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The Single Equality Act in Britain: a good practice example

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This fact sheet aims to present the British Equality Act, providing an overview of the process of adoption, the content of the legislation and the progress made compared to previous equality laws. The British Equality Act is one of the most far-reaching and progressive equality laws in Europe, and is therefore a good practice example for other EU member states to follow.

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Introduction

The Equality Act 2010 was one of the last measures to be enacted under the Labour Government which lost office in the U.K. in May 2010. It is the outcome of 14 years of campaigning by equality specialists and human rights organisations. Remarkably, there was eventually cross-party support for nearly all of its provisions, and the new Conservative-Liberal Democrat Coalition Government is committed to bring it into operation in stages from October 2010. The Act covers Great Britain (England, Wales and Scotland) but not Northern Ireland which has devolved powers on these matters, and appears to be set to continue its own patchwork of anti-discrimination legislation rather than enact a single Act, because of disagreements within the power-sharing government of that province. However, Northern Ireland has since 1989 been the pathfinder of new ways to combat inequality, some of which are reflected in the British Act.

Some features of the Act may serve as a model for other countries, in particular:

- Adopting a unitary or integrated perspective of equality law enforced by a single Commission;
- Clarifying the definitions of discrimination, harassment and victimisation and applying them across all protected characteristics;
- Expanding positive duties on public authorities to advance equality in respect of all protected characteristics;
- Widening the circumstances in which positive action is allowed; and
- A new duty on public authorities to have due regard to socio-economic disadvantage when taking strategic decisions.

Of course, legal models cannot simply be transplanted from one jurisdiction to another. Account has to be taken of the precise historical, political, and socio-economic circumstances in which equality legislation is made and enforced. This article, therefore, aims to explain the history and context of the British Act, and then to assess its content against the benchmark of the Declaration of Principles on Equality (the Declaration) launched by The Equal Rights Trust (ERT) which represents a “moral and professional consensus among human rights and equality experts.”² It will be seen that, despite its promise, there are still some important gaps between the Act and the vision of the Declaration.

1. Five generations of legislation

The Equality Act 2010 is part of the fifth generation of equality legislation in Britain. Social legislation of this kind is not the “gift” of enlightened rulers. It is the outcome of struggles between different interest groups and competing ideologies. As Abrams has said, “what any particular group of people gets is not just a matter of what they choose, but what they can force or persuade other groups to let them have.”³ The first generation of British legislation was based on the notion of formal equality - likes must be treated alike. The Race Relations Act 1965 was the response of a Labour Government to campaigns by, among others, members of the Movement for Colonial Freedom and the Campaign Against Racial Discrimination to deal with the then widespread overt discrimination against recent immigrants from the Caribbean and the Indian sub-continent. The Act was a kind of quid pro quo for the Commonwealth Immigrants Act 1962 which had made it more difficult for Black and Asian immigrants to come to the U.K. It covered direct racial discrimination but only in places of public resort, such as public houses and hotels. It established a Race Relations Board which investigated complaints through conciliation committees. If conciliation failed and the discrimination was likely to continue, the Board could refer the matter to the Attorney-General to seek an injunction.

² *Declaration of Principles on Equality*, published by the Equal Rights Trust, London, October 2008, p.2.

³ Abrams, P., *Historical Sociology*, Sheptom Mallet, Open Books, 1982, p.15.

The second generation, the Race Relations Act 1968, was also a measure of formal equality. It was limited to direct racial discrimination but extended coverage to employment, housing, goods and services. Enforcement was still through local conciliation committees, and voluntary bodies in 40 industries, but if conciliation failed the Race Relations Board could itself bring proceedings in a designated county court. Campaign groups managed to mobilise political pressure for this new Act by commissioning two reports, one on the extent of racial discrimination (whose existence many then denied) and the other on anti-discrimination legislation in the USA and Canada. A Labour Home Secretary, Roy Jenkins, whose special adviser was Anthony Lester (later Lord Lester of Herne Hill QC, first Chair of the Equal Rights Trust), steered the measure through Parliament, but once again the quid pro quo was a restrictive Commonwealth Immigrants Act 1968 to halt the influx of East African Asian refugees.

The third generation started with the extension of legislation to discrimination on grounds of sex (Equal Pay Act 1970 and Sex Discrimination Act 1975 (SDA)). This had long been fought for by the trade union and feminist movements and the Labour and Liberal parties. The unique features of the SDA 1975, passed under a Labour Government, were the introduction of the concept of indirect or adverse effects discrimination (borrowed from the USA), and provisions permitting positive action. This marked the beginning of a transition from formal equality to substantive equality. Moreover, there was an individual right to claim compensation for unlawful discrimination in industrial (later called employment) tribunals and courts. An Equal Opportunities Commission (EOC) was created to undertake strategic enforcement and to assist individuals. This model was followed in a new Race Relations Act 1976, deliberately introduced later than the SDA because women's rights were more popular than those of ethnic minorities. There was now a separate Commission for Racial Equality (CRE) in place of the Race Relations Board and Community Relations Commission (CRC). The SDA was enacted soon after the UK joined the European Economic Community (EEC) under the Treaty of Rome which laid down the principle of equal pay for women and men and later issued directives on equal opportunities. There was a radical development of European law on gender equality as a result of test cases brought by the EOC before the European Court of Justice (ECJ). A further step towards substantive equality occurred with the Disability Discrimination Act 1995 (DDA). Growing political activism by disability organisations had been seeking "rights not charity." Disabled people increasingly saw the welfarist approach as paternalistic and oppressive. It was under a Conservative Government that the 1995 Act established individual rights for disabled people to claim equal treatment. It was recognised that disability discrimination is asymmetrical, and measures to achieve substantive equality therefore included a duty to make reasonable adjustments for a disabled person. From 2000, a Disability Rights Commission (DRC) was established.

The fourth generation resulted from Article 13 of the Treaty of Amsterdam (1997) and the implementing Race Directive⁴ and Framework Employment Directive⁵ (covering age, disability, religion or belief, and sexual orientation) and subsequently the Equal Treatment Directive⁶ (covering sex). There were growing pressures within Britain for an extension of anti-discrimination legislation to the new strands from LGBT groups, religious groups - particularly Muslims - and those concerned with age discrimination. But without the Article 13 EC Directives it is unlikely that any domestic legislation would have been introduced at that time. A series of regulations implemented the

⁴ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁶ European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

Directives between 2003 and 2007. The Government chose to do this by secondary rather than primary legislation, with the result that the British regulations could not go beyond the provisions of the Directives. For example, the age, religion or belief and sexual orientation regulations had to be confined to employment and related fields because that was the scope of the Framework Employment Directive. Despite the gaps and shortcomings, this generation of EU-inspired legislation marks the start of comprehensive equality.

The fifth generation continues the move towards comprehensive equality and starts a period of transformative equality. This was first sparked by pressures from US and Irish Catholic activists who wanted to promote fair representation in Northern Ireland, and was based on American models. In 1989, the Fair Employment (Northern Ireland) Act imposed positive duties to achieve fair participation of the Catholic and Protestant communities on certain employers. This has resulted in significant improvements in fair employment for both Catholics and Protestants without the use of quotas.⁷ The Northern Ireland Act 1998 (implementing the Belfast/Good Friday Agreement) went further imposing positive duties on public bodies to have due regard to the need to promote equality of opportunity not only between Protestant and Catholic communities, but also in respect of age, disability, race, religion, sex, marital status, and sexual orientation. In other words, public bodies had to mainstream equality into the exercise of all their functions. This approach crossed the Irish Sea to Britain in 2000 in respect of race equality, following the inquiry into the death of a black teenager, Stephen Lawrence, which exposed “institutional racism” in the Metropolitan Police.⁸ Amendments to the Race Relations Act not only extended anti-discrimination law to police and similar functions, but also imposed both general and specific public sector equality duties.⁹ Similar public sector positive duties were introduced in respect of disability in 2005¹⁰ and gender in 2007.¹¹

2. The campaign for a single Act and single Commission

By 1997 when the Blair Labour Government was elected, anti-discrimination legislation was widely criticised for being outdated, fragmented, inconsistent, inadequate, inaccessible, and at times incomprehensible. Shortly before the 1997 election, Lord Lester and I brought together a small group of human rights specialists under the auspices of Justice and the Runnymede Trust.¹² We set out the main reforms that were needed. After the election we met the Labour Home Secretary (Jack Straw) and proposed that the new Government should review anti-discrimination law and practice. He said the Government had too much else to do, but he was sympathetic and supported our application to funding bodies for a one-year Independent Review (the Cambridge Review).¹² We undertook targeted case studies in Britain, Northern Ireland and the USA to examine how employers and others acted under different types of legislative regime. We interviewed individuals and organisations responsible for enforcement, and conducted widespread public consultation. Our report proposed that there should be a single Equality Act adopting a unitary or integrated approach covering all protected characteristics, and based on clear principles. We also advocated a single Commission. We made detailed recommendations on discrimination, harassment, and positive action, proposed a duty on public authorities to promote equality, a duty on all large employers, including the private

⁷ McCrudden, C., Muttarak, R., Hamill, H., Heath, A., “Affirmative Action without Quotas in Northern Ireland”, *Equal Rights Review*, Volume 4, 2009, pp. 7-14.

⁸ See *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Stationary Office, February 1999.

⁹ Section 71 of the Race Relations (Amendment) Act 2000.

¹⁰ Section 49A of the Disability Discrimination Act 2005.

¹¹ The public sector positive duties for gender were introduced by sections 84 and 85 of the Equality Act 2006 and came into force in 2007.

¹² Hepple, B., Coussey, M., Choudhury, T., *Equality: a new Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Oxford, Hart Publishing, 2000.

sector, to undertake employment and pay equity reviews, and the use of contract and subsidy compliance to promote equality. There were also recommendations to make enforcement procedures and remedies more effective.

The report was sympathetically received by the Labour Government but no concrete action followed, apart from the establishment of a single Equality and Human Rights Commission (EHRC) from October 2007, merging the existing commissions and covering all the strands of discrimination. In order to stimulate reform, Lord Lester, a Liberal Democrat member of the upper House, introduced a Private Member's Bill in 2003. This Bill passed through all its stages in the House of Lords, with cross-party support, and over 200 Members of the House of Commons signed a motion calling on the Government to introduce such a Bill. In its manifesto for the 2005 elections, the Labour Government followed the Liberal Democrats in pledging to introduce a Bill, but it took another two years before it published an Equalities Review,¹³ examining the extent of discrimination, and a Discrimination Law Review with proposals for a single Equality Bill.¹⁴ Over 4,000 individuals and organisations responded to the consultation.¹⁵ After a number of "false starts, empty announcements and delays"¹⁶, the Government's Equality Bill was finally presented, in April 2009, by Harriet Harman, Minister for Women and Equalities. The Conservative Party, while supporting the main principles in the Bill, opposed some of the provisions on grounds that they were "unworkable and overly bureaucratic", and "unnecessarily onerous" on business in a time of recession.¹⁷ The Liberal Democrats supported the Bill but thought it should go further especially in respect of equal pay.¹⁸ The Bill was the product of intense scrutiny and debate by the House of Commons over a period of one year, fuelled by human rights and equality organisations that presented evidence to the Public Bill Committee and gave detailed briefs to parliamentarians. The debate could have continued even longer, when the Bill reached the upper House, but Lord Lester persuaded his fellow peers to exercise restraint so as to ensure that the measure was passed before the election due to be held in May 2010. The Bill received the royal assent on 8 April 2010, just before the dissolution of Parliament.

3. Unitary or integrated perspective

The overriding aim of the Equality Act 2010 is to achieve harmonisation, simplification, and modernisation of equality law. This in effect expresses several principles in the Declaration, in particular the right to equality of all human beings (principle 1), equal protection from discrimination regardless of the grounds concerned (principle 6), and the obligation on states to give "full effect" to the right to equality in all activities of the state (principle 11).¹⁹ There must be no hierarchy of equality. The same rule should be applied to all strands unless there is convincing justification for an exception. To a large extent, the Act achieves this aim, although some of the exceptions in respect of particular strands remain controversial. Examples are the retention of a mandatory default retirement age of 65²⁰ (although the Coalition Government have promised to phase this out), the exclusion of some discriminatory immigration decisions from protection,²¹ and the limitation of

¹³ Department of Communities and Local Government, *Fairness and Freedom. The Final Report of the Equalities Review*, February 2007.

¹⁴ Department of Communities and Local Government, *Discrimination Law Review: a Framework for Fairness. Proposals for a Single Equality Bill for Great Britain*, June 2007.

¹⁵ *The Equality Bill - Government Response to the Consultation*, Cm 7454, 2008.

¹⁶ House of Commons Debates, 11 May 2009, cols. 565-7. Theresa May MP, Conservative Party, who later became Home Secretary in the Coalition Government.

¹⁷ House of Commons Debates, 11 May 2009, cols. 565-7 - Theresa May MP.

¹⁸ This was stated by Lynn Featherstone MP, Liberal Democrat, who later became Minister of State for Women and Equalities in the Coalition Government.

¹⁹ See above, note 2, ppp. 5, 8 and 9.

²⁰ Schedule 9, Part 2.

²¹ Schedule 3, Part 4.

protection from harassment on grounds of religion, belief or sexual orientation to employment and related fields.²² There is bound to be continuing argument at the margins, particularly where the principle of equality has to be reconciled with the freedom of religion and freedom of expression, but broadly speaking, the drafters have managed to limit the exceptions.

The judges have been given the power to decide whether indirect discrimination on any ground, and direct discrimination on grounds of age or arising as a consequence of disability, is justified as being “proportionate to a legitimate aim.”²³ This will enable them to balance apparently conflicting values on the basis of evidence as to whether a provision, criterion, or practice is appropriate and necessary. British judges are, in fact, showing an increasing awareness that there should be no hierarchy of equality. For example, in a recent case in which a counsellor employed by a relationship counselling service was dismissed for refusing to provide services to same sex couples because of his particular Christian beliefs, Lord Justice Laws, refusing leave to appeal against a decision that the dismissal was not unfair, made it clear that the law’s protection of the right to hold and express a belief does not mean that priority must be given to that belief’s substance or content where it is incompatible with the principle of equality.²⁴

The Act replaces nine previous major pieces of legislation²⁵ and seeks to implement fully four main EU Directives.²⁶ There is a question as to how far a single Equality Act can successfully “simplify” this very complex area of law, and make it more accessible. Lord Lester’s Bill in 2003 had 94 clauses and 8 schedules in 111 pages. The new Act has 218 sections, organised in 16 Parts, and 28 schedules, in 239 pages, and there will also be some detailed regulations in secondary legislation, and guidance in codes of practice. By contrast, the Dutch Equal Treatment Act of 1994 has only 35 sections, and the Swedish Discrimination Act of 2008 has 71 sections. The British Act, like those in Ireland, reflects the different drafting conventions of the Anglo-Saxon common law systems and the Continental civil law systems. Within those constraints, the British drafters have provided a model which may influence other common law jurisdictions. The Act is complemented by a very helpful set of Explanatory Notes which make the turgid legal language more accessible to the ordinary reader. Guidance and codes of practice will be issued by the EHRC. But professional legal advice will still often be needed by those who wish to institute legal proceedings.

²² Section 29 (8).

²³ Section 13 (2) and section 15 of the Act.

²⁴ *McFarlane v Relate Avon Ltd* [2010] EWCA CivB1, 29 April 2010.

²⁵ Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006, Part 2, Equality Act (Sexual Orientation) Regulations 2007.

²⁶ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), see above, note 4; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive), see above, note 5; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Equal Treatment Amendment Directive); European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Recast Equal Treatment Directive), see above, note 6. Also relevant is article 157 of the Treaty on the Functioning of the EU. Account was taken of the new draft Directive (July 2008) on discrimination because of disability, religion or belief, sexual orientation and age, in access to goods and services, housing, education, social protection, social security and social advantage.

4. Clarification of the definitions of discrimination, harassment and victimisation and applying them across all protected characteristics

Principle 4 of the Declaration states that “the right to non-discrimination is a free-standing, fundamental right subsumed in the right to equality”, and Principle 5 contains a definition of discrimination. Broadly speaking, the British Act is compatible with these principles. However, unlike the European Convention on Human Rights and most other international instruments, it does not adopt an open-ended approach to defining the kinds of status or identity that are protected. The Act covers only eight of the characteristics mentioned in Principle 5. These are: age, disability, gender reassignment (which is possibly narrower than gender identity), marriage or civil partnership, pregnancy and maternity, race (which includes colour, nationality and ethnic or national origins; caste may be added later by secondary legislation), religion or belief, sex (man or woman), and sexual orientation. The Act does not mention descent (although ethnic descent is included in “ethnic origins”), language, political or other opinion (a “belief” has to be of a philosophical nature and not simply political), birth, social origin, economic status, health status, genetic or other disposition toward illness. The new definition of direct discrimination is broad enough to cover mistaken perception that a person has any one of the protected characteristics (e.g. that he or she is thought to be HIV-positive).

The Government refused to give specific protection to carers, saying that this is not a “status” and is better protected by other legislation such as that allowing some carers to request time off work or flexible working arrangements. However, association with a person with any one of the protected characteristics is protected, for example association with a national minority. The Act gives effect to an ECJ decision that less favourable treatment of a person because of the disability or age of the person for whom they care must be covered,²⁷ nonetheless carers who are discriminated against because of their position as carers rather than the characteristics of the person for whom they care, is still ambiguous. The position of carers is important. It has been estimated that half of women are likely to be providing care by the age of 59; carers are less likely to be in paid work or in education than the general population; and caring reinforces gender inequalities because it has a disproportionate impact on women.²⁸

The Act deals only partly with the issue of what Principle 12 of the Declaration calls “multiple discrimination” that is discrimination on more than one ground.²⁹ The Act allows claims where because of a combination of two relevant protected characteristics a person treats another less favourably than they treat or would treat a person who does not share either of those characteristics.³⁰ The limitation to two grounds was a compromise made by the Equality ministers in the Government in the face of the opposition of the Business lobby, supported by Business ministers, who opposed any provision on multiple discrimination. The new provision only allows a combination of two claims of direct discrimination, and a claim of direct and indirect discrimination cannot be combined. So if a disabled woman is denied flexible working and she alleges indirect discrimination on grounds of sex and direct discrimination because of disability, she will not be able to combine these in a single claim where it is unclear which of them caused the unfavourable treatment. Again the reason given for this was that it would be “unduly burdensome” to business.

²⁷ *Coleman v Attridge Law* [2008] ECR I-5603.

²⁸ National Equality Panel, *An Anatomy of Economic Inequality in the UK*, London, Government Equalities Office, 2010, pp. 238-9.

²⁹ For detailed analysis see, Uccellari, P., “Multiple Discrimination: How Law Can Reflect Reality”, *Equal Rights Review*, Volume 1, 2008, pp. 24-49.

³⁰ Section 14.

Principle 5 says that “direct discrimination may be permitted only very exceptionally when it can be justified against strictly defined criteria.” The Act does not allow a defence of justification of direct discrimination except in the case of age discrimination. In that case, the burden of proof is on the respondent to show that the discrimination is “a proportionate means of achieving a legitimate aim.” For example, policies which draw a “bright line” for certain benefits (e.g. educational grants) at a particular age may be justified, depending on the circumstances. But mere generalisations and prejudiced assumptions about age should not be accepted without satisfactory proof.

The definition of discrimination because of disability differs significantly from that of other protected characteristics.³¹ This is, in effect, an application of Principle 2: “equal treatment, as an aspect of equality, is not equivalent to identical treatment.” The law does not expect disabled people to be treated in exactly the same way as those who are not disabled. The Act recognises the special needs of disabled people. More favourable treatment of disabled people than others is allowed, and a new provision improves protection for disabled people who are treated unfavourably because of “something arising in consequence” of their disability.³² So a visually disabled person who is not allowed to bring a guide dog into a restaurant does not have to show that they were less favourably treated than other dog owners. There is a defence of justification in respect of this kind of discrimination using the proportionality test. For example, the licensee of a public house who ejects a person because of violent conduct arising from a disability, might be able to show that this was a proportionate means of achieving the legitimate aim of protecting other customers.

There is also, as in earlier legislation, a duty to make reasonable adjustments for a disabled person.³³ This fulfils the aims of Principle 13 of the Declaration: “to achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.” Although the Act now provides some consistency in regard to reasonable adjustments, for example requiring the disabled person to show a “substantial disadvantage”³⁴, it is necessary to consult no less than six schedules to the Act to ascertain the precise circumstances in which the duty to make reasonable adjustments arises. For example, there are different requirements in respect of different types of public transport vehicle. Broadly speaking, the requirements are of two kinds. Some are reactive, that is they are triggered when a provision, criterion or practice substantially disadvantages a particular disabled person, for example that a job applicant has particular needs. Others are anticipatory, requiring proactive steps to make services available, for example the manager of a large retail store might be expected to install automatic doors and lifts for wheelchair users.

The new Act, implementing the Framework Employment Directive 2000/78/EC, also applies the concept of indirect discrimination to disability.³⁵ This is likely to encourage service providers to identify and remove barriers for disabled people in advance. The previous law focused only on providing individual solutions to individual problems.

The new Act provides a single, uniform definition of unlawful harassment, which goes further than the definitions in EU law. There are three types of harassment in British law. The first is similarly worded to the definition in Principle 5 of the Declaration. This covers unwanted conduct which is related to a relevant protected characteristic and has the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating, or offensive environment.³⁶

³¹ Section 15.

³² Section 15 (1) (a).

³³ Section 20.

³⁴ Section 20 (3).

³⁵ Section 19.

³⁶ Section 26 (1).

The second type is conduct of a sexual nature or related to gender reassignment or sex, which has the same purpose or effect as the first type of harassment.³⁷ The third type is treating someone less favourably because they have either rejected or submitted to conduct of a sexual nature or related to gender reassignment or sex. Controversially, the Act excludes harassment related to religion or belief, or related to sexual orientation, from its application to the provision of services, the exercise of public functions, and the disposal, management, and occupation of premises. In effect the prohibition of harassment related to religion or belief or sexual orientation is confined to the workplace.³⁸ This limitation reflects concerns about freedom of religion and freedom of expression which are protected by articles 9 and 10 of the European Convention on Human Rights. For example, it was feared that a cartoon “offensive” to some Muslims, or a Christian preaching against homosexuality in a way “offensive” to gays and lesbians, would constitute harassment. These concerns could probably have been met by applying a conjunctive definition of harassment, as in EU law, in non-work fields (that is requiring both an invasion of dignity and objectively offensive conduct), rather than the disjunctive one favoured in work-related British law. Applying the Declaration’s definitions to verbal conduct does not have to mean neglecting other human rights such as freedom of religion and freedom of speech. A sensible balance has to be struck, but the British law still goes too far in allowing the verbal bullying of gays and lesbians – a particular problem in schools.

A welcome change made by the new Act is that victimisation is no longer treated as a species of discrimination. Under previous legislation, a person complaining of victimisation had to establish that there was a comparator who would not have been unfavourably treated in comparable circumstances. There is no longer a need for a comparator. There is victimisation if a person is subjected to a detriment because they do a “protected act”, such as bringing proceedings under the Act or giving evidence in good faith.³⁹

5. The expansion of positive duties on public authorities to advance equality

The vision of comprehensive and transformative equality is embodied in the extension of what is now a single general public sector equality duty to all protected characteristics. As mentioned above, earlier public sector equality duties applied only to race, sex and disability, and there were differences between them. The single duty now applies as well to age, gender reassignment, pregnancy and maternity, religion or belief, and sexual orientation.⁴⁰ The duty has three elements:

- Eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by the Act;
- Advancing equality of opportunity between persons who share a relevant characteristic and persons who do not share it;
- Fostering good relations between persons who share a relevant characteristic and persons who do not share it.⁴¹

This general duty is placed on most central and local government authorities, health authorities, schools, and the police. For example, the duty could lead a local authority to provide funding for a black women’s refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women and, in particular, meeting the different needs of women from different

³⁷ Section 26 (2).

³⁸ Section 26 (3).

³⁹ Section 27.

⁴⁰ Marriage and civil partnership are not included in respect of the second and third elements. It was believed this could be better dealt with through the other strands.

⁴¹ Section 149.

groups. It could also lead a local authority to focus council services on older people, or it may lead a school to review its anti-bullying policy to prevent homophobic conduct.⁴² In addition, a Minister may, after consultation, make regulations placing specific duties on certain public authorities to enable them to carry out the public sector equality duty more effectively. Perhaps the most important of these specific duties will be those that fall within the EU law public procurement regime, for example when buying goods and services from private firms. These specific duties may allow public bodies to require their contractors in the private sector to ensure equal opportunities.

The extended and strengthened public sector equality duty is compatible with Principle 11 of the Declaration which requires States to “take the steps necessary to give full effect to the right to equality in all the activities of the State”, and in particular to “promote equality in all relevant policies and programmes”, and to “take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality.” However, there are weaknesses. First, the general duty, as under previous legislation, is to have “due regard to the need” to achieve the three stated objectives mentioned above. Although there has been some clarification of what this means (for example, it may involve treating some people more favourably than others where this is permitted by the Act), the words have encouraged a “tick-list” approach, with an emphasis on procedures rather than outcomes. Consequently, it is enough for the authority to consider the equality impact but then to move on, without achieving fairer representation. It would have been better to replace “due regard” with an obligation to “take such steps as are necessary and proportionate for the progressive realisation of equality.”⁴³ A second weakness is the extent of the exceptions. For example, the duty does not apply to age in respect of functions relating to schools and children’s homes; indeed children are also excluded from protection against age discrimination, which appears to be in violation of provisions of the UN Convention on the Rights of the Child that recognise the rights of children to be protected from unequal treatment and discrimination. Another example is that the public sector duty does not apply to immigration functions - a field in which discrimination is endemic - in respect of the protected characteristics of age, race (except as it applies to colour), religion or belief. Thirdly, the public sector equality duty does not give rise to any enforceable private law rights.⁴⁴ It is enforceable only by way of judicial review. So if a local authority decides to stop funding a women’s refuge, a woman would not be able to sue the local council. Judicial review proceedings may be brought by any person with sufficient interest (including the EHRC) and may result in a decision being set aside, but there will only rarely be an order for compensation. Moreover, the grounds on which a review can be sought are limited.⁴⁵ The usual way of enforcing a specific public sector duty will be by the EHRC issuing a compliance notice; if the authority fails to comply, the EHRC may then seek a court order requiring the authority to comply.

6. Widening the circumstances in which positive action is allowed

Principle 3 of the Declaration states that:

“To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.”

⁴² These examples are taken from the Explanatory Notes, Para 492.

⁴³ This was proposed by the Joint Parliamentary Committee on Human Rights, 26th Report Session 2008-9, Para 263.

⁴⁴ Section 156.

⁴⁵ See Schedule 18.

International human rights standards view positive action measures as permissible if they are necessary, proportionate, and time-limited.⁴⁶ The new British Act contains three mainly new provisions which appear to be in compliance with these principles.

First, section 158 provides that the Act does not prohibit a person from taking any action which is a proportionate means of achieving any one of three aims:

- Enabling or encouraging persons who share a protected characteristic to overcome or minimise a disadvantage connected to the characteristic;
- Meeting needs of persons who share a protected characteristic that are different from the needs of persons who do not share it; or
- Enabling or encouraging persons who share a protected characteristic to participate in an activity where participation by persons who share that characteristic is disproportionately low.

For example, measures including training can be targeted to particular disadvantaged groups to enable them to gain employment or health services. Previous legislation allowed positive action but this applied to different protected characteristics in different ways. The new section brings consistency and extends what is permissible to the extent allowed by EU law. It applies to all protected characteristics.

Secondly, section 159 of the Act allows an employer to take a protected characteristic into consideration when deciding who to recruit or to promote in a so-called “tie-break” situation. This can only be done where persons who share the protected characteristic suffer a disadvantage connected to the characteristic, or their participation in an activity is disproportionately low. For example, a police service which employs a disproportionately low number of people from an ethnic minority background may give preferential treatment to a candidate from that background. However, the candidates must be equally qualified to be recruited or promoted, and the comparative merits of other candidates must also be taken into consideration. The employer must not have a policy of treating people who share a protected characteristic more favourably than those who do not, and the action must be a proportionate means of achieving the aims mentioned above.

Thirdly, section 104 allows registered political parties to make arrangements in relation to the selection of candidates for election where there is under-representation of people with particular protected characteristics in elected bodies such as Parliament and local government. This can include single-sex shortlists. A party cannot specifically shortlist only Black or Asian candidates, but it may reserve places on relevant electoral shortlists for people with a specific protected characteristic such as race or disability.

7. Public bodies’ duty to have due regard to socio-economic disadvantage

Finally, mention must be made of the controversial new provision which requires some public authorities when making decisions of a strategic nature about how to exercise their functions 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.⁴⁷ The purpose of this duty was said to be to “reduce the gap between rich and poor”, and ensure “that public bodies systematically and

⁴⁶ See, for example, UN Human Rights Committee, General Comment 18: Non-Discrimination, 1994, U.N. Doc. HRI/GEN/1/Rev.1 at 26, Para 13; Article 4(1) of the UN Convention on the Elimination of All Forms of Discrimination Against Women; Article 1(4) of the UN Convention on the Elimination of All Forms of Racial Discrimination; Belgian Linguistics case (1979-80) 1 EHRR 252 (Article 14 of European Convention on Human Rights).

⁴⁷ Section 1.

strategically take account of people who are poor and clearly disadvantaged.”⁴⁸ Examples given included a health authority allocating money to fund geographical areas with the worst health outcomes; or a regional development agency encouraging more bids for funding from deprived areas; or local education authorities taking steps to ensure that children from deprived areas have a better chance of securing a place at a school of their choice. The Solicitor-General (Vera Baird MP) said - in terms not dissimilar to those in Principle 14 of the Declaration - that “poverty and powerlessness make it much harder to battle with discrimination and discrimination itself can undoubtedly generate poverty and powerlessness.”⁴⁹ The provision was opposed by the Conservative Party, then in opposition, on the grounds that “the remedies and powers to prevent discrimination are quite different from solutions to socio-economic disadvantage.”⁵⁰

This novel duty is unlikely to be implemented by the new Coalition Government. Even if it were to be implemented in its present form, it would not confer any private right of action on individuals, and there would be formidable obstacles in the way of seeking judicial review for an abuse of the public body’s use of discretionary powers. However, although only aspirational at present, this provision reminds us that social disadvantage is a complex, multidimensional problem with many causes not limited to discrimination. These include lack of opportunities for poor persons to work or to acquire education and skills, childhood deprivation, disrupted families, inequalities in health and poor access to social housing. The long-term issue - which remains unresolved - is how to develop socio-economic rights through the avenue of equality law.

Conclusion

The Act is a major achievement for the equal rights movement. Over the past 45 years, struggles for equality in Britain have resulted in the gradual recognition of the legal rights of a wider range of disadvantaged groups and the expansion of the law from formal to substantive equality to deal not only with individual acts of discrimination, harassment and victimisation, but also subtler forms of indirect discrimination. It has also been recognised that equal treatment does not mean identical treatment, and that full and effective equality entails accommodating differences.

The new fifth generation, embodied in the Equality Act 2010, goes even further than this. First, it is based on the principle that equality is an indivisible fundamental human right, and that there can be no hierarchy of equality. Although its early performance has been disappointing, the EHRC has the potential to speak with a strong voice on behalf of all disadvantaged groups on the basis of an overarching principle of equality, rather than representing only sectional interests. Secondly, the Act recognises that members of disadvantaged groups will not have equal life chances or enjoy respect for their equal worth unless institutions take proactive measures to ensure equality. The streamlining and broadening of the public sector equality duty and the provisions on permissible positive action are the core of the new approach to transformative equality.

Unfortunately, there are still major gaps. In particular, the Act does not implement the proposals made by the Cambridge Review and many activists that every employer with more than 10 employees should be required to conduct periodical employment and pay equity reviews for the purpose of determining whether members of disadvantaged groups are enjoying, and are likely to continue to enjoy, fair participation and equal pay for work of equal value in the undertaking, and to take positive measures to achieve these aims. In this respect British legislation still falls a long way

⁴⁸ House of Lords Debates, 15 December 2009, col. 1407.

⁴⁹ Public Bill Committee (Equality Bill), 6th sitting, 11 June 2009, col. 156. Principle 14 of the Declaration states: “As poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in pursuit of full and effective equality”.

⁵⁰ Public Bill Committee (Equality Bill), 5th sitting, 11 June 2009, col.129.

behind countries such as South Africa and Canada, and is not compliant with the Declaration.⁵¹ In view of the fact that over 80 per cent of workers are employed in the private sector, and that the delivery of public services is increasingly being outsourced to private companies, there is a serious risk that the positive duties will become marginalised and ineffective. In other words, the new Act is not the end of the struggle for equality, but it is an important new beginning.

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ENAR is a network of some 700 NGOs working to combat racism in all EU member states and acts as the voice of the anti-racist movement in Europe. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national and European initiatives.



The Equal Rights Trust (ERT) is an independent organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. It focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

⁵¹ In particular Principle 3 (Positive Action), and Principle 11 (Giving Effect to the Right to Equality).