

# **DISCRIMINATION IN THE PROVISION OF PUBLIC SERVICES AND FUNCTIONS:**

## **A BRIEF SUMMARY OF THE NEW PROVISIONS**

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### **The Previous Provisions**

1. Discrimination in the provision of public services and the undertaking of public functions is rendered unlawful in respect of race by the Race Relations Act 1976 (“RRA”) sections 19(B) and 21; in respect of sex by the Sex Discrimination Act 1975 (“SDA”) sections 21A and 29; in respect of disability by the Disability Discrimination Act 1995 (“DDA”) sections 19 – 21E; in respect of sexual orientation by the Equality Act (Sexual Orientation) Regulations 2007 regulations 4 and 8; and in respect of religion or belief by the Equality Act 2006 sections 46 and 52. The scope of the prohibition on discrimination, the forms of discrimination outlawed and the applicable exceptions varies significantly amongst these legislative provisions.

### **The New Provisions and Commencement**

2. As set out in more detail below, the key provisions concerning discrimination in the provision of public services and the exercise of public functions are contained in Part 3 of the Equality Act 2010 (“EA 2010”), particularly sections 28, 29 and 31. Schedule 2 sets out how the duty to make reasonable adjustments applies in these areas. Schedule 3 contains specific exceptions applicable to these areas (in addition to the general exceptions contained in Part 14 EA 2010).
3. Save to the extent that they apply to the protected characteristic of age, these provisions come into force on 1 October 2010: para. 2 The Equality Act 2010 (Commencement No. 4 etc) Order 2010 No. 2317.
4. In terms of transitional arrangements, the EA 2010 provisions apply where an act carried out before 1 October 2010 is unlawful under a previous enactment and that act continues on or after 1 October 2010 and is made unlawful by the EA 2010: see para. 7 of the Commencement Order No.4.

## **Public Services and Public Functions**

5. The provisions concerning discrimination in respect of public services and functions are residual in the sense that they do not apply if the conduct in question is prohibited by Part 4 (premises), Part 5 (work) or Part 6 (education) EA 2010, or would be but for the applicability of any express exception: see section 28(2).
6. If the conduct in question does not fall within Parts 4 – 6 EA 2010, it is necessary to first consider whether it constitutes the provision of a service (as opposed to the exercise of a function). This is because of the terms of section 29(6) which provides: *“A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation”*. This is reinforced by section 31(3), which provides: *“A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function”*. It is also confirmed by the Explanatory Notes to the EA 2010, which give the example of medical treatment on the NHS as being covered a public service covered by the provisions dealing with services: para. 108.
7. Services are not defined for the purposes of the EA 2010, save that section 31(2) indicates that a reference to the provision of a service includes a reference to the provision of goods or facilities. As the various previous legislative provisions concerning discrimination in respect of services, referred to “goods facilities and services” (“gfs”) the previous case law concerning the ambit of these concepts should still be applicable. The EA 2010 does not contain a non-exhaustive list of examples of relevant gfs, as the earlier legislative provisions did. However, given the similar statutory wording, it would be very surprising if any of the listed examples were no longer considered to be within the concept of provision of a service. In keeping with the earlier legislative provisions, section 29(1) indicates that “a service provider” for these purposes is a person concerned with the provision of a service to the public or to a section of the public, whether for payment or not.
8. In terms of the previous case law concerning the meaning of provision of a service to the public / section of the public, the leading authority is *In re Amin* [1983] 2 AC 818, in which the House of Lords identified the test as being whether the conduct in

question was similar to that which would be or could be undertaken by a private person. Applying that test, the immigration control arrangements in issue in that case did not involve the provision of a service or a facility. Police officers' duties in so far as they involve protecting and assisting victims and investigating crime on behalf of victims can come within the concept of service provision: *Farah v Commissioner of Police of the Metropolis* [1998] QB 65 CA, *Brooks v Commissioner of Police of the Metropolis* [2002] EWCA Civ 407. Further, provision of toilet and washing facilities, bedding and medical assistance and access and egress to particular rooms at an immigration detention centre were within the scope of gfs: *Gichura v Home Office* [2008] ICR 1287. As a private person would often be engaged in providing such things, it did not matter that in the particular instance their provision was incidental to the discharge of a public function (immigration detention). The Explanatory Notes to the EA 2010 gives law enforcement and revenue raising and collection as examples of public functions which do not involve the provision of a service: para. 108. However, that statement may be too wide sweeping in light of the Court of Appeal's decisions in *Farah* and in *Brooks* (above) in respect of policing and in respect of applications for tax relief in *Savjani v Inland Revenue Commissioners* [1981] 1 QB 458.

9. Sections 29(1) and (2) (read with section 31(7)) prohibit a service provider from discriminating:
  - In not providing a person requiring the service with that service (including not providing it to the same quality or on the same terms as are usually provided);
  - As to the terms on which the service is provided;
  - By terminating the provision of the service;
  - By subjecting the person in question to any other detriment.
  
10. If the circumstances do not constitute the provision of a service, the prohibition on discrimination in the exercise of public functions falls to be considered. There is no express requirement that the function in question is undertaken by a public authority, nor any list of applicable public authorities, in contrast to the provisions concerning the public sector equality duty (sections 149 -150 and Schedule 19). The prohibition applies to the exercise of any public function (subject to the exceptions discussed

below). Section 31(4) provides that “a *public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.*” Section 6 of the Human Rights Act 1988 (“HRA”) provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right and then provides that a “public authority” includes “*any person certain of whose functions are functions of a public nature*”. “Functions of a public nature” is not defined in the HRA, but there is now a considerable body of case law on the meaning of this phrase, which will in turn determine whether the public function provisions of the EA 2010 apply (see, for example, *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; *L v Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95; and *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363).

### **Protected Characteristics**

11. The services and public functions provisions apply to all of the protected characteristics listed in section 4 EA 2010 save for marriage and civil partnership and age so far as it relates to persons who have not attained the age of 18: section 28(1).
12. The EA 2010 thus extends the previous prohibition on discrimination in services provision and the exercise of public functions to cover for the first time the protected characteristics of gender re-assignment, age and pregnancy and maternity (albeit conduct relating to the latter characteristic would in any event have come within the sex discrimination provisions in the majority of instances at least). Of these extensions, age is potentially the most significant change. However, as set out above, the provisions are not being brought into force in so far as they relate to age on 1 October 2010. The Government has said that Ministers are considering how best to implement this provision and no timetable has been given as yet.

### **Forms of Discrimination**

#### **Protected Characteristics other than Disability**

13. Direct discrimination and indirect discrimination (as defined by EA 2010 sections 13 and 19 respectively) are unlawful forms of discrimination in respect of each of the protected characteristics to which the Part 3 provisions apply. Direct discrimination in respect of pregnancy and maternity in non-work cases, including services and

public functions is addressed by section 17. Unlike many other areas where direct discrimination is outlawed (for example work or services), in relation to the exercise of public functions, it is unnecessary to show that a detriment was suffered as a result of the less favourable treatment.

14. In one of the leading cases on direct discrimination claims in respect of the exercise of public functions, *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1 the House of Lords upheld a claim brought under section 19B RRA in relation to a pre-clearance immigration control scheme operated by United Kingdom immigration officers at Prague airport. The scheme was operated in a way that treated Roma applicants less favourably as they were routinely met with more suspicion and subjected to more intrusive questioning than non-Roma applicants. The House of Lords unanimously allowed the appeal from the Court of Appeal's finding that there was no direct discrimination, as the difference in treatment arose from the supposedly sound reason that the Roma applicants were less well placed than the other applicants to persuade the officers that they were not seeking to enter the United Kingdom on false grounds. Their Lordships emphasised that this reasoning effectively and impermissibly introduced a justification defence into the direct discrimination statutory provisions. The lack of a justification defence in respect of direct discrimination (save in relation to age) is probably of particular importance in respect of the public functions provisions, where public bodies may often wish to explain that any apparent difference in treatment arose from an (allegedly) rational and specific reason.
15. The EA 2010 provisions harmonise the applicable definition of indirect discrimination, as set out in section 19, across the various protected characteristics. Previously several different definitions applied, depending upon the strand of discrimination relied upon. The leading example of a successful indirect discrimination claim in respect of the exercise of public functions is probably *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, concerning the criteria of an ex gratia scheme introduced to compensate those who had been interned in Japanese prisoner of war camps. The criteria were indirectly discriminatory in excluding a greater proportion of non-UK national than UK nationals, as the Secretary of State ultimately conceded. The main issue before the Court of Appeal

was whether such prima facie discrimination could be justified as a proportionate means of achieving a legitimate aim. The Court found that it could not, in particular because the potential for indirect discrimination had not been appreciated at the time when the criteria were devised. The Court also found that the defendant's wholesale failure to comply with the race equality duty imposed by section 71 RRA reinforced this conclusion.

16. Victimisation and harassment are also prohibited in relation to the provision of services and the exercise of public functions: section 29 (3) – (6). However, neither religion or belief nor sexual orientation are applicable protected characteristics for the purposes of such a harassment claim: section 29(8). Additionally, the EA 2010 definition of harassment does not extend to conduct related to pregnancy or maternity. However, the majority of such conduct should fall within the direct discrimination provisions in any event.

### **Disability Discrimination**

17. In respect of the provision of services and the exercise of public functions, unlawful disability discrimination can arise in respect of direct discrimination, indirect discrimination, harassment or victimisation as discussed above in relation to the other protected characteristics, but also by way of discrimination arising from disability (defined in section 15) or breach of a duty to make reasonable adjustments (considered below).
18. As regards the latter form of discrimination, section 29(7) clarifies that the duty to make reasonable adjustments applies to a service provider and to a person exercising public functions. "The relevant matter" for the purposes of the three requirements set out below is the provision of the service or the exercise of the public function. Section 20 sets out the three circumstances where, in general, a duty to make reasonable adjustments arises and the nature of that duty ("the three requirements"). Section 21 provides that a failure to comply with those requirements is a failure to comply with a duty to make reasonable adjustments and that "A" discriminates against a disabled person if A fails to comply with that duty in relation to that person. Schedule 2 applies the three requirements to the provision of

services and the exercise of public functions with some amendment to the wording. Accordingly, for present purposes the three requirements are as follows:

*“The first requirement is a requirement, where a provision, criterion or practice (“PCP”) of A’s puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as are reasonable to have to take to avoid the disadvantage”.*

*“The second requirement is a requirement, where a physical feature puts disabled persons generally 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 take - (a) to avoid the disadvantage, or (b) to adopt a reasonable alternative method of providing the service or exercising the function.”*

*“The third requirement is a requirement where disabled persons generally 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 reasonable to have to take to provide the auxiliary aid”.*

19. Schedule 2 para. 2(7) clarifies that a service provider is not required to take a step that would fundamentally alter the nature of the service (or the nature of its trade or profession). Schedule 2 para 2(8) provides that a person exercising a public function is not required to take a step that s/he has no power to take.
  
20. Absent the Schedule 2 amendments to the three requirements contained in section 20, they apply to “a disabled person”. As the Explanatory Notes to the EA 2010, the change in wording to “disabled persons generally” is intended to indicate that the duty is an anticipatory one, so that service providers and those exercising public functions must anticipate the needs of disabled people in advance and make appropriate adjustments: para. 676. The reference to “disabled persons generally” is thus not a requirement that all disabled persons be disadvantaged in the manner set out in the requirement in issue. This is reinforced by the examples given in the

Explanatory Notes as to when a breach of the duty to make reasonable adjustments could arise in this field. It is also consistent with the decision in *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), a case concerned with the defendant's decision not to licence a particular type of vehicle for use as a public taxi, despite the fact that it could be readily used by those with long wheel chairs, unlike the standard London taxis that were currently licensed. Blake J. emphasised that for the duty to make reasonable adjustments to arise, it was sufficient for a disadvantaged class of disabled persons to be identified (as opposed to a single individual), but that class did not need to comprise, as the defendant had contended, all wheelchair users.

21. Being placed at “a substantial disadvantage” by the exercise of a public function for the purposes of the three requirements means, if a benefit is or may be conferred, being placed at a substantial disadvantage in relation to the conferment of that benefit; or, where a person may be subjected to a detriment, suffering an unreasonably adverse experience when being subjected to the detriment: see Schedule 2 para. 5. This may connote a lower threshold test than that contained in section 21E DDA, which referred to PCPs that made it “impossible or unreasonably difficult” for disabled persons to receive a benefit conferred or to be subjected to the detriment in question.
22. A breach of a EA 2010 duty to make reasonable adjustments in respect of service provision or public functions cannot be justified by the defendant, unlike the equivalent (and complex) DDA provisions.
23. Recent examples of successful claims involving a breach of the duty to make reasonable adjustments in respect of the exercise of a public function include *R (Gill) v Secretary of State for Justice* [2010] EWHC 364 (Admin) and *Lunt* (above). *Gill* concerned a life sentence prisoner who suffered from a learning disability, which meant he was not permitted to undertake offending behaviour programmes, which in turn delayed his progress towards release. The Court found that the defendant's approach had made it impossible or unreasonably difficult for the claimant to access the relevant behaviour programmes, so that the duty to make reasonable adjustments arose. Further, that the defendant had failed to discharge the duty to make reasonable adjustments as alternatives had not been properly explored.



## **Exceptions**

24. In addition to the general exceptions contained in Part 14 EA 2010 (including statutory requirements, national security and charities: see sections 191 – 194), specific exceptions relating to services and public functions are contained in Schedule 3. The main exceptions that will apply to the provision of public services and the exercise of public functions are summarised below.

## **Parliament and Legislation**

25. The exercise of Parliamentary functions and functions connected to the undertaking of Parliamentary business are excluded from section 29 provided they are undertaken by or in pursuance of a resolution or other deliberation of either House or a Committee of either House: Schedule 3, para.1 . Section 29 does not apply to preparing, making or considering an Act of Parliament or Bill for an Act of Parliament, nor to preparing, making confirming, approving or considering an instrument which is made under an enactment by a Minister of the Crown, or made by Her Majesty in Council or by the Privy Council: Schedule 3, para 2. As the Explanatory Notes emphasise not all law making activities are excluded; the example given is the making of a bye-law by a local authority: para. 683.

## **Judicial Functions**

26. Section 29 does not apply to a judicial function or to anything done on behalf of or on the instructions of a person exercising a judicial function: Schedule 3, para 3(1). This exception would not include administrative decisions made by court staff: see para 683 of the Explanatory Notes.
27. A decision not to commence or continue criminal proceedings is excluded, as is anything done for the purpose of reaching, or in pursuance of such decisions: Schedule 3, para 3(2). Although also appearing in the Schedule under the sub-heading of judicial functions, such decisions would usually be taken by the Crown Prosecution Service or (in some instances) the police or other law enforcement agencies. As with previous legislation, a decision to prosecute is not within the exception.

## **Armed Forces and Security Services**

28. The prohibition on discrimination in the exercise of public functions (section 29(6)) does not apply to anything done for the purpose of ensuring the combat effectiveness of the armed forces, so far as the protected characteristics of age, disability, gender reassignment and sex discrimination are concerned; Schedule 3, para 4. The Security Services, Secret Intelligence Services and Government Communications Headquarters are completely excluded from section 29: Schedule 3, para 5.

## **Education**

29. The prohibitions on discrimination contained in section 29 do not apply to local authorities' functions under the Education Act 1996 relating to the provision of primary and secondary schools in a given catchment area, so far as the protected characteristics of age and religion or belief are concerned: Schedule 3, para 6. This exception is to prevent a local authority from being bound to provide schools for pupils of different faiths (or no faith), or for particular age groups, in every catchment area. Schedule 3, para 11 creates an exception from the prohibition on religious or belief related discrimination in relation to the exercise of functions concerning faith and non-faith educational institutions, including the curriculum and collective worship arrangements.
30. The effect of Schedule 3, para 8 is to permit a local authorities to establish single-sex schools, but to require it to provide a similar number of school places for boys and girls. Schedule 3, para 9 permits local authorities to have various policies and practices relating to schooling based on age, for example school admissions policies and school transport. Schedule 3, para 10 provides an exception for local authorities from the provisions concerning the duty to make reasonable adjustments in respect of school education in relation to the requirement to alter physical features of premises.

## **Health and Care**

31. Schedule 3, para 13 provides that it is not unlawful for a person operating a blood service to refuse to accept a person's donation of blood provided they have reliable

evidence that accepting it would put the public or the individual donor at risk and that such a refusal would not be unreasonable.

32. Paragraph 14 creates exceptions in relation to services provided to pregnant women on health grounds. An example given in the Explanatory Notes is an airline refusing to allow a pregnant woman to travel beyond her 35<sup>th</sup> week.

### **Immigration**

33. Schedule 3 para 16 provides an exception from the Part 3 EA 2010 provisions in respect of disability, in relation to certain immigration decisions, including making a decision not to allow a person to enter the country or a decision not to allow him or her to remain in the country. These exceptions only apply where the decision is necessary for the public good. This is a new exception, not previously thought necessary under the DDA, as direct discrimination did not apply to the provision of services or the exercise of public functions and disability related discrimination could be justified.
34. The exercise of immigration functions because of ethnic or national origins or nationality are exempted: Schedule 3, para 17.
35. Decisions not to allow a person to enter the country or to remove a person from the country because of their religion or belief are exempted from the Part 3 provisions provided the decision is made on the grounds that it is conducive to the public good to exclude the person from the United Kingdom or it is not desirable to permit them to enter.

### **Separate and Single Services**

36. The provision of separate services for each sex does not contravene section 29 so far as sex discrimination is concerned, if the provision of a joint service for both sexes would be less effective and the limited provision is a proportionate means of achieving a legitimate aim: Schedule 3, para 26. Similarly, the provision of services to persons of one sex only does not contravene section 29 if one of a number of stipulated conditions are satisfied and the limited provision is a proportionate means of achieving a legitimate aim: Schedule 3, para 27. The stipulated conditions include

provision of services in hospital or where the circumstances are such that persons of one sex might reasonably object to the presence of persons of the opposite sex. Paragraph 28 contains a similar exception in relation to gender reassignment discrimination.

37. Paragraph 29 permits ministers of religion to provide separate and single-sex services, so long as this is done for religious purposes and it is either necessary to comply with the tenets of the religion or to avoid conflict with the strongly held views of a significant number of the religion's followers.
38. Paragraph 30 provides that a service provider does not breach section 29 if s/he supplies the service in such a way that it is commonly only used by people with a particular protected characteristic and s/he continues to provide that service in that way. However, the service provider can only refuse to provide the service to a person who does not share the particular characteristic if it would be impracticable to provide it.

### **Broadcasting**

39. Claims under Part 3 EA 2010 cannot be brought in relation to broadcasting and distribution of content, as defined in the Communications Act 2003; this includes, for example, the content of a television programme or the distribution of on-line content.

### **Amendment**

40. Schedule 3, para 35 contains a power for a Minister of the Crown to add, vary or remove exceptions in the Schedule relating to both service provision and public functions in respect of disability, religion or belief and sexual orientation. Similar variations in respect of race, sex, gender reassignment and pregnancy and maternity can be made in respect of the exercise of public functions, but not the provision of services. However, the scope of the exceptions covering constitutional matters and judicial functions cannot be reduced. The Minister must consult the Equality and Human Rights Commission before exercising the power under this paragraph.

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