GETTING THE MOST OUT OF THE EQUALITY ACT 2010
DISCRIMINATION LAW ASSOCIATION

"The Equality Act – What's In and What's Out"

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Introduction

The Equality Act 2010[1] was finally enacted on 8 April 2010 in the wash up period after announcement of the general election[2] and in the event (notwithstanding its early roots in the last Labour Government's manifesto policy) rather hurriedly - the cause of some complaint.[3] The Act does provide for some strengthening of the law but entrenches, and creates some new, weaknesses, as explored further below.[4]

The Equality Act 2010 as enacted[5] represents the most historically significant legislative measure enacted in this jurisdiction since the first of the anti-discrimination statutes seen in the form of the Race Relations Act 1965. Whilst the Act does not quite herald the revolution that many parts of the media sought to have us believe on publication of the Bill that preceded it,[6] it does reflect a gradual and progressive shift in the legislative approach to

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1 In large part the Act replicates the Equality Bill which was introduced in the House of Commons and published on 24th April 2009, though with some important changes: Bill 85. Available on-line at http://www.equalities.gov.uk/equality_bill.aspx, giving effect to the Government's manifesto commitment to a Single Equality Act: See, Joint DTI and Cabinet Office Release at http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&NavigatedFromDepartment=False.

2 It was enacted on 8 April 2010, after announcement of the election, on 6 April 2010 (http://news.bbc.co.uk/1/hi/8603591.stm, [accessed 14/9/2010]).

3 House of Lords Library Note, "Equality Bill (HL Bill 20 of 2009-10", (December 2009) LLN 2009/012, pages 1-2.

4 Some of the problems with the Bill – and Explanatory Notes to the Bill – have been rectified. Certain of the provisions of the Act did not obviously have the meaning apparently anticipated by the Explanatory Notes Thus, for example, Cl 80(10) read with Cl 80(3) which together excluded from the protection afforded against harassment in schools, harassment connected to sexual orientation could not be reconciled with the Explanatory Notes which shortly after those provisions gace an example of a pupil bringing a claim of harassment because of sexual orientation (§288). This gave rise to a concern that we may have seen, in due course, certain lacunae in the Bill filled by interpretative device and Explanatory Note. Such gap may still be filled by reading the direct discrimination provisions, which do address sexual orientation, in a way which covers harassment: *Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4; *Driskel v Peninsula Business Services Ltd and O'rs* [2000] IRLR 151.

5 As to which provisions will be brought into force, this is addressed below and is still the subject of some uncertainty.

6 *"The Equality Bill will hinder, not help"*; *"Firms bidding for Government contracts face equality quotas, signals Harriet Harman"*, Telegraph on-line http://www.telegraph.co.uk/comment/personal-view/5308564/The-Equality-Bill-will-hinder-not-help.html;

addressing discrimination and, more particularly, inequality. Whilst a disappointment to many campaigners, the Equality Act is likely to be significant domestically and internationally, as much for what it does not do, as for what it does. It is certainly likely to be with us now for many decades and will represent the main legal framework for addressing inequality in the public and private spheres, and to that extent will be of historic importance. The impact of the Act is unlikely to be territorially limited. This is because of the cross-jurisdictional impact of equality law, seen in its historic routes in many jurisdictions[7] and in the increasing willingness of domestic and regional courts to look to case law elsewhere for assistance in developing local equality law concepts and understanding domestic schemes.[8] As mentioned, the origins of the Equality Act can be found in the outgoing Labour Government's manifesto commitment to a Single Equality Act. With that in mind it established the Discrimination Law Review (in early 2005). To run parallel with the Discrimination Law Review the *"Equalities Review"* was established (chaired by Trevor Phillips, then Chair of the Commission for Racial Equality) to undertake a *"route and branch review to investigate the causes of persistent discrimination and inequality in British society"*. The Discrimination Law Review was given the remit of assessing *"how our anti-discrimination legislation can be modernised to fit the needs of Britain in the 21st century. This work will consider the approaches that are effective in eradicating remaining discrimination but avoid imposing unnecessary, bureaucratic burdens on business and public services"*.[9] The Equalities Review reported in early 2007.[10] It found widespread,

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http://www.telegraph.co.uk/news/newstopics/politics/5230604/Firms-bidding-for-Government-contracts-face-equality-quotas-signals-Harriet-Harman.html; *"Harriet Harman's Equality Bill signposts the route to a better Britain"*, Mirror on – line, http://www.mirror.co.uk/news/columnists/maguire/2009/04/29/harriet-harman-s-equality-bill-points-to-the-route-for-a-better-britain-115875-21316506/; *"It's official: Women ARE more equal than men as Harman shake-up gives preferential treatment"*, Daily Mail on-line, http://www.dailymail.co.uk/news/article-1173895/Its-official-Women-ARE-equal-men-Harman-shake-gives-preferential-treatment.html; *"Compulsory audits on equal pay will force firms to give women more"*, Times on-line, http://business.timesonline.co.uk/tol/business/law/article6157760.ece. Accessed 14/9/2010].

7 All anti-discrimination statutes in the common law world have drawn heavily from the US Civil Rights Act of 1964, though in the UK (as elsewhere) without the sort of *"faithful"* reproduction which would have permitted both UK lawyers to draw on any established body of US equality law 1976 (Neil Rees, Katherine Lindsay and Simon Rice, *"Australian Anti-Discrimination Law, Text, Cases and Materials"* (2008, The Federation Press), 3, 5; D. Pannick, , *"Sex Discrimination Law" 1985, Clarendon Press)*, 39-40; L Lustgarten, *"Legal Control of Racial Discrimination"* (1980, Macmillan), xv-xvi). In turn, the Australian and New Zealand anti-discrimination statutory schemes are modelled on UK anti-discrimination law and in particular, the Sex Discrimination Act 1975 and the Race Relations Act 1976 (see, *"Australian Anti-Discrimination Law, Text, Cases and Materials"* op. cit, 3; the New Zealand Race Relations Act 1971 and the Human Rights Act 1993). Directive 76/207/EEC contains the same binary approach to direct and indirect discrimination seen in U.K. domestic law (and now reflected, too, in Directives 2002/73/EC; 2000/78/EC and 2000/43/EC all addressing discrimination across the protected strands) such that UK, influencing European legal development more generally.

8 See, by way of very small example, *A and others v Secretary of State for the Home Department* [2005] 2 AC 68; *Wilkinson v Kitzinger & Ors* [2006] EWHC 2022; *D.H. and O'rs v The Czech Republic*, Application no. 57325/00; *Purvis v New South Wales* (2003) 217 CLR 92.

9 The emphasis on avoiding *"unnecessary, bureaucratic burdens on business and public services"* set a worrying tone. However, the Discrimination Law Review did explore various anti-discrimination and equality models with a view to informing their work.

10 *"The Equalities Review: Fairness and Freedom: The Final Report of the Equalities Review" (*2007).

entrenched and persistent forms of discrimination and inequality associated with the protected characteristics. It found, for example, that *"it may take some decades to achieve parity in employment or education for some groups; over 75 years in the case of women's political representation and equal pay, half a century in the case of educational attainment of some ethnic minority children"*[11] and that *"disabled people are 30% more likely to be out of work than non-disabled people with the same qualifications, age, place of residence and so forth"*.[12] Notwithstanding the findings of the Equalities Review, the consultation paper that followed the Discrimination Law Review[13] proposed adopting for any new Single Equality Act in general the same formalistic model for addressing inequality seen in existing domestic anti-discrimination law which had by then been in force, in some form or another, for forty years.[14] Thus, the consultation paper stated that:

> *"In harmonising and simplifying, we intend to keep broadly the same level of protection from discrimination as we have in the current law, which has generally worked well in addressing inequality for individuals without placing unnecessary burdens on those who have to comply with it."*[15]

The Equality Act 2010 broadly reflects those aspirations. Thus the long title to the Act reads as follows:

> *"An Act to make provision to require ministers of the Crown and others when making strategic decisions about the exercise of their functions to have due regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstance; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunities; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes."*

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11 Page 5.
12 Page 20.
13 *"Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, a consultation paper"* (June 2007).
14 See pages 16-25, for a summary.
15 Page 26.

The Explanatory Notes to the Act describe the Acts *"two main purposes"*, namely *"to harmonise discrimination law, and to strengthen the law to support progress on equality"*. It does not meet either of these aspirations in their entirety and the emphasis on harmonisation acknowledges the limited vision that in large part prescribes the parameters of the new law constituting the Equality Act 2010. However, as the long title alludes to, there are some innovative provisions in the Act. The question whether the most innovative and progressive measures will be brought into force by this Coalition Government remains presently unanswered but these measures are addressed below along with some of the other important provisions in the Act and the Government's proposals, as they presently stand,[16] for implementation.

When brought into force, the Act will repeal to a large extent the existing anti-discrimination statutes and regulations[17] and replace them with consolidated protection against discrimination connected to the protected characteristics.[18] The Act runs to some 218 sections and 28 Schedules.[19] The extent of the potential impact of the Act is somewhat opaque since it contains wide ranging regulation making powers which will, for example, if exercised serve to enact in due course *all* of the Act's provision in relation to equal pay audits,[20] if ever brought into force (as to which see below), and many of the exemptions addressing age discrimination,[21] provision in respect of which is not apparent on the face of the Act.

As mentioned, in the general the Act is a not a radical measure. It adopts, in the main, the model of the existing anti – discrimination enactments. It defines the protected characteristics in Part 2, Chapter 1 of the Act and the forms of prohibited conduct (discrimination) in Chapter 2, Part 2. Thereafter, the Act contains provision identifying the activities covered and in the context of which the prohibited conduct (discrimination), related to the protected characteristics, is made unlawful.[22] So far, so familiar. Much to the

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16 As of Monday 13th September 2010.

17 The Equality Act 2006 will remain in force, though amended by the Bill, so far as it relates to the constitution and operation of the Equality and Human Rights Commission and the Disability Discrimination Act 1995 will remain in force so far as it applies to Northern Ireland. There will be some additional provisions retained, see Sch.s 26 and 27.

18 As to which see below.

19 One innovative feature of the Bill that became, in an amended form the equality Act, was that the Explanatory Notes were, for the first time in a British Bill and on a trial basis:(http://services.parliament.uk/bills/2008-09/equality.html) interwoven. Explanatory Notes have also been provided (though not interwoven) with the Act (http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf [accessed 14/9/2010]).

20 Section 78, addressed further below.

21 Section 197.

22 Parts 3 to 8.

disappointment of many, it does not contain any *"constitutionalised"* equality guarantee.[23] The Equality and Human Rights Commission called for an entrenched or constitutional equality guarantee[24] and a "purpose clause".[25] However, the Act contains neither.

As addressed further below, the Act does contain some interesting equality duties and duty making powers. This does reflect the discernible (albeit cautious) shift in our domestic scheme, away from a purely remedial model towards one which imposes positive obligations on public authorities, in particular,[26] to address and prevent inequality. The duties are modest but important and may affect the further development of law domestically and legal progress elsewhere. The big question remains, however, whether this Coalition Government will ever bring them into force.

Consolidation and Harmonisation[27]

As mentioned, the Act endeavours to consolidate existing legislation. It does so by, broadly, outlawing those forms of conduct seen in the existing anti-discrimination legislation.[28] The Act replicates many of the definitions seen in the existing legislation, though with important alterations. A convenient place to start in considering the Act may well be the very last Schedule. Schedule 28, headed up *"Index of Defined Expressions"*, lists the various expressions used in the Act and identifies in the Act where their meanings might be found.[29] The *"Protected Characteristics"* are defined by section 4[30] as "*age; disability; gender reassignment; marriage and civil partnerships; pregnancy and maternity; race; religion or belief; sex; sexual orientation."* Each of those protected characteristics is further defined and in the main the definitions reflect those found in the existing anti-discrimination measures, though with some interesting differences.

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23 K. Monaghan, *"Constitutionalising Equality: New Horizons"* (2008) EHRLR 1, 20.

24 See: *"Submission to the Government Equalities Office on the Need for an Equality Guarantee in the Equality Bill: Securing a Right to Equality Fit for the 21st Century"* (April 2009, EHRC)

25 Evidence of John Wadham (Legal Director, Equality and Human Rights Commission), Public Bill Committee, 2nd June 2009, Q20, Col 13 (http://services.parliament.uk/bills/2008-09/equality.html#2008-09 [accessed 14/9/2010]).

26 Though, in addition, the equal pay duties described below will be imposed on private bodies.

27 See, section 203 for specific provision granting power to enact regulations for the purposes of harmonising domestic law with changes made to give effect to EU law regulation, so avoiding the absurdities seen presently in, for example, the Race Relations Act 1976 which enacts different rules for certain forms of race discrimination, pursuant to regulations made under the European Communities Act 1972, giving effect to EU law which itself applies only to certain of the activities covered by the Race Relations Act 1976.

28 In summary, the Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; the Equality Act 2006 (Part 2); Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660; Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661; Employment Equality (Age) Regulations 2006 SI 2006/1031; Equality Act (Sexual Orientation) Regulations 2007 SI 1263/2007.

29 There is in addition, as is usual, a general interpretation provision: Section 212.

30 As we learn from Schedule 28, as with all the technical expressions used in the Act.

The Protected Characteristics

The concept of *"age"* is defined as follows: *"(1) In relation to the protected characteristic of age—(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group. (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."*[31] The Act then makes it clear that protection against "age" discrimination protects against all forms of discrimination connected to one's age but also to one's membership of an *age group*. The legislation presently protecting against age discrimination connected to membership of an age *group* does so explicitly only in relation to indirect discrimination.[32] The Act puts beyond doubt that prohibitions affecting the "over fifties" and "under fifties", for example, would now be captured.[33] The Act's approach otherwise to age is very controversial indeed.[34] In particular, and to the considerable disappointment of many of the main children's organisations, children are excluded from much of the protection afforded by the Act.[35] In particular, in relation to the provision of goods, facilities and services and in the exercising of public functions, protection is not afforded against age discrimination where the victim has not attained the age of 18.[36]

"Disability" is defined in much the same way as the Disability Discrimination Act 1995[37] so that: *"A person (P) has a disability if—(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"* and *"[a] reference to a disabled person is a reference to a person who has a disability."*[38] So far this is materially identical to the Disability Discrimination Act 1995.[39] As with the Disability Discrimination Act 1995, the Act addresses persons who have had a disability so that the Act "applies in relation to a person who has had a disability as it

31 Section 5.
32 Employment Equality (Age) Regulations 2006 SI 2006/1031, Reg 3(1)(b).
33 Explanatory Notes to the Act, §37.
34 See evidence before the Public Bills Committee, 2nd June 2009, Q40, Col 21, *et seq.*
35 Children's Rights Alliance; Young Equals Campaign (evidence before the Public Bills Committee, 2nd June 2009, Q44, Col 24 and see, http://www.crae.org.uk/protecting/age-discrimination.html, [accessed 14/9/2010]).
36 Section 28(1)(a). Children, of course, retain protection where the discrimination occurs on other grounds, for example race, gender etc., in the fields of education and goods and services and so on.
37 Section 1 and Schedule 1, DDA.
38 Section 6(1) and (2).
39 Section 1.

applies in relation to a person who has the disability".[40] Again this much is in all material respects the same as the Disability Discrimination Act 1995.[41]

In relation *"to the protected characteristic of disability"*, a reference to a person who has a protected characteristic is a reference to a person who has a *particular* disability and a reference to persons who share a protected characteristic is a reference to persons who have the *same* disability.[42] Schedule 1 to the Act provides further detail about the meaning to be afforded the concept of disability and in material respects replicates the prescriptions in Schedule 1, Disability Discrimination Act 1995, though with important differences. According to the Act the effect of an impairment is a long-term effect if it has lasted at least 12 months; the period for which it lasts is likely to be at least 12 months; or it is likely to last for the rest of the life of the person affected.[43] Where an impairment ceases to have a substantial effect on a persons ability to carry out normal day - to - day activities, it is treated as continuing to have that effect if that effect is likely to recur.[44] The requirement that the impairment in any case be *"long term"* remains controversial, particularly because of its exclusionary impact in relation to, in particular, depression which is a typically fluctuating impairment and in respect of each episode may not be *"long term"*.[45] However, the Act does not replicate the list of eight capacities (such as mobility or speech, hearing or eyesight) that is to be had regard to in determining whether an impairment is to be taken to effect the ability of a person to carry out normal day – to - day activities, under the Disability Discrimination Act 1995.[46] There is no list of capacities under the Act. According to the Explanatory Notes to the Act:

> *"This change will make it easier for some people to demonstrate that they meet the definition of a disabled person. It will assist those who currently find it difficult to show that their impairment adversely affects their ability to carry out a normal day-to-day activity which involves one of these capacities.*
>
> *Example*
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> *A man with depression finds even the simplest of tasks or decisions difficult, for example getting up in the morning and getting washed and*

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40 Section 6(4).

41 Sch. 2.

42 Section 6(3). As with the DDA, the Minister is given power to issue guidance about the matters to be taken into account in deciding any question pertaining to the meaning of disability (Clause 6(5), Bill). Schedule 1 to the Bill provides further detail about the meaning to be afforded disability and in material respects replicates the guidance provided in Sch 1, Disability Discrimination Act 1995, though with important differences.

43 Sch. 1, paragraph 2(1).

44 Schedule 1, paragraph 2(2).

45 See evidence before the Public Bills Committee, 2nd June 2009, Q 53, Col 28.

46 Sch. 1, paragraph 4(1).

dressed. He is also forgetful and can't plan ahead. Together, these amount to a "substantial adverse effect" on his ability to carry out normal day-to-day activities. The man has experienced a number of separate periods of this depression over a period of two years, which have been diagnosed as part of an underlying mental health condition. The impairment is therefore considered to be "long-term" and he is a disabled person for the purposes of the Act."[47]

The Act does still require *"a substantial and long term adverse effect"* by reason of any physical or mental impairment and the extent to which this is compatible with the Framework Directive 2000/78/EC remains doubtful.[48] Further, the absence of a specific statutory explanation of *"substantial"*, which according to present guidance means merely something more than "minor" or "trivial"[49], may also prove problematic.[50]

As to *"gender reassignment"*, the Act enacts principally the medical model adopted in the Sex Discrimination Act 1975. According to the Act: *"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."*[51] The meaning given to *"gender reassignment"*, however, differs importantly from that provided in section 2A, Sex Discrimination Act 1975. The Sex Discrimination Act defines gender reassignment as *"a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process."* [52] The new definition of gender reassignment in the Act does not require that the process of reassigning one's sex is undertaken under medical supervision as a condition for protection. This is important in providing greater autonomy for transpeople. The Explanatory Notes gives as an example: *"A person who was born physically female*

47 §§674-5.

48 Having regard to the judgment of the ECJ in Case C-13/05, *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706 which provided in some respects for a narrower test and more restrictive test for determining disability than the Disability Discrimination Act 1995 but in certain respects a more generous one: the ECJ require that a person has a limitation which results in particular from a physical, mental, or psychological impairment which *"hinders"* over *"a long period of time"* a person's participation in professional life. It is not necessary, according to the ECJ, for the purposes of the Framework Directive, to show that there has been an adverse *and substantial* effect on a person's normal day to day activities. However, where a person's disability does not effect their participation in professional life, as opposed to other aspects of their life or not at all, then it is not clear that the Framework Directive protects them at all, at least unless they are *perceived* to be disabled within the meaning of that concept as explained by the ECJ in *Chacón Navas*.

49 *Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability* (in force on 31st July 1996: SI 1996/1996), §B1.

50 *Ibid.*

51 Section 7(1).

52 Section 82(1), Sex Discrimination Act 1975, as amended (emphasis added).

decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully 'passes' as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act."[53] The absence of a requirement for medical supervision may extend the protection afforded against gender reassignment discrimination but it is unlikely to protect persons other than true transpersons, those being persons who are genuinely reassigning their sex (as opposed to persons engaging in other forms of *Queer* or gender variant conduct). According to the Act, *"[a] reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment" and "[i]n relation to the protected characteristic of gender reassignment—(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."*[54]

A person who has a gender recognition certificate (under the Gender Recognition Act 2004) has plainly *undergone gender reassignment*. However, a person may be undergoing or have undergone gender reassignment, whether or not they have a gender recognition certificate (under the Gender Recognition Act 2004) and thus still have the *'protected characteristic'* of gender reassignment under the Equality Act 2010. Despite the more liberal approach to defining gender reassignment and transsexual people, and in particular because of the absence of any reference to a gender recognition certificate, the gender reassignment provisions are likely to prove controversial, in part at least because of the very failure to distinguish between transsexual people with and those without a gender recognition certificate. In general, the Act will require a person to be treated in their reassigned sex (whether or not they have reassigned under medical supervision and whether or not they have a gender recognition certificate, if discrimination is to be avoided[55]). In some circumstances, the prohibition on discrimination against transsexual people may mean that a transsexual person should be treated equivalently to others sharing their birth sex (as, where, for example, health screening services may be required). However, the exemptions in the Equality Act affecting discrimination against transsexual people are arguably not prescriptive enough having regard to the Gender Recognition Act. The exemptions in the Equality Act permit discrimination against transsexual people in certain circumstances.

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53 §43. I note in parenthesis that this language is extremely unfortunate coming from the GEO – the description *"passing"* by a transsexual person is very controversial with the question of who *"passes"* being very often to do with social prejudice and stereotyping and less to do with the physical or other attributes of the transsexual person concerned.

54 Section 7(2) and (3).

55 See, for example, in relation to insurance services: Sch 3, paragraph 22 which provides only a limited exemption in relation to insurance services affecting, *inter alia*, transsexual people.

Those exceptions permit the different treatment of transsexual people as compared to non-transsexual people of the same sex (see, for example, Schedule 3, paragraph 28[56]). However, the extent to which this would be lawful in the case of a transsexual people who has a gender recognition certificate, having regard to the terms of the Gender Recognition Act 2004, is highly doubtful. By section 9(1), Gender Recognition Act 2004: "*Where a full gender recognition certificate is issued to a person, the person's gender becomes <u>for all purposes</u> the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)"*[57] *[emphasis added.]* Thus, it would seem plain that the exemptions in the Equality Act 2010, as they relate to discrimination connected with gender reassignment, cannot apply where a gender recognition certificate has been issued under the Gender Recognition Act 2004, because a person is then to be treated for *"all purposes"* in their reassigned sex.[58] According to the Explanatory Notes to the Gender Recognition Act, section 9(1), "*states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975; and she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act 1973, and so able to contract a valid marriage with a man*."[59] The Equality Act contains no explicit acknowledgement of this legal effect of a gender recognition certificate and this may prove problematic in due course.

As to *"marriage and civil partnership"*, these are defined as such[60] and given that these concepts are legally defined there will be little room for dispute about their meaning. Both the common law and statutory definition of marriage, with which the courts in our jurisdiction

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56 "(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim. (2) The matters are— (a) the provision of separate services for persons of each sex; (b) the provision of separate services differently for persons of each sex; (c) the provision of a service only to persons of one sex." The Explanatory Notes to the Act gives the following example, "A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful" (§740).

57 Section 9(3) provides, as to section 9(1), that: "*Sub-section (1) is subject to provision made by this Act or any other enactment or any subordinate legislation"*. However, the Equality Act makes no exception of the sort anticipated by section 9(3).

58 Arguably, they would not apply where the conditions in and, in addition, such exceptions will not operate where the test in *A v Chief Constable of West Yorkshire Police (No 2)* [2005] AC 51 is met – at least it seems difficult to see how they could given the condition of proportionality in Sch 3, paragraph 28.

59 §27 (available at http://www.legislation.gov.uk/ukpga/2004/7/notes [accessed 14/9/2010]

60 Section 8.

would be most concerned, restrict marriage to opposite-sex partners, of course.[61] Similarly, civil partnerships are restricted to same sex partners.[62] In this way marriage remains a hetero-normative institution. To the extent that it excludes transpeople, this has been remedied in large part by the Gender Recognition Act 2004.

The concept of *"race"* is defined inclusively as follows: *"(1) Race includes— (a) colour; (b) nationality; (c) ethnic or national origins. (2) In relation to the protected characteristic of race— (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group. (3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls. (4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group."*[63] The Act, then, treats *"race"* as an expression embracing a number of specific characteristics (colour, nationality etc). The Race Relations Act 1976 defines, conversely, *"racial grounds"* and *"racial group"* as terms embracing race as a distinct characteristic. The reason for the shift is unclear but may reflect progress in that the concept of *"race"*, insofar as it reflects a biological rather than a social determinist approach to *"racism"*, is largely now discredited. *"Race"* has generally been assumed to denote the possession of particular biological characteristics, and is predicated often on the discredited assumption that there are groups possessing significantly different biological characteristics as compared to other groups.[64] In fact as generally now accepted, there is no such thing as *"race"* if the word is to suggest *"that there exists an indissoluble association between mental and physical characteristics which make individual members of certain 'races' either inferior or superior to members of certain other 'races'"*.[65] To avoid the pejorative associations that the expression *"race"* might suggest, the expression *"ethnicity"* is often preferred to identify particular social groupings, by reference to culture, national origin and history. The new definition of *"race"* reflects that approach more closely.[66] As seen, a racial group may be defined by reference to more than one *"racial"* characteristic. The Explanatory Notes give

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61 Section 11(C), Matrimonial Causes Act 1973; *Wilkinson v Kitzinger (Lord Chancellor & Attorney General Intervening)* [2006] EWHC 835.

62 Section 1(1), Civil Partnership Act 2004.

63 Section 9.

64 See the discussion in *Mandla v Dowell Lee* [1983] 2 AC 548, 561.

65 A Montagu (ed), *"The Concept of Race"* (1964, free press), cited in "*A Lester & G Bindman, Race and Law"* (1972) Penguin), 154.

66 There is now no distinction so far as protection is concerned generally, as between the various categories protected under the umbrella expression *"race"*. Consistent with the aim of the Equality Bill - that it is to be a harmonising measure - the concepts of discrimination are the same, whether ethnicity discrimination is in issue or nationality discrimination is in issue (and the same applies for all categories of *"race"* discrimination).There are, however, unsurprisingly, specific exceptions addressing nationality as can be seen, *inter alia*, in Schedule 23 to the Equality Act.

the example of *"black Britons"*.[67] Thus the provisions addressing race, address some forms (albeit only defined by reference to race) of intersectional discrimination, addressed further below.

Often related to *"race"*, *"religion and belief"* are both defined. "*Religion" "means any religion and a reference to religion includes a reference to a lack of religion"* and "*belief" "means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."*[68] This reflects the provision made in the Equality Act 2006. It is intended to reflect the scope of Article 9, ECHR.[69] The Explanatory Notes to the Act indicate that: *"The criteria for determining what is a "philosophical belief" are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others."*[70] The Explanatory Notes to the Equality Bill had expressed the view that *"political beliefs and beliefs in scientific theories are not religious or philosophical beliefs for these purposes"*.[71] It gave a list of illustrative religions that will be protected including Christianity, Hinduism, Islam, Judaism etc., and a list of belief systems that will not, including Communism, Darwinism, Fascism and Socialism.[72] There is at least room for argument about this and this was, therefore, controversial advice which has not found its way into the Explanatory Notes to the Act. The Employment Equality (Religion or Belief) Regulations 2003[73] originally contained a definition of religion which was more limiting than that seen in the Equality Act, comprising *"any religion, religious belief, or similar philosophical belief"*.[74] The limitation that any philosophical belief be *"similar"* to a *"religious belief"* might have served to exclude certain belief systems that are political and social rather than faith based. Whether the wider definition will embrace those political and social belief systems has yet to be tested. It seems tolerably clear that a mere opinion about some matter or another will not be sufficient to meet the requirements necessary to acquire protection.[75] There will,

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67 §50.

68 Section 10(1) and (2). By section 10(3): *"In relation to the protected characteristic of religion or belief (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."*

69 §51, Explanatory Notes to the Act.

70 §52.

71 §64, Explanatory Notes to the Equality Bill published on 24 April 2009.

72 §65, Explanatory Notes the Equality Bill published on 24 April 2009.

73 SI 2003/1660.

74 Regulation 2(1) (now amended by the Equality Act 2006, to match the definition contained within that Act).

75 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (a belief that the placement of children with same sex couples had not been shown to be in the best interests of children); *R (Williamson) v*

however, inevitably be some room for debate around the edges. The ongoing difficulty is extracting religion and belief from the manifestation of religion and belief or not, as the case may be. Whether the interference in the manifestation of a religious or philosophical belief is such as to engage the protection afforded by the indirect discrimination provisions (as where a rule impedes a person's opportunity to manifest religion or belief) or direct discrimination, because any such rule might be said to be detrimental to a person holding that religion or belief – and therefore necessarily manifesting it - is one of the challenging questions, the answer to which remains unclear.[76] In addition, whilst it is clear that minority religions and the manifestation of minority religious belief is intended to be protected, recent case law on the extent of group disadvantage that must be established to make out a claim in indirect discrimination raises questions about the extent to which the indirect discrimination guarantees can protect the manifestation of minority religious belief (and indeed the extent to which the indirect discrimination provisions, as construed in case law, might themselves be discriminatory as against small religious minorities).[77]

As to *"sex"*, *"[i]n relation to the protected characteristic of sex—(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."*[78] The definition of *"sex"*, then, is most definitely one which is dependent upon a biological determinist view of sex (as opposed to gender which connotes a more socially constructed concept of *"men"* and *"women"*). The ignoring of the socially imposed aspects of what it means to be a *"man"* or a *"woman"* can force both genders to conform to norms of behaviour perceived to be *"natural"* but with which they may be less than comfortable and which are in fact socially constructed. Nevertheless the Equality Act, just like the Sex Discrimination Act 1975, will tend to reinforce these forms of biological determinism notwithstanding that that can impede efforts to tackle gender inequality.[79]

Secretary of State for Education and Employment & Others; (R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 (a belief in corporal punishment).

76 For recent examples see *Chondol v Liverpool City Council* UK EAT/0298/08 concerning an evangelising social worker dismissed for failing to follow a reasonable management instruction not to overly promote his religious beliefs (according to his employer), upheld by the Employment Appeal Tribunal as not directly discriminatory on gounds of religion or belief because the reason why he was so treated was inappropriate proselytisation rather than religion or belief ("it was not on the ground of his religion that he received this treatment, rather on the ground that he was improperly foisting it on service users", §23) and *London Borough of Islington v Ladele* [2010] IRLR 211 concerning detrimental treatment of a Christian registrar for refusing to conduct civil partnerships, held by the Employment Appeal Tribunal not to be direct discrimination on the grounds of her religion or belief because the reason why she was so treated was her conduct rather than her belief. See too, the evidence before the Public Bills Committee, 9th June 2009, Q126, Col 68 *et seq*.

77 *Eweida v British Airways* [2010] IRLR 322.

78 Section 11.

79 The dress code cases are an example of this: *Department for Work and Pensions v Thompson* [2004] IRLR 348 – which demonstrates that because the law treats *"sex"* as an immutable biological characteristic, little regard is had to the fact that one differentiation between the sexes which is constant

"Sexual orientation", is defined similarly narrowly, so that, *"(1) Sexual orientation means a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex. (2) In relation to the protected characteristic of sexual orientation— (a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation."*[80] Understanding the concept of *"sexual orientation"* has not always been regarded as unproblematical. Eric Heinze observes: *"'Studies' (and courts) have sometimes confused homosexuals, bisexuals, transsexuals, and transgenderists,*[81] *drawing no distinction between these various groups' behaviours, desires and identities."* [82] As for defining sexual orientation, for the purposes of discrimination law, a concept adopted for the purposes of human rights law can readily be applied. Eric Heinze describes it as follows: *"Sexual orientation, for the purposes of human rights law, can be understood as encompassing sexual acts or preferences either sufficiently conforming to the normative-heterosexual paradigm to avoid discrimination, or sufficiently derogating from the normative-heterosexual paradigm to prompt discrimination … [t]hus …, the term 'sexual orientation', should be understood to correspond to 'being' as well as 'doing'; that is, to any possible source of discrimination. Finally, discrimination on the basis of sexual orientation can be defined, in general terms, as invidious treatment made, in law or practice, on the basis of actual or imputed derogation from the normative-heterosexual paradigm."* [83] Eric Heinze therefore includes in the concept of sexual orientation; heterosexuality, homosexuality, bisexuality, asexuality, transsexualism, transgenderism, intersexualism, and hermaphrodism.[84] The definition provided for in the Equality Act (matching that already found in existing statutory law) is much narrower than that and when read with the definitions of *"sex"* and *"gender reassignment"*, the Act itself will provide limited protection in respect of *Queer* activity. Indeed, even in relation to protections for Gay men and lesbians there will be continuing argument, in the absence of explicit provision, on the extent to which the manifestation of Gay and lesbian sexuality will be protected by the direct discrimination and

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is dress norms which are plainly not biologically determined but socially constructed but which are regarded as *"sex specific"* thus not challengeable under the law. See for a discussion, K Monaghan *"Equality Law"* (2006, OUP), 201-205.

80 Section 12.

81 That is those individuals who feel and wish to express strong psychological or social identification with the opposite sex including, for example, transvestites and cross-dressers.

82 E. Heinze, *"Sexual Orientation: A Human Right"* (1995, Martinus Injhoff/Kluwer), 49, internal references removed.

83 *Ibid*, 59-60.

84 *Ibid*, 60.

harassment provisions (when adverse treatment cannot be justified) as opposed to indirect discrimination.[85]

"Pregnancy and maternity", though protected characteristics, are not defined by the Part 2, Chapter 1 *("Protected Characteristics"*) of the Act.[86] Instead, the scope of the protection afforded by those concepts is addressed (differently depending upon the activity concerned) by Chapter 2 (*"Prohibited Conduct"*). Importantly, it is explicitly provided that less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding[87] in the context of non-work activity, though such does not apply for the purposes of the provisions of the Equality Act addressing 'work' (though such is a gender specific condition and so treatment based on it will be directly discriminatory).[88]

Each of the protected characteristics, save *"race"*, is defined as a singular characteristic so that protection is provided in respect of *age*, *disability*, *gender reassignment* discretely *etc.* As seen above, *"race"* alone makes specific provision for multiple (race related) characteristics. At the same time as publication of the Equality Bill (2009), the Government Equalities Office published a discussion paper entitled *"Equality Bill: Assessing the Impact of a Multiple Discrimination Provision"*.[89] As the paper acknowledges, *"people are complex, with many different characteristics which make up who they are and which can effect the opportunities open to them and how they are treated"*.[90] In addition, as the paper states: *"while the existing law gives most people the protection they need from discrimination, for some of the people who experience multiple discrimination, it is difficult, complicated and sometimes impossible to get a legal remedy"*.[91] The paper defines *"multiple discrimination"* as occurring when a person is treated less favourably because of more than one of the protected characteristics.[92] The paper identifies three forms of multiple discrimination,[93] comprising situations: (1) Where someone is treated less favourably because of more than one protected characteristic but each type of discrimination occurs on separate occasions. Plainly a remedy for each discriminatory act would be afforded under the existing scheme.[94] (2) Where a person is treated less favourably because of more than one protected

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85 See evidence before the Public Bills Committee, 9th June 2009, Q 128, Col 69 *et seq*.
86 Section 4.
87 S 13(6)(a) and s17(4).
88 S 13(7). It is difficult to see how such is compliant with EU law.
89 (2009) GEO. Available at: http://www.equalities.gov.uk/pdf/090422%20Multiple%20Discrimination%20Discussion%20Document%20Final%20Text.pdf [accessed 14/10/2010].
90 §3.3.
91 *Ibid.*
92 §3.4.
93 10-11.
94 And such is not usually what is understood by the expressions "multiple discrimination".

characteristic and, although the two forms of discrimination happen at the same time, they are not related to each other. Again it seems likely that the law would provide a remedy for that presently (the paper describes this as *"additive multiple discrimination"*). (3) Where the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination in such a way that they are completely inseparable. This is generally known as *"intersectional"* discrimination (and occurs, for example, where a black woman is treated less favourably because she is a black woman – that is differently and distinctly as compared to the way in which a black man would be treated or a white woman). This form of discrimination is extraordinarily difficult to pursue under the present scheme.[95] The paper, however, proposed limiting protection against multiple and intersectional discrimination to *"direct discrimination"*.[96] There seemed little justification for this given that the broader problem of addressing intersectional discrimination was acknowledged (and was, it appeared, the subject of many responses to the earlier consultation exercises).[97] It also proposed to limit the number of characteristics that might be relied upon in a multiple or intersectional claim to two.[98] Again it seemed difficult to justify this. The experience of being a mentally unwell black man can be very, very different to the experience of being a mentally ill white man or a well black man or a mentally ill black woman, for all sorts of institutional and social reasons. It was unfortunate that this did not appear to be fully recognised. Indeed the paper proposed (as it acknowledged it was bound to do as a matter of EU law) to permit single strand claims of discrimination to be brought alongside multiple discrimination claims,[99] so potentially resulting in a proliferation of different claims still not quite addressing the experience of intersectional discrimination in many cases. In any event, the Act follows the proposals in the paper and regulates only *"combined discrimination: dual characteristics"*, addressing direct discrimination *"because of a combination of two relevant protected characteristics"*.[100] Those relevant characteristics are all those protected by the Act *except*, inexplicably, marriage, civil partnership and pregnancy and maternity.

Prohibited Conduct

Apart from the protected characteristics, the Act defines the prohibited forms of conduct, or concepts of discrimination, that it regulates. The *"prohibited conduct"* is conveniently identified in one provision (section 25) which refers back to the specific regulated forms of

95 The Paper acknowledges this, § 4.
96 §4.5.
97 *"A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain",* see § 3.7 of the paper.
98 §§4.9 and 4.17.
99 §4.11.
100 Section 14(1).

discrimination. The provisions addressing these prohibited forms of conduct do go some very long way to harmonising the protections as between strands but inexplicable differences remain.

"Direct discrimination" is defined, as follows[101]: *"(1) 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. (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim. (3) 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. (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner. (5) If the protected characteristic is race, less favourable treatment includes segregating B from others. (6) If the protected characteristic is sex— (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding; (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth. (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work). (8) This section is subject to sections 17(6) and 18(7)."* There are a number of observations that can be made about this. Firstly, the well known and extensively explored *"grounds of"*[102] formulation in the existing direct discrimination provisions has been replaced with the single condition; *"because"*. This is, apparently, because the use of *"because"* was thought to be easier to understand than the expression *"grounds of"* but that it is not intended to have a different meaning.[103] There is, however, at least a possibility that the different formulation will cause complexity and confusion, and give rise to challenges to the scope of direct discrimination through efforts to distinguish older cases. The requirement that treatment be *"because"* of a protected characteristic may be indicative of a requirement for conscious motivation.[104] The *"grounds of"* formulation certainly did not require the same.[105] A

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101 Section 13. See too, sections 23 and 24 for the proper comparator where one is required.

102 Section 1(1)(a) and 1(2)(a), Sex Discrimination Act 1975; Section 1(1)(a) Race Relations Act 1976; Section 3A(5), Disability Discrimination Act 1995; Reg 3(1)(a), Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660; Reg 3(1)(a), Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661; Reg 3(1)(a) Employment Equality (Age) Regulations 2006 SI 2006/1031. See: *Race Relations Board v Applin* [1973] 1QB 815; *Zarcynska v Levy* [1978] IRLR 532*Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425; IRLR 94; *Showboat Entertainment Centre Ltd v Owens* [1984] ǁ ǁIRLR 7; *Redfearn v Serco Ltd t/a West Yorkshire Transport Service* [2006] EWCA Civ 659; [2006] IRLR 623; *James v Eastleigh BC* 1990] 2 AC 751; [1990] IRLR 288; *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

103 Explanatory Notes to the Act, §61.

104 See the Australian case of *Purvis v New South Wales* (2003) 217 CLR 92, in which, in a case of direct disability discrimination (section 5, Disability Discrimination Act 1992: "(1) For the purposes of this Act, a person (d*iscriminator*) discriminates against another person (*aggrieved person*) on the ground of a

requirement that any less favourable treatment be *"because"* of a protected characteristic gets precariously close to a conscious *"reason why"* inquiry.[106] Such will make proving direct discrimination, if that is the approach taken by the courts, very much more difficult. It would also give rise to complaints about the extent to which domestic law complies with EU law because the Equality Directives use the formulation, *"grounds of"*.[107]

According to the Explanatory Notes to the Act the definition of direct discrimination is broad enough *"to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief)"*.[108] This gives effect to the ruling in Case C-303/06, *Coleman v Attridge Law & Another*, [2008] ICR 1128.[109] However, it is less clear whether it will deal with the situation seen in *English v Thomas Sanderson Blinds Limited* [2009] IRLR 206, that is, a case where the discriminator knows that a person does not have the protected characteristic in issue but nevertheless discriminates on the basis of it (in that case homophobic abuse of a man known to be straight, crassly because he went to public school and lived in Brighton). According to the Court of Appeal, such homophobic abuse was on *"the ground of sexual orientation"*, even though the victim was neither Gay nor perceived or assumed to be Gay. The *"because of"* formulation may be problematical in addressing such cases, requiring as it perhaps does some causal link between the treatment and, perhaps, the existence of a protected characteristic.

The direct discrimination provision is the first in the Act which would be capable of harmonising existing provision across strands. Regrettably it does not. There are a number of differences as between the protected characteristics. As to the differences, firstly, a defence of justification exists in the case of age, only.[110] Secondly, direct

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disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability), the majority identified "the central question" as "why … the aggrieved person [was] treated as he or she was? If the aggrieved person was treated less favourably, was it 'because of', 'by reason of' that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'" (§236). See discussion in *"Australian Anti-Discrimination Law, Text, Cases and Materials"*, op. cit. 92-93.

105 *King v Great – Britain China Centre* [1992] ICR 516; *James v Eastleigh BC* [1990] 2 AC 751; [1990] IRLR 288.

106 *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

107 Directives 2000/43/EC; 2000/78/EC; 2002/73/EC; 2004/113/EC; 20006/54/EC.

108 §59. How this will fit with the complex meaning of "disability" is unclear – will a discriminator need to wrongly think that a person has a physical or mental impairment and that the impairment has a substantial and long term adverse effect on the person's ability to carry out normal day-to-day activities, for protection to be engaged?

109 And [2010] IRLR 10.

110 S13(2).

discrimination in the case of marriage and civil partnership is prohibited only where the treatment is because the victim is married or a civil partner (that is, not covering claims of discrimination by way, *inter alia*, of *association* or *perception*).[111] Thirdly, segregation is only explicitly regarded as less favourable treatment where it affects race.[112] Segregating women from men is not deemed, therefore, to be less favourable treatment and nor are any other forms of segregation.[113] Fourthly, pregnancy and maternity discrimination, though a form of direct sex discrimination[114], as alluded to above, is largely excluded from the protection afforded by the main direct discrimination provision in section 13[115] with discrete protection instead provided.[116] Fifthly, as mentioned above, though it is explicitly provided that less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding[117] (a gender specific condition and so treatment based on it will be directly discriminatory), such does not apply for the purposes of the provisions of the EA addressing 'work'.[118] Sixthly, and again as mentioned above, though provision is made addressing direct 'combined discrimination',[119] where any less favourable treatment is because of two relevant protected characteristics, marriage and civil partnership and pregnancy and maternity are not listed as amongst those relevant characteristics.

Specific provision is also made allowing for assymetetrical treatment, or positive discrimination, in the case of disabled people (by, *inter alia*, the duty to make

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111 S13(4). Further, discrimination connected to marriage and civil partnership is not outlawed in; the provision of services and public functions (s28(1)(b)); premises (s32(1)(b)); schools s 84(1)(b); further and higher education (s 90); general qualifications bodies (s 95) and assiocations (clubs etc) (s 100). As such, direct marriage and civil partnership discrimination applies only to those unlawful acts in the employment and related fields (Part 5) – another unfortunate absence of harmonization.

112 S 13(5). Reflecting existing provision (section 1(2), Race Relations Act 1976 which itself was inspired by the US experience; *Brown v Board of Education of Topeka and Others* (1954) 347 US 483).

113 For example, connected to sexual orientation; see the discussion in *London Borough of Islington v Ladele* [2009] IRLR 154; [2009] ICR 387, para.s 100-107; 115, upheld by the Court of Appeal; and *Ladele* v *London Borough of Islington* [2009] EWCA Civ 1357; [2010] IRLR 211; [2010] ICR 532.

114 *Webb v Emo Air Cargo (UK) Limited, Case C-32/93* [1994] ICR 770; [1994] IRLR 482.

115 S 13(8) and ss17(6) and 18(7), EA. Ss17 and 18. S17, EA (non-work) cases does not reflect the provision made in the Bill (Cl. 16(7)) which had provided that "a reference to a woman being treated less favourably is a reference to her being treated less favourably than is reasonable". It was said in the Explanatory Notes to the Bill that this Clause was intended to replicate the effect of *"similar provisions in the Sex Discrimination Act 1975."* It certainly did not do so in terms and went significantly further than the SDA in effectively prescribing a general *reasonableness* exclusion (see and cf s 3B, SDA, now repealed) and in any event both the provision in the Bill and indeed its predecessor in the SDA were not compliant with the Gender Goods and Services Directive 2004/113/EC which defines direct discrimination in the same way as the other EU non-discrimination Directives and makes no exception for *reasonable* treatment in the case of pregnancy and maternity. Cl 16(7) did not survive and s17 does not include any such exclusion..

116 See too, the particular protection afforded in relation to direct gender reassignment discrimination connected to absence from work, extending the circumstances in which protection is afforded beyond less favourable treatment on *the ground of* gender reassignment to less favourable treatment wich is 'not reasonable', s 16.

117 S13(6)(a) and s17(4), EA.

118 S137), EA. It is difficult to see how such is compliant with EU law (00.00).

119 S14.

adjustments)[120], and in the case of pregnancy and maternity leave.[121] The provision in the Equality Act addressing permissible assymetrical treatment of disabled people, whilst much improved on the Bill,[122] may yet be controversial. Its intention is clear, that is to permit the more favourable treatment of disabled people.[123] As to the provision itself, section 13(3) provides that: *"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 may be difficult to reconcile with the holding of the ECJ in *Coleman v Attridge Law*[124] namely that the Framework Directive[125] prohibits *"all forms of discrimination on grounds of disability"*[126], including discrimination because of an association with a disabled person.[127] If an employer decides, perhaps because of a need to comply with the duty to make adjustments,[128] to disregard a period of absence in the case of a disabled employee but takes disciplinary action against a non-disabled employee for absence attributable to the need to care for a disabled child, there is *prima facie* direct discrimination within the meaning of the Framework Directive, as the ECJ made clear in *Coleman v Attridge Law*[129] whilst apparently not intended to have this effect,[130] Section 13(3)

120 S 13(3), EA.

121 S 14(6)(b), EA (*'in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth*'). Further, protection against direct pregnancy and maternity discrimination is regulated by ss 17 and 18 and each of those sets of provisions apply only to women who are pregnant or who have given birth, thus treating a pregnant women or a woman who has given birth, covered by the provisions, afforded more favourable treatment will not afford a man or a woman who is not pregnant or has not given birth no claim in dorect discrimination.

122 Bill 85, Cl 13(3) provided that: 'If the protected characteristic is disability, A does not discriminate against B only because, (a) A treats a third person who has a disability in a way which is permitted by or under this Act, (b) B does not have the disability, and (c) A does not treat B in that way'. The meaning to be afforded this provision was difficult to deduce with certainty. It appeared on one reading to be intended to harmonise the protection against discrimination by association (the protection of carers of disabled people, for example) with the exceptions in the Bill. So on that reading it appeared to address a situation where, for example, permission to rent a boat to a non-disabled person only on terms that she does not allow her accompanying disabled friend to board because the boat operator takes the view that the disabled person could not safely sail in the boat would not be direct discrimination of the non-disabled person (by reason of her association with the disabled person) if the boat operator could lawfully refuse the disabled companion use of the boat, for safety reasons (see discrimination arising from disability, which may be justified, now s15). Instead, it was plainly intended to ensure that the prohibition against direct disability discrimination is asymmetrical, that is protecting disabled people only, though how this would fit with the need to outlaw direct discrimination of a person – disabled or not - because of their association with a disabled person (Case C-303/06, Coleman v Attridge Law & Another, [2008] ICR 1128, 00.00) is quite unclear. See for a discussion, K Monaghan, 'The Equality Bill: A Sheep in Wolf's Clothing or Something More? [2009] EHRLR 4, 512

123 See evidence before the Public Bills Committee, 2nd June 2009, Q 48, Col 26 and Explanatory Notes to the Bill, § 74.

124 *Coleman v Attridge Law & Another* Case C-303/06 [2008] IRLR 722.

125 2000/78/EC, see 00.00.

126 [2008] IRLR 722, 729, para 38 (00.00).

127 See the approach of the EAT following the referral to the ECJ: EBR *Attridge Law LLP and Another v Coleman (No.2)* [2010] IRLR 10, and the discussion above.

128 Ss.20 and 21 Equality Act.

129 *Supra*.

130 See Explanatory Notes, § 59 *"Direct discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in clause 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with*

would deprive the non-disabled employee of a claim in direct discrimination. Such is, of course, inconsistent with EU law.

The next form of prohibited conduct is *"indirect discrimination"*. This is perhaps the first real harmonising provision.[131] The definition of indirect discrimination matches the new form of indirect discrimination found in the Equality Directives and the amendments made to domestic anti-discrimination law to give effect to those Directives.[132] Importantly, the prohibition against indirect discrimination now applies to disability, for the first time, and it will therefore prohibit unjustifiable rules which adversely impact on disabled people sharing a particular disability.[133] These do not replace the *"reasonable adjustments"* obligations. The Act enacts a fresh *"reasonable adjustments"* duty,[134] comprising three requirements. The first requirement is a requirement, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.[135] The duties apply only in relation to disabled people. Certainly arguments have been made that the duty to make reasonable adjustments should apply across strands and this would go some way to ensuring substantive equality in access to public spaces for, for example, women with children, women breast feeding; persons from minority groups requiring time off for, for example, religious worship etc (without the need to change an offending rule for all). However, the Act does not go this far. Disabled people are now, then, protected by the general (negative) prohibition on facially neutral rules that disadvantage them (indirect

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someone who has that characteristic (for example, is disabled), or because the victim is wrongly though to have it (for example, a particular religious belief)".

131 Section 19: "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if, (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it 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 it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim. (3) The relevant protected characteristics are, age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

132 Directives 2000/43/EC; 2000/78/EC; 2002/73/EC; 2004/113/EC; 20006/54/EC.

133 S 19(2) and s. 6(3)(b).

134 S 20.

135 S20(2)-(5).

discrimination) and the positive obligation to take steps to avoid disadvantage arising from provisions, criteria or practices, physical features or the absence of auxiliary aids. It is widely understood that ensuring substantive equality for disabled people may require *"more favourable treatment"* and these provisions reflect this. However, the complexities arising out of the reasonable adjustments duties have not been mitigated. Instead the duties remain complex, activity specific (that is, they vary according to the particular activity concerned, e.g. work, public functions etc) and indeed arguably they are now more complex because one must look to different parts of the Act to determine the scope of the adjustments duties. There is also, just to add to the complexity, a series of regulation making powers which will complete the regulation of the reasonable adjustments obligations once regulations are made pursuant to them.[136]

Harassment is also prohibited by the Act.[137] Again, there is a general harmonising in that the meaning afforded the concept of harassment is generally (though not entirely[138]) the same across the protected characteristics.

Finally, victimisation is prohibited, largely reflecting existing protection.[139] Interestingly, the victimisation provisions are now limited to individual victims.[140] The reference to *"person"* in legislation, of course, applies equally to non-human as well as human bodies (unless the context necessarily requires otherwise). It is not clear why this limitation has been imposed. And it may prove unhelpful. If a private company were refused the opportunity to tender for work pursuant to a public authority's procurement arrangements because they were thought to be employing disproportionately high numbers of staff from one ethnic group or another

136 S 22.

137 S 26. And adopts the wider "*related to"* formulation required by EU law: *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] IRLR 327.

138 The third form of harassment (less favourable treatment because of a rejection or submission to conduct) applies only in the context of conduct related to sex or gender reassignment or conduct of a sexual nature (section 26(3)). In addition, harassment related to certain characteristics is not outlawed in across the scope of the Act (thus sexual orientation discrimination, *inter alia*, is not outlawed in schools: s85(3) read with s85(10)).

139 There are two particular differences that may in the event not turn out to be material but are interesting to note. Firstly, section 27(1) does not require proof of comparative less favourable treatment (whether actually or hypothetically determined). It requires only that a detriment occurs *"because"* of the protected acts. This may make little difference in the event because the *"because"* formulation closely matches the *"by reason"* formulation contained within existing provisions and if an act is done *"by reason"* or *"because"* of a protected act then necessarily it is likely to be treatment which is *"less favourable"* than that which was or would have been afforded a person who had not done such an act. Secondly, the protected acts are those actually done as well as those the discriminator *"believes"* that the victim has done. This might impose a slightly higher threshold than that found in the existing provisions which protect against acts *"suspected"* to have been done – which does not require *"belief"*. Again whether this will make much difference in practice will have to be determined but the change in wording is inconvenient and may give rise to unnecessary litigation.

140 S27(4).

and they had therefore made complaints of direct discrimination about the same, they would not now be protected by the victimisation provisions. No explanation is provided for this.

The prohibited conduct, then, as proscribed by the Act largely reflects that seen in the existing anti - discrimination enactments. There is some consistency in provision across the protected strands but not complete uniformity and the complexities remain. Consolidation has been achieved, then, but not with harmonisation or simplicity.

The Equality Duties

Perhaps the most significant change in anti-discrimination law over the past decade has been the enactment of equality duties, requiring public authorities to have proportionate regard to enumerated equality objectives, addressing inequality associated with race, then disability and finally gender.[141] The duties are still fairly new but indications are that they are very influential indeed in affecting positively public authority decision making, both in terms of process and substance.[142] The Equality Act goes further and in so doing demonstrates a discernible shift from an almost exclusively reactive, remedial, anti – discrimination scheme to one which, if fully enacted, will impose positive and anticipatory duties on bodies most able to effect change. The scope of the duties in the Act vary, but they are, in part, innovative. Those Duties fall into three groups: Socio-economic; Equality and Equal Pay Duties.

The very first section of the Act contains the most widely reported duty in the Act. It is headed: *"Public sector duty regarding socio-economic inequalities"*, tempting us with the possibility of such promise. This provision is welcome especially in an Equality Act, recognising as it does the close link between poverty and discrimination.[143] It is not the only statutory duty which recognises the link between poverty and the existence of certain protected characteristics. The Child Poverty Act 2010[144] enshrined in law the then Government's commitment to eradicate child poverty by 2020 by placing a duty on the

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141 Section 71, Race Relations Act 1976 (enacted by the Race Relations (Amendment) Act 2000; section 49A, Disability Discrimination Act 1995 (enacted by the Disability Discrimination Act 2005 and section 76A, Sex Discrimination Act 1975 (enacted by the Equality Act 2006). See too, the important specific equality duties enacted under; section 71(2), Race Relations Act 1976; section 76B, Sex Discrimination Act 1975 and section 49D, Disability Discrimination Act 2005.

142 See, for example, *C (a Minor, by litigation friend) (R on the application of) v Secretary of State for Justice & Anor* [2008] EWCA Civ 882; *Kaur (R on the application of) v London Borough of Ealing* [2008] EWHC 2062*; R (Elias) v. Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] WLR 3213; *R (BAPIO & Anor) v. Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199; *R v (Chavda & Others) v Harrow LBC* [2007] EWHC 3604.

143 "The Equalities Review, Fairness and Freedom: The Final Report of the Equalities Review" (2007), http://archive.cabinetoffice.gov.uk/equalitiesreview/.

144 Which received Royal Assent close in time to the Equality Act on March 25th 2010.

Secretary of State to ensure that four income poverty targets were met by that date.[145] Paradoxically, for a measure which had at its core an aspiration to eradicate child poverty, because of the prescriptions within it, its impact is likely to be discriminatory. This is because, as the Joint Committee on Human Rights observed in their scrutiny of the Bill which became the Child Poverty Act,[146] the Act imposes on the Secretary of State the duty to meet targets relating to four income-based indicators of poverty[147] and all of those indicators relate to children in *"qualifying households"*. This carries the risk that children not in qualifying households will in practice be discriminated against, because policy-makers will prioritise raising the income of children in qualifying households in order to meet the targets.[148] Though what is a *"qualifying household"* is not defined in the Act itself, but by regulations thereunder, even at the Bill stage it was recognised that what was envisaged by *"qualifying households"* were those covered by statistical surveys used to collect data by which indicators were already measured and those were surveys based on the "*small users post-code address file*". This includes most addresses which have post-codes and receive less than 50 items of post a day and exclude addresses which are *"communal establishments or institutions"*.[149] As the Joint Committee on Human Rights noted,[150] the effect of confining the duty to meet the targets to children in households that can be measured using current surveys would be to exclude certain children, for example children who live in communal accommodation, such as local authority children's homes, and children who do not live in accommodation with a post-code, such as many gypsy and Roma children and children from other traveller communities, as well as asylum seeking children.[151]

The socio-economic duty in section 1 of the Equality Act, on the other hand, though in an Act which has as its primary focus the elimination of discrimination and disadvantage associated with certain particular protected characteristics, does not discriminate in its scope. As the

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145 For a discussion see *"Enhancing Parliament's Role in Relation to Economic and Social Rights"*, Murray Hunt [2010] EHRLR, issue 3, 242-250.

146 *"Legislative Scrutiny: Child Poverty Bill, HL Paper No.183, HC1114 (twenty eighth report of Session 2008-09) at para 1.43 et seq.*

147 Sections 3-6

148 Murray Hunt, *"Enhancing Parliament's Role in Relation to Economic & Social Rights"* , *supra*, 246.

149 *"Legislative Scrutiny: Child Poverty Bill"*, *supra*, §1.43

150 Ibid.

151 As has been pointed out by Murray Hunt, see above, although the Government did not accept the amendment proposed by the Joint Committee on Human Rights, designed to prevent discrimination against children not living in qualifying households, the Government apparently accepted the force of the criticism noting that there was considerable sympathy in the House of Commons for what the committee's amendment was seeking to achieve, and making clear that the Government would keep under review the feasibility of extending the coverage of some surveys to include children in communal establishments (Hansard, HL col.GC180 (January 21, 2010)). The government also accepted a House of Lords Amendment to the Bill to ensure that the Secretary of State, in preparing a UK child poverty strategy, would focus not only on those children who are easy to lift above the poverty line, but would consider those children whose disadvantage is the greatest (Hansard, HC col.84 (March 22, 2010)).

Government Equalities Office observed in their Guide to the socio-economic duty:[152] *"A person's socio-economic background, their social class, is still a factor in determining their life chances. … in some cases, the evidence shows that socio-economic background – class – is actually a more important factor in determining life chances than other significant characteristics"*.[153] However, as was recognised too, *"socio-economic disadvantage reinforces and increases the inequalities associated with particular protected characteristics"*.[154] Thus *"around 70% of people from black and minority ethnic (BME) backgrounds live in the most deprived wards in the country; disabled adults are twice as likely to live in low-income households as non-disabled adults; half of all own parents are in low income households, the overwhelming majority of them being women; only 61% of Muslim men have jobs, compared to 80% of Christian men, and 82% of Hindu men"*.[155]

As to the content of the Duty, it requires the public authorities[156] to which it applies, *"when making decisions of a strategic nature about how to exercise its 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."*[157] This new "class" duty, as it has been described, whilst innovative is, however, limited.[158] Firstly, the obligation to "have due regard to the desirability of exercising" functions in a way which is designed to reduce inequalities is a weak obligation; less compelling than the obligations imposed by the equality duties, described below. The duty is almost certainly justiciable[159] but the obligations within it may prove not too difficult to meet. It is reminiscent of the duty in section 71 Race Relations Act 1976 before the amendments[160] made to give effect to the findings of the Stephen Lawrence Inquiry Report[161] and, in particular, its finding of "institutional racism". Section 71 as originally enacted imposed, on local authorities only, a duty to *"make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need to (a) eliminate unlawful discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups"*. This imposed *"an obligation upon the local authority, when they consider[ed]*

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152 *"The Equality Bill: Duty to Reduce Socio-Economic Inequalities, A Guide"* (January 2010) GEO, 8.

153 Ibid. 9.

154 Ibid.

155 Ibid.

156 As to which see s 1(3) to (5).

157 S 1(1).

158 And contains a pernicious and spiteful exemption at s1(6): *"The reference to inequalities in subsection (1) does not include any inequalities experienced by a person as a result of being a person subject to immigration control within the meaning given by section 115(9) of the Immigration and Asylum Act 1999."*

159 Though not in private law proceedings: s 3. See, evidence before the Public Bills Committee, 2nd June 2009, Q 18, Col 11.

160 Made by by the Race Relations (Amendment) Act 2000.

161 CM- 4262-I (February 1999), §. 46.27, 321.

discharging any of their functions which might have a race relations content, to do so such a manner as would tend to promote good relations between persons of different racial groups".[162] The original section 71 was wide in scope and embraced all activities of local authorities.[163] However, it was widely regarded as having limited, uneven impact in practice and as being difficult to enforce.[164] One key difficulty was that there was no indication of the content of the duty or the steps which local authorities should take in order to comply with it. The same difficulty may very well be experienced in relation to section 1, Equality Act. It does not have, for example, the statutory institutional frameworks supporting it that are seen in the case of the equality duties (by reason of the *specific* equality duties). But the new duty provides some potential and opportunity for tackling socio-economic disadvantage and may well be used in conjunction with the equality duties to further promote equality, if brought into force.

As to whether the Socio-Economic Duty will ever be brought into force, at least by the Coalition Government, this remains unclear. According to the Government Equalities Office website the Government is *"still considering"* the socio-economic duty on public authorities.[165]

Section 149 enacts the more robust Public Sector Equality Duty. It provides that: *"(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*

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162 *Wheeler v Leicester City Council* [1985] 1 AC 1054, 1060C-D per Ackner LJ in the Court of Appeal approved by Lord Roskill at 1077F-G.

163 *Wheeler v. Leicester City Council* [1985] 1 AC 1054, 1077D-G; *R. v. Lewisham LBC ex parte Shell UK Limited* [1988] 1 All E.R. 938, 951.

164 See Speech of Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department, HC Standing Committee D, 2 May 2000: *"…the present duty, which is only on local Councils, can effectively be ignored by a Council that considers it "inappropriate". As a result it has had a limited and uneven impact in practice. We have tried to avoid that in the new general duty."*. See also Speech of Lord Dholakia, HL Standing Committee, 13th January 2000, Cols 779-780: *"…Section 71 has not been effective… In our view, the enactment of a strong clear, enforceable legal duty ought not to be delayed. Only by imposing such a duty upon public bodies will the Government give tangible reality and consistency to their commitment to racial equality."* (emphasis added).

165 Amongst other provisions: http://www.equalities.gov.uk/equality_bill.aspx [accessed on 14/9/2010].

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. (8) A reference to conduct that is prohibited by or under this Act includes a reference to— (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule."[166] This Duty reflects in large part the existing equality duties[167] which have proved very compelling indeed.[168] The new duty, however, goes further in covering all the protected strands and all the unlawful acts and requiring not merely that equality of opportunity be *"promoted"*[169] but that it be *"advanced"*, including by having regard to the need to take specific steps to this end,[170] making the duties more substantive. However, there remain concerns. A "public authority", for the purposes of the duty, is a

166 Exceptions are contained in Sch. 18; s149(9).

167 Despite earlier indications that the new duty would be regressive: "*Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain"* (§5.10 *et seq*). Concerns remain about the substance of the duty; in particular the absence of specific reference to the fact that equality for disabled people may require more favourable treatment, cf. section 49A(1)(d), Disability Discrimination Act 1995 and see, evidence before the Public Bills Committee, 2nd June 2009, Q 41, Col 22. The problem is compounded by the fact that the limited positive action provisions apply to disability, which may confuse bodies into wrongly believing that positive action is *only* permissible in the case of disabled people where the positive action provisions are met (ss158-9, and see evidence before the Public Bills Committee, 2nd June 2009, Q 61, Col 33).

168 *R (on the application of Elias) v Secretary of State (Commission for Racial Equality Intervening)* [2005] EWHC 1435 Admin; [2006] EWCA Civ 1293); *R (BAPIO & Anor) v. Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199 (QB); *R (Smith) v. South Norfolk Council* [2006] EWHC 2772 (Admin); *(R (Baker & Others) v. Secretary of State and London Borough of Bromley)* [2008] EWCA 141; *R v (Chavda & Others) v Harrow LBC* [2007] EWHC 3604; *Eisai v National Institute of Clinical Excellence* [2007] EWHC 1941, Dobbs J; *Kaur (R on the application of) v London Borough of Ealing* [2008] EWHC 2062 (Admin), (§25)); *C (a Minor, by litigation friend) (R on the application of) v Secretary of State for Justice & An'or* [2008] EWCA Civ 882.

169 Section 71(1)(b), Race Relations Act 1976; section 76A(1)(b), Sex Discrimination Act 1975 and section 49A(1)(c), Disability Discrimination Act 1995.

170 S149(3). Though the duties are still a very long way from the outcome focussed duties seen in other jurisdictions, most notably South Africa: Promotion of Equality and Prevention of Unfair Discrimination Acts2000 and 2002.

person who is specified in Schedule 19.[171] Schedule 19 contains a limited (albeit long) list of public authorities. In this way section 149 will not apply to all public authorities, as is presently the case with the gender and disability equality duties, but instead adopts the "list" approach as seen in Schedule 1A, Race Relations Act 1976. All the authorities presently listed are "pure" public authorities.[172] Though section 149(2) indicates that the duties apply to "hybrid" authorities in the exercising of their public functions, none are presently listed. The regulation powers which exist to add to the list in Schedule 19 may fill that lacuna in due course.[173] The Coalition Government has indicated that it proposes to add to the list under Schedule 19[174] so that certain hybrid bodies will be included in respect of their public functions.[175]

The power to impose specific duties on public authorities is provided for under section 153 which gives a regulation making power to the Minister for this purpose. These duties may include duties requiring that consideration be given to certain matters and may include *public procurement* duties.[176] The content of the specific duties will be critical in determining the effectiveness of the duties under section 149, as the existing specific duties have demonstrated.[177] We do not yet know for sure what the specific duties will look like under the Act and, as with the pay auditing duties addressed below, so much of the importance of the duties will be in the detail. The Act itself leaves a considerable lack of clarity about the likely content of the duties. As to the proposed specific duties, the Government Equalities Office has published a consultation paper setting out the Coalition Government's present proposals for the imposition of specific duties.[178] The proposals are regressive both as compared to the existing specific equality duties and as compared to the outgoing Labour Government's proposals for specific duties under the Equality Act 2010.[179] The coalition Government's vision is one which informs the prescriptions it intends to impose and it is not a progressive one. The Government has indicated that it: *"believes that public bodies will perform best if they are free from unnecessary red take and allowed to concentrate on their core functions. We must remove time-waste in bureaucracy and strip out unnecessary*

171 S 150.

172 Except perhaps the Sub-Treasurers of the Inner and Middle Temple.

173 S151 and see, *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, a Consultation"* (August 2010), Government Equalities Office, 23.

174 Ibid, page 23.

175 For example, the General Council of the Bar.

176 S155(2) and (3).

177 Race Relations Act 1976 (Statutory Duties) Order 2001 SI 2001/3458; Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966; Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930.

178 *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, a Consultation"* (August 2010), Government Equalities Office.

179 *"Equality Bill: Making it Work, Policy Proposals for Specific Duties, A Consultation"* (June 2009), Government Equalities Office and *"Equality Bill: Making it Work, Policy Proposals for Specific Duties, Policy Statement"* (January 2010) Government Equalities Office.

prescription, processes and monitoring regimes to free up resources for front line services".[180] This is a worrying approach because as experienced equality practitioners recognise prescription process and monitoring are important for the progression of equality which does not happen without rigorous endeavour, measurement and checking.

As to the Coalition Government's *"approach to the specific duties"*, these are said to focus on four areas:

- transparency
- enabling citizens to exercise greater choice
- devolving power
- focusing on measurable results[181]

Draft regulations have been published for consultation purposes and there are real problems with the way the specific duties as presently drafted are formulated. In part that derives from the limits of the Government's aspirations as reflected in its *"approach"*. The draft specific equality duties[182] will, if enacted, require a listed public authority to:

- Publish information relating to its performance of the general Public Sector Equality Duty including, in particular, information relating to the protected characteristics of its employees (if it has 150 or more employees), assessments of the impacts of its policies and practices and the likely impact of its policies and practices on the furtherance of the equality objectives contained within the public sector equality duty; information that it took into account when it assessed the impact of its policies and practices and the likely impact of its policies and practices on the furtherance of the equality objectives set out in the Public Sector Equality Duty and details of any engagement that it undertook with persons whom it considered had an interest in furthering those equality objectives (draft Regulation 2).
- Prepare and publish one or more objectives which it reasonably thinks it should achieve in order to further one or more of the aims set out in the Public Sector Equality Duty. A listed public authority must also ensure that the objectives it sets are specific and measurable and set out how progress towards the objective should be measured (draft Regulation 3).

180 *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, a Consultation"* (August 2010), para 4.4

181 Ibid page 14.

182 Annexed at annex 2 to the Consultation Paper, page 31.

The Regulations as they are presently drafted will not require a listed public authority to publish an equality scheme *showing how it intends to fulfil its duties under* the public sector equality duty[183] nor, therefore, is there any obligation (as there is under the existing specific duties by reason of the duty to publish an Equality Scheme) an obligation to identify functions and policies etc which the public authority has assessed as relevant to the performance of the Equality Duty; the arrangements for assessing and consulting on impact; monitoring policies for adverse impact and training staff.[184] The publishing duty imposed by the draft Specific Duties[185] is intended to give effect to the Coalition Government's aspiration for transparency and enabling citizens to exercise greater choice. It is said by Government[186] that the proposals *"empower citizens and civil society groups to hold public authorities to account by requiring them to put their data relating to equality in the public domain using 'standardised formats and licences'"* and that *"more freely available data will enable people to compare public bodies and, where possible, choose between providers. Where choice is not available, free and open information will give people the power to use democratic accountability to hold organisations to account and drive up standards"*.[187] However, as the Government themselves recognise, the duties as drafted do not impose any obligation to collect data.[188] A public authority that declines to collect data that might go to show whether or not it is complying with its public sector equality duty or meeting any of the equality objectives stated therein, cannot it appears be compelled to do so under the specific duties if enacted as in their draft form. In addition, the suggestion that the duty to publish information might facilitate the opportunity to *"choose between providers"* smacks of weasel words in an environment where the deficit - cutting measures are likely to have devastating impact on public sector services so depriving all but a very privileged few of any ability to *"choose"*.

Further, the duty to prepare and publish *"one or more objectives"* which a public authority reasonably thinks it should achieve in order to further one of the equality objectives set out in the Public Sector Equality Duty is insufficiently robust and prescriptive and is regressive. It does not, importantly require a public authority to set objectives in relation to each of the

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183 Cf Article 2(1), Race Relations Act 1976 (Statutory Duties) Order 2001 SI 2001/3458; Regulation 2, Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966 and Article 2, Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930.

184 Cf Article 2(2), Race Relations Act 1976 (Statutory Duties) Order 2001; Article 2(3), Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 and Article 2(6), Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006.

185 Under draft Regulation 2.

186 *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, A Consultation"*, *supra*, 14.

187 14.

188 That is made clear by the government themselves when they state that the requirement *"should not be interpreted as a requirement on public bodies to routinely collect data on sensitive personnel issues, such as the religion or sexual orientation of their employees"*, page 17, para 5.11.

protected characteristics; a public authority may choose as few as one objective and in relation to as few as one protected characteristic. This is said to promote the Government's aspiration for the devolving of power so empowering *"public bodies to identify work towards achieving their own priorities"* but goes very little way indeed to ensuring that a public authority sets meaningful objectives. It is true, as the outgoing Government recognised,[189] that if there is no evidence of need *"then it would be odd and artificial to require an objective"*.[190] However with so little prescription about the objectives that a public authority is required to identify or their subject matter, the effectiveness of the specific duties, if enacted in their present form, must really be called into doubt. Further, there is no duty under the draft regulations to meet any objectives set.[191] In addition, and notwithstanding the outgoing Government's commitment to the same, this Government's proposals include no proposals for imposing duties in relation to procurement activity.[192] This is then *"extra-light touch regulation"*.[193]

As to the pay auditing duties, these are directed at tackling gender inequality in pay. Section 78 of the Act confers a regulation making power on the Minister and regulations enacted may *"require employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees."* The regulations will only apply to private sector employers with 250 employees or more (it is hoped and assumed that the specific equality duties referred to above will address pay in the public sector) and the outgoing Government did not intend to enact them before 2013. According to the Explanatory Notes to the Act: *"The Government wants larger private and voluntary sector employers in Great Britain to publish information on what they pay their male and female employees, so that their gender pay gap (the size of the difference between men and women's pay expressed as a percentage) is in the public domain. The Government's aim is for employers regularly to publish such information on a voluntary basis. To give voluntary arrangements time to work, the Government does not intend to make regulations under this*

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189 Equality Bill: Making It Work, Policy Proposals for Specific Duties, Policy Statement" (January 2010), GEO 13-14.

190 §2.23.

191 Cf Regulation 2(3)(c) read with Regulation 3, Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 and Article 2(4) and (6)(e) Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006.

192 *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, A Consultation"*, §§5.20-5.21, 19, cf "*Equality Bill: Making It Work, Policy Proposals for Specific Duties, Policy Statement*" (January 2010), GEO, §5.11 et seq (published by the outgoing Labour government) and see s.155(2)-(3), addressing specific duties (which might be introduced by regulations) addressing public procurement in terms.

193 There is not even any requirement to formulate an objective in relation to the causes of any differences between the pay of men and women that are related to their sex (cf Article 2(5), Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006), notwithstanding the persistent and undisputed gender discrimination in pay.

power before April 2013. The power would then be used only if sufficient progress on reporting had not been made by that time."[194]

Even if brought into force, the provisions are inadequate. They are a very long way from the equal pay audits that campaigners sought and that are seen in other jurisdictions.[195] It is also quite unclear why the outgoing Government thought that employers would *"voluntarily"* undertake pay audits. Employers may voluntarily undertake pay audits now if they choose (and there is much guidance on the same[196]). The Equal Pay Act 1970 was not brought into force until five years after its enactment to permit employers the opportunity to remedy inequality in pay before being legally bound so to do but gender inequality in pay remains a social reality forty years after its enactment. Without compelling equal pay duties, the position is unlikely to radically alter. As the Fawcett Society has said, *"all employers must be legally required to compare the pay of women and men doing equivalent work, make this information transparent, and take action to address any gendered pay disparity. The majority of employers have not been doing this under the current voluntary scheme. Unless pay audits are conducted employers will not know whether they are paying women employees*

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194 §273-4.

195 See, for example, the proactive equal pay legislation in Ontario and Quebec, covering both public and private sector employers (excepting some small employers). Ontario's Pay Equity Act (Pay Equity Act. R.S.O. 1990, c. p. 7) *"was perhaps the most progressive pay equity statute of its time"* ('Pay Equity: A New Approach to a Fundamental Right, (Canadian) Pay Equity Task Force Final Report (2004), ISBN 0-662-34045-0, p 68). Its section 7(1) provides that, *"Every employer shall establish and maintain compensation practices that provide for pay equity [defined in terms of comparisons between male and female job classes] in every establishment of the employer."* The statute imposes a positive obligation on each employer who has more than 10 employees to ensure that its own remuneration policies are not discriminatory. It sets out clear methodological and procedural requirements for attaining a non-discriminatory wage structure. The unit of comparison—the *"establishment"*—is all employees of an employer in a geographic division. The statute also permits the joining together of different employers as a single establishment by agreement. The Pay Equity Act provides that a pay equity plan must be negotiated with any trade union representing employees. Where there is no trade union, there is no obligation for an employer to discuss the pay equity plan with the employees, although they are entitled to comment on the posted plan, and to raise objections with the Pay Equity Commission if they disagree with it. There are statutory bodies supporting the legislative framework. The Pay Equity Commission is composed of two separate bodies—the Ontario Pay Equity Office and the Ontario Pay Equity Hearings Tribunal. The Ontario Pay Equity Office performs various functions, including educational and advisory functions; the provision of materials and templates for use in the pay equity process; the provision non-partisan advice about entitlements and responsibilities under the Act; the provision of assistance, through its review services branch, for employers and employee representatives engaged in job evaluation and the formulation of pay equity plans (*Pay Equity: A New Approach to a Fundamental Right, (Canadian) Pay Equity Task Force Final Report* (2004), ISBN 0-662-34045-0, p 69). The review officers of Pay Equity Office also have power to investigate complaints, facilitate *"discussion"* and issue compliance orders as well as to monitor and audit pay equity plans. Ontario's Pay Equity Hearings Tribunal adjudicates upon cases where a compliance order of the Pay Equity Office is appealed, or where it is referred by the Pay Equality Office for enforcement. Quebec's Pay Equity Act (Pay Equity Act. R.S.Q., c. E-12.001), passed in 1996, adopts many of the characteristics of the Ontario model including by the imposition of a positive obligation on employers in the public and private sectors. Whilst not wholly successful, such models *"it does appear that the level of compliance is higher under this kind of system than it is under complaint-based regimes or those which rely exclusively on an audit system. The caveat attached to this is that there must be adequate support from the regulatory agency*" (*Pay Equity: A New Approach to a Fundamental Right, (Canadian) Pay Equity Task Force Final Report* (2004), ISBN 0-662-34045-0, p 155).

196 *"Equal Opportunities Commission: Code of Practice on Equal Pay"* (2003, EOC).

less than men, how this is happening, or what they should do to rectify any gap. Furthermore, without a pay audit to refer to, most female employees experiencing pay discrimination will not be able to access the requisite information to challenge her pay."[197] Inequality in pay remains entrenched with women working full-time being paid on average 17% less than men, and women working part-time being paid 36% less than men working full-time.[198] It must be doubtful whether the duties proposed will make much difference to this, especially given the obligations under them will not require that action be taken to address any inequality even if the rather superficial reporting under the duties reveal the inequalities obscured so often by a failure to afford equal value to work of different kinds and by occupational segregation. In any event, it is by no means clear that this Coalition Government will introduce the minimum provision permitted by the Equality Act.

Implementation

As to implementation of the Act, its main provisions are due to be implemented on 1st October 2010. [199] it is at least possible (if not probable) that most of the most progressive parts of it will not be brought into force, at least by this Government. The Coalition Government has said that it intends to bring the Public Sector Equality Duty into force in April 2011.[200] However, as to other important provisions, the Government has said that *"Ministers are considering how to implement these … provisions in the best way for business and for others with rights and responsibilities under the Act. Their decisions will be announced in due course."* Those provisions are:

- the Socio-economic Duty on public authorities
- dual discrimination
- duty to make reasonable adjustments to common parts of leasehold and commonhold premises and common parts in Scotland
- gender pay gap information
- provisions relating to auxiliary aids in schools
- diversity reporting by political parties
- positive action in recruitment and promotion
- provisions about taxi accessibility
- prohibition on age discrimination in services and public functions
- family property

197 http://www.fawcettsociety.org.uk/index.asp?PageID=728 [accessed 14/9/2010].
198 http://www.fawcettsociety.org.uk/index.asp?PageID=754 [accessed 14/9/2010].
199 http://www.equalities.gov.uk/equality_bill.aspx [accessed 14/9/2010].
200 *"Equality Act 2010: The Public Sector Equality Duty, Promoting Equality Through Transparency, A Consultation"*, 9.

- civil partnerships on religious premises

Conclusion

If history repeats itself, the Equality Act will almost certainly principally prescribe and inform our equality law for the next two or three decades. It is also likely to be instructive in other jurisdictions, especially common law jurisdictions. The Act is welcome in developing the relatively new positive obligations seen in the equality duties under the existing legislation if brought into force. But for many it will be seen as a wasted opportunity.

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15 September 2010