as well as recruitment.

How the duty will operate in practice is not clear, especially given that identifying socio-economic disadvantage is not in itself straightforward. As the guide points out, poverty is one factor, but it also includes health, housing and education as well as 'family background and a resulting lack of ambitions and expectations'. Nevertheless, the guide suggests the following basic approach that it would expect all the public bodies covered to take:

- when making key strategic decisions affecting spending and public services, to take account of the impact those decisions may have on narrowing the gaps in outcomes experienced by different socio-economic groups
- to do so by examining the evidence they hold on the inequalities relevant to the decision or issue, and the role of socio-economic factors in driving these inequalities
- where the evidence suggests that taking a particular decision or course of action would reduce outcome gaps, to give appropriate weight to the desirability of taking that course of action, and balance this against other policy objectives and available resources
- to demonstrate how they have fulfilled this duty and take this into account in their existing monitoring and reporting mechanisms.

Public bodies will be monitored in the implementation of their duty by inspectorates such as the Audit Commission and Ofsted. Government and other interested parties will be able to use the information made available through the monitoring process to assess a body's compliance with the duty. Enforcement is by way of judicial review.

Enforcement and remedies

The enforcement provisions, which are contained in Part 9 of the Equality Act, remain largely unchanged. However, there are a few notable exceptions.

Territorial jurisdiction

Unlike existing discrimination legislation, the Equality Act is silent as to its territorial scope. Current discrimination law applies to employment 'at an establishment in Great Britain' and provides protection to those who work 'wholly or partly' in Great Britain as well as those who work wholly outside Great Britain but fulfil specific criteria. (The latter is subject to some exceptions such as colour.) Those criteria, in short, are that the employee works for a business that has an establishment in Great Britain, and that he or she is resident in Great Britain either when he or she applied for the job or at any time during the course of the employment. According to the Explanatory Notes, the decision to remove territorial scope from the Act follows the precedent of the Employment Rights Act

1996 and leaves it to employment tribunals to determine whether the Act applies. (S.196 ERA, which determined that Act's application to employees who ordinarily work outside Great Britain, was repealed by the Employment Relations Act 1999.)

This means that when determining whether they have jurisdiction to hear a claim brought under the Equality Act, tribunals will generally be obliged to follow the test laid down by the House of Lords in Lawson v Serco Ltd and other cases 2006 ICR 250 (Brief 799). In that case, their Lordships held that the right not to be unfairly dismissed under S.94 ERA applies to employees employed in Great Britain at the time of dismissal. They established that peripatetic employees – who include, for example, airline pilots and international management consultants and salesmen – are able to claim unfair dismissal if they are based in Great Britain at the time they are dismissed.

Their Lordships also acknowledged two other exceptional categories of employee who will be able to claim unfair dismissal even though they are not employed in Great Britain at the relevant time, provided their employment has strong enough connections with Great Britain and British employment law. One such exceptional case is that of expatriate employees, such as foreign correspondents on British newspapers, who live and work in a foreign country but who nevertheless remain permanent employees of the newspaper. The second is that of expatriate employees of a British employer who work within a British enclave in a foreign country. Thus, a civilian who worked on a British military base in Germany and a security supervisor working for a British company at a Royal Air Force base in the South Atlantic were both entitled to claim under the ERA. Lord Hoffmann emphasised that whether an employee was employed in Great Britain (or, in the case of a peripatetic employee, was based there) must be decided according to the factual position at the time of the dismissal, rather than according to where the employee could be employed under the terms of the contract of employment.

The territorial reach of the ERA under the Lawson v Serco test is narrower than that of existing discrimination legislation, since it excludes those recruited in Britain for a British business but who work outside Great Britain, unless they fall within the narrow exceptions set out by the House of Lords. Consequently, some employees who are currently covered by discrimination law are potentially excluded from the protection of the Equality Act.

If the application of Lawson does indeed result in narrower protection, the most likely solution will be for claimants to seek to apply the principle established in Bleuse v MBT Transport Ltd and anor 2008 ICR 488, EAT (Brief 846). That case, recently endorsed by the Court of Appeal in Duncombe and ors v Secretary of State for Children, Schools and Families 2010 IRLR 331 (Brief 894), held that the Lawson test ought to be modified in its application to UK law where necessary to give effect to directly effective rights derived from EU law. Since most discrimination laws are so derived, it is strongly arguable that a wider test will apply to claims brought under the Equality Act. Furthermore, ECJ cases like Mangold v Helm 2006 IRLR 143 (Brief 803) and Kücükdeveci v Swedex GmbH und Co KG 2010 IRLR 346 (Brief 896) suggest that non-discrimination is a general and fundamental principle of EU law, which can be relied on against private individuals as well as against the State. So, the wider test is likely to apply to workers in the private sector as well as their public sector counterparts.

Recommendations

Currently, where an employer is found to have unlawfully discriminated against a claimant, an employment tribunal has the power to make a recommendation that the employer takes action for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates. This could be, for example, that the employer sends a particular individual at fault on equal opportunities training. But because recommendations are limited to those that affect the individual claimant, they have no application in situations where the claimant has already left the workplace.

In its response to the Equality Bill in July 2008, the Government recognised that 'around 70 per cent of employees involved in discrimination cases leave the organisation'. This limits the power of tribunals to make recommendations that could prevent discrimination in that workplace in the future. Consequently, the Act widens the scope for tribunals to make recommendations that will benefit the wider workforce and help to prevent discrimination occurring in the future. S.124(3) provides that a tribunal can make a recommendation to obviate or reduce the adverse effect on the complainant or any other person of any matter to which the proceedings relate. Note, however, that this does not apply to equal pay claims by virtue of S.113(6).

Burden of proof

Section 136 of the Equality Act harmonises the burden of proof provisions across the equality strands, albeit with some small changes to the wording. Under existing legislation, in most cases the burden of proof shifts onto the respondent once the claimant has established a prima facie case. However, this 'reverse' burden of proof does not currently apply

in race discrimination claims brought on grounds of nationality; claims of victimisation relating to race discrimination; and some other non-work discrimination claims.

The Equality Act reverses the burden of proof in all claims brought under the Act except those relating to a criminal offence. S.136(2) and (3) provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, unless A shows that he or she did not contravene the provision. If the allegation concerns a criminal offence, the usual criminal burden of proof applies, i.e. proving the case beyond reasonable doubt.

Conduct giving rise to separate proceedings

A new power to allow for the transfer between employment tribunals and civil courts of certain types of connected cases is contained in S.140. This enables an employment tribunal to transfer jurisdiction in a case to a county court (or sheriff court in Scotland), or a county court or sheriff court to transfer jurisdiction in a case to an employment tribunal, in certain circumstances. These are where the case is based on conduct which has given rise to two or more separate proceedings under the Act and one of the claims relates to instructing, causing or inducing a person to discriminate against, harass or victimise another person contrary to S.111. S.140(5) makes clear that the court or tribunal cannot make a decision in such a case which is inconsistent with an earlier decision about the same conduct.

The Explanatory Notes give the following example of how this power is intended to work. An employer instructs an employee to discriminate against a customer. The customer brings a case against the employer or the employee in a county court. The employee brings a case against the employer in an employment tribunal. Both claims arise out of the same conduct and so the court or the tribunal can transfer one set of proceedings in order for them to be dealt with together.

Previous findings

To prevent matters being relitigated under the new Act, S.137 provides that any final finding in a claim brought under the existing discrimination legislation is to be treated as conclusive in proceedings under the Equality Act. A finding is considered final when an appeal against it is dismissed, withdrawn or abandoned or the time limit for appealing against it has expired.

Harmonisation

The Equality Act 2010 includes areas of discrimination law that derive from EU law (such as discrimination on racial grounds) alongside areas that have their origins purely in domestic law (such as discrimination on the grounds of colour or nationality). As things stand, S.2(2) of the European Communities Act 1972 allows the Government to achieve the effect required by EU law by way of secondary legislation, i.e. by order or regulations. However, any changes to domestic law that are not strictly required by European legislation are outside S.2(2) and so must ordinarily be made by a new Act of Parliament. Thus, there is a risk that future changes to EU law would disrupt the Act's streamlined and harmonious approach – changes covered by S.2(2) could be made relatively quickly, while complementary changes to other areas would have to wait until Parliament finds time to legislate. The inconsistencies in the burden of proof rules under the RRA have come about for precisely this reason – see 'Race discrimination', above.

In an attempt to head off this potential disruption, the Act contains what is known as a 'Henry VIII clause' at S.203. Such a clause, like S.2(2) of the 1972 Act, creates a power to amend the Act by ministerial order. The power will be available when the United Kingdom comes under an obligation to implement EU law (such as a Directive) that relates to the Act or the Equality Act 2006, and the Minister thinks it appropriate to make 'harmonising provision'. 'Harmonising provision' is amendment made to sections of the Act not covered by EU law, but which corresponds to the implementing measure, or which the Minister thinks is necessary or expedient as a result of the EU-derived amendment. Any such provisions may only be laid before Parliament after consultation has been undertaken and at least 12 weeks have passed, and will only come into force after receiving an affirmative resolution in both Houses. A Minister must report to Parliament every two years on the exercise of this power.