

British Developments in Non-Discrimination Law: the Equality Act

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I. Introduction

In Spring 2010, the British Parliament finally adopted a comprehensive reform of equality law, following a public debate that stretched over more than a decade. The Equality Act 2010 is the biggest reform of British equality legislation since its inception in the 1960s. It entails the repeal of the burgeoning mass of existing legislation and the replacement of these diverse laws with one statute that will become the main source of law on equality. The Act is a large and complex piece of legislation; it consists of 218 sections followed by 28 Schedules. Moreover, the legislative itinerary is not yet concluded; some key areas of the Act require subsequent delegated legislation.¹

Given the magnitude of the legal reforms undertaken in the Equality Act 2010, it is not possible to provide a comprehensive analysis of all significant changes found therein. This chapter examines the overall picture emerging from the Act with a view to considering the extent to which it meets the objectives of the law reform process. At its core, there are two key aims identified in the Act: ‘to reform and harmonise equality law’, and ‘to increase equality of opportunity’.² The first aim might be characterised as more technical in nature. It entailed the challenging process of consolidating many different legal instruments into one legislative Act, while at the same time modernising the legislation in various respects. The second aim is profoundly ambitious as it explicitly seeks to bring about a particular social change. This chapter will consider how the Equality Act measures up to both of these objectives. Before proceeding to delve into the detail of the legislation, it begins with a short introduction to the evolution

¹ For example, the specification of the exceptions applicable to discrimination on grounds of age in the provision of services.

² These are found in the ‘long title’ of the Act. This framework of analysis is also adopted in *M. Malik*, *Modernising discrimination law: proposals for a single equality act for Great Britain* (2007) 9 *International Journal of Discrimination and the Law* 73.

of British equality law, as well as the process that culminated in the adoption of the Act.

II. How we got to here: a brief history of British equality law

One of the defining characteristics of British equality law since the 1960s has been its incremental evolution. This trend can already be witnessed in the genesis of the Race Relations Act (RRA); weaker measures were adopted in 1965 and 1968, prior to the more robust prohibition of direct and indirect racial discrimination adopted in 1976.³ For most of the past 40 years, the central pillars of British equality law were the laws on race and sex discrimination.⁴ As well as conferring rights for individuals to challenge discrimination in a range of areas of social life, these statutes established two bodies, the Commission for Racial Equality and the Equal Opportunities Commission, with a mandate for promoting enforcement of the legislation. In 1995, the Disability Discrimination Act (DDA) extended legal protection against discrimination to disabled persons, but this was not a simple reproduction of the existing laws on race and sex. A new definition of discrimination was constructed, including a duty to provide reasonable adjustments. The DDA was not based on a symmetrical model of equal treatment of disabled and non-disabled persons. Instead, the law prohibited discrimination against disabled persons, with no corresponding conferral of rights on non-disabled persons. Initially, the DDA did not provide for the setting up of an equality body, but this lacuna was remedied in 2000 with the creation of the Disability Rights Commission.⁵

Parallel to this slow evolution, a gradual Europeanisation of British equality law can be traced. Given the general reluctance of the Conservative governments during 1979-1997 to expand equality law, the European Union became one of the main engines for change. In particular, cases referred to the European Court of Justice enhanced gender equality law, such as protection against discrimination based on gender reassignment.⁶ Nevertheless, the most distinct influence of Europeanisation was the adoption of the Racial Equality and Employment Equality Directives in 2000.⁷ These

³ See further, *E. Bleich*, *Race politics in Britain and France – ideas and policymaking since the 1960s* (Cambridge: Cambridge University Press, 2003).

⁴ Notably, the Race Relations Act 1976, the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

⁵ *K. Monaghan*, *Blackstone's guide to the disability discrimination legislation* (Oxford: Oxford University Press, 2005) 15.

⁶ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

⁷ Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Directive 2000/78 establishing a

Directives led to the reform of the RRA and the DDA, but also to the introduction of new legislation dealing with discrimination on grounds of religion or belief, sexual orientation and age.⁸ The initial response was to follow the historic pattern of separate laws for each ground of discrimination. Yet the proliferation of legal instruments that resulted inevitably provoked calls for an overhaul of the legal framework and the adoption of a single law on equality,⁹ an approach already evident in various EU Member States.¹⁰

Finally, it should be noted that the period since 2000 has also witnessed a notable shift in the direction of British equality law. In 1999, a major public inquiry reported on the racist murder of a young black man, Stephen Lawrence, and the mishandling of the police investigation into his murder. Crucially, this inquiry recognised the existence of ‘institutional racism’ within the police. It defined this concept as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.¹¹

The subtle, yet engrained, nature of institutional discrimination is unlikely to be challenged effectively through individual litigation. It resides in unspoken assumptions, such as what type of person would ‘fit in’ within a particular workplace. The recognition of this concept led to a turn in the legislation, away from the overwhelming reliance on enforcement by individual complaint, and instead emphasising the need for public sector organisations to take measures to promote equality. Concretely, legislation was gradually introduced placing public authorities under a duty to pay ‘due regard’ to the need to promote equality of opportunity on grounds of race,

general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

⁸ For an overview, see *N. De Marco*, Blackstone’s guide to the Employment Equality Regulations 2003 (Oxford: Oxford University Press, 2004); *S. Cheetham and E. White*, Age discrimination – the new law (Bristol: Jordans, 2006).

⁹ *A. McColgan*, Discrimination Law – text, cases and materials (2nd edition, Oxford: Hart Publishing, 2005) 10.

¹⁰ See further, *M. Bell*, I Chopin and F Palmer, Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared (3rd edition, Luxembourg: Office for Official Publications of the European Communities, 2007).

¹¹ Para.6.34, The Stephen Lawrence Inquiry – report of an inquiry, Cm.4262-I (1999).

sex and disability.¹² These provisions have required a wide range of public authorities, such as schools, universities, local government, police, etc, to draw up ‘equality schemes’ setting out how they go about the task of promoting equality.

III. Reforming the legal framework: a decade of debate

The debate around reforming the law has been long-running, but a common point of reference is the 2000 independent review of anti-discrimination legislation.¹³ This was based on an extensive consultation and it recommended bringing together the existing laws into a single equality act, combined with a single equality body. Although this was the ‘headline’ recommendation of the review, it is important to note that the review also emphasised the need for deep-seated change in the basic model of the legislation in order to enhance its effectiveness. Specifically, it recommended the adoption of active measures to promote equality, such as a duty on employers to adopt employment equity plans to redress under-representation of women, ethnic minorities or disabled people.¹⁴

Initially, there was little appetite on the part of government for an ambitious reform agenda. It argued that:

Equality legislation is constantly evolving. Our view is that an incremental approach to implementing equality legislation allows us fully to think through the implications at each stage.¹⁵

This philosophy of pragmatism (or minimalism) produced absurd complexities within the legislation. For example, the RRA prohibited discrimination on grounds of colour, race, nationality or ethnic or national origins. The Racial Equality Directive expressly refers to discrimination on grounds of racial or ethnic origin. In order to implement the Directive, the government was required to alter various aspects of the RRA, such as the definition of indirect discrimination, the list of permitted exceptions and the introduction of a shift in the burden of proof. The government’s view was that the Directive applied to the RRA grounds of race, ethnic or na-

¹² For an overview, see *K. Monaghan*, *Equality Law* (Oxford: Oxford University Press, 2007) 625.

¹³ *B. Hepple, M. Coussey and T. Choudhury*, *Equality: a new framework – report of the independent review of the enforcement of UK anti-discrimination legislation* (Oxford: Hart Publishing, 2000).

¹⁴ *Ibid* 71.

¹⁵ Lord Sainsbury HL Deb vol 649 col 334 11 June 2003.

tional origins, but not to the grounds of colour or nationality. Accordingly, it amended the RRA's provisions in respect of the former grounds, but not in respect of the latter. This effectively created a dichotomy within the legislation where the applicable set of legal provisions depended on the form of racial discrimination (e.g. based on ethnic origin or colour), as well as whether it was inside or outside the material scope of the Directive.

The first crack in the government's resistance to serious reform emerged in relation to the equality bodies. Although the Employment Equality Directive did not require the creation of institutions to support individuals in respect of discrimination on grounds of religion, sexual orientation or age, the government recognised the inconsistency that this yielded in the British context, where such bodies already existed for sex, race and disability.¹⁶ It decided to replace the existing equality bodies with a new institution, eventually called the Equality and Human Rights Commission.¹⁷ This has a mandate covering all forms of prohibited discrimination, as well as human rights. Many of the justifications advanced for the single commission, such as responding to multiple discrimination and simplifying the organisational framework,¹⁸ were somewhat hollow given that the Commission was compelled to function under legislation that remained fragmented and ground-specific.

The Labour Party manifesto for the 2005 general election shifted the government's previous position and committed it to introducing single equality legislation. A very lengthy process of review and consultation ensued, but the Equality Act was finally adopted by Parliament in the last days of the Labour government. Due to this timing, the decisions on how and when to bring the provisions of the Act into force fell to the Conservative-Liberal Democrat coalition government, which took office in May 2010. Most of the Act's provisions were brought into force in October 2010; however, for several provisions, discussed below, the new government decided that they should not enter into force. These provisions remain in the statute, but they are unenforceable.

IV. Reforming and Harmonising Equality Law

This section will focus on the Act's goal of reforming and harmonising British equality legislation. As discussed above, this vocation stemmed from the sheer volume and complexity of the pre-existing framework. The

¹⁶ Department of Trade and Industry (DTI), *Making it happen* (London: DTI, 2002).

¹⁷ See further, *C. O'Conneide*, *The Commission for Equality and Human Rights: a new institution for new and uncertain times* (2007) 36 *Industrial Law Journal* 141.

¹⁸ DTI (n. 16 above) 20.

government identified ‘nine major pieces of discrimination legislation, around 100 statutory instruments setting out rules and regulations and more than 2,500 pages of guidance and statutory codes of practice.’¹⁹ Therefore, a central mission was to ‘replace this thicket of legislation with a single Act, which will form the basis of straightforward practical guidance for employers, service providers and public bodies.’²⁰

The Act repeals most of the principal statutes and statutory instruments, with the main exception being the Equality Act 2006, under which the Equality and Human Rights Commission is established. To a large extent, it achieves the tidying objective of bundling most laws relating to equality into a single piece of legislation. While this makes it superficially easier to identify where the rules on equality are located, it is necessary to examine the detailed contents of the Act to gain a better picture of how far the Act actually results in simplification. This section will examine two broad themes within the Act (definitions and scope), before turning to consider the ways in which the Act reforms the law in the sense of introducing new protections against discrimination.

1. Harmonising the definition of discrimination

The Act identifies nine ‘protected characteristics’ to which it applies. These are ‘age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race;’²¹ religion or belief; sex; sexual orientation.²² These characteristics were all found within the pre-existing legislation, however, the characteristics of pregnancy and maternity, marriage and civil partnership, and gender reassignment were all located under the auspices of the Sex Discrimination Act (SDA) 1975. At first glance, the Equality Act 2010 has elevated these characteristics by placing them alongside sex, rather than being treated as a derivation of this characteristic. As discussed below, differences remain, however, in the approach to the various characteristics and arguably this is most pronounced in relation to marriage and civil partnership, and pregnancy and maternity. Although the consultation had floated the possibility of extending the law to cover

¹⁹ Government Equalities Office, *A fairer future – the Equality Bill and other action to make equality a reality* (London: Government Equalities Office, 2009) 7.

²⁰ *Ibid.*

²¹ ‘Race’ includes colour, nationality, ethnic or national origins; s. 9. There is a power within the Act for a Ministerial order to amend the Act in the future to deem ‘caste’ to be an aspect of ‘race’.

²² s. 4.

new characteristics, such as being a carer or genetic predisposition,²³ the government ultimately chose to preserve the status quo.

In terms of ‘prohibited conduct’, the Act identifies several forms of unlawful discrimination: direct, indirect, harassment and victimisation. There are also the additional offences of instructing, causing or inducing another person to contravene the Act,²⁴ or knowingly helping another person to contravene the Act.²⁵ The catalogue of prohibited conduct is (generally) based around a common definition of all of these actions applying across the protected characteristics. On the surface, this is an excellent example of the harmonisation objective being put into practice. The Act eliminates some of the most egregious and irrational differences in the pre-existing legislation. For example, there are no longer different definitions of discrimination depending on whether racial discrimination is based on colour or ethnic origin. Another example of welcome reform can be found in the area of harassment. Here, there was a notable gap between the SDA and the other discrimination legislation. The SDA included a provision allowing employers to be held liable for harassment by third parties (e.g. customers or students),²⁶ where this occurs on at least three occasions and the employer fails to take reasonably practicable steps to prevent its occurrence. There was no provision akin to this in the other discrimination legislation, but the Equality Act 2010 extends this approach across the protected characteristics.²⁷

Although the Act makes a laudable contribution to making the legislation more coherent and consistent, the veneer of a single set of rules for all protected characteristics is somewhat misleading. When you scratch beneath the surface, there are in fact numerous ways in which the legislation continues to differentiate between the protected characteristics.²⁸

A notable example is the maintenance of the asymmetrical approach to discrimination on the ground of disability. Section 13(3) clarifies that a non-disabled person cannot bring a claim of direct discrimination because a disabled person has been treated more favourably. Therefore, the disability provisions of the Act continue to pursue a model that recognises the legitimacy of preferential treatment as a means of bringing about full equality in practice. In a similar vein, the Act retains specific forms of un-

²³ Department for Communities and Local Government, *Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (London: Department for Communities and Local Government, 2007) ch 8.

²⁴ s. 111.

²⁵ s. 112.

²⁶ ss. 6(2B)-(2D) SDA 1975.

²⁷ ss. 26 and 40.

²⁸ *K. Monaghan*, *The Equality Bill: a sheep in wolf’s clothing or something more?* [2009] *European Human Rights Law Review* 512, 527.

lawful discrimination that only apply to disability. These are discrimination arising from disability and failure to make a reasonable adjustment.²⁹ The former is akin to direct discrimination; however, the strict comparator requirement found in direct discrimination cases does not apply.³⁰

The fact that disability continues to be dealt with differently within the Equality Act illustrates that gathering equality legislation together into one legal document will not, by itself, result in a complete harmonisation of rules across all protected characteristics. Indeed, if the harmonisation process resulted in the extinguishing of any recognition of diversity between the characteristics, this would be ultimately damaging to the effectiveness of the law. Disability is a characteristic where it is well-established that equality entails more than simply providing identical treatment.³¹ An employer whose offices can only be accessed via a flight of stairs will treat everyone in the same manner, but this will not produce equality for wheelchair users. The difficulty lies in determining when it is congruent with the pursuit of equality to depart from the general principle of harmonised provisions across the protected characteristics. In relation to disability, the decision to retain an asymmetrical model of protection seems a justified case of when difference needs to be recognised within the law. An asymmetrical approach would not, for example, be appropriate for discrimination related to the characteristic of religion and belief. Unlike disability, potential discrimination arises across minority and majority groups. Religious discrimination law is relevant to a Christian who does not wish to work on Sundays, as well as a Muslim who would like time off to attend Friday prayers. In contrast, disability discrimination law is vocationally aimed at combating disadvantage experienced by disabled persons and it is therefore coherent to exclude its application to non-disabled persons.³²

The fairly clear justification for treating disability differently is not, though, mirrored elsewhere in the Act. Other instances of differentiating between the characteristics seem to lack an obvious or convincing rationale. Three examples will be given to illustrate some of the interior com-

²⁹ ss. 15, 20, 21.

³⁰ In direct discrimination, s. 23 requires the complainant to demonstrate less favourable treatment by reference to a comparator where there is 'no material difference between the circumstances relating to each case'.

³¹ *S. Fredman*, Disability equality: a challenge to the existing anti-discrimination paradigm? in A Lawson and C Gooding (eds.), *Disability rights in Europe – from theory to practice* (Oxford: Hart Publishing, 2005) 199, 203; *L. Waddington*, Reasonable accommodation, in: D. Schiek, L. Waddington and M. Bell (eds.), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford: Hart Publishing, 2007) 629, 632.

³² An exception would be discrimination by association (see further below).

plexity of the Act. First, section 13(5) states ‘if the protected characteristic is race, less favourable treatment includes segregating B [the complainant] from others’. This provision can be regarded as part of the legacy of the RRA, which expressly prohibited racial segregation.³³ The historical origins of prohibiting racial segregation are not difficult to trace; Apartheid in South Africa was a key influence on the 1965 UN International Convention on the Elimination of Racial Discrimination, which also forbids segregation.³⁴ It is symptomatic of the tendency within the Equality Act to carry over pre-existing legislative provisions that there appears to have been no thought given to whether the prohibition of segregation should be extended to other protected characteristics. Arguably, the segregation of women and men in the workplace should also be regarded as unlawful discrimination; indeed, it is often linked to the persistence of the gender pay gap.³⁵

A second instance of departure from the standard provisions is in relation to the characteristic of pregnancy and maternity. The prohibition of direct and indirect discrimination does not apply to this characteristic. Instead, discrimination is defined as where a woman is treated unfavourably because of pregnancy or maternity.³⁶ The potential benefit of this approach is that the requirement for a comparator, which applies to direct discrimination,³⁷ does not extend to unfavourable treatment because of pregnancy or maternity. Moreover, this reflects the position in EU legislation, which states that ‘discrimination includes ... any less favourable treatment of a woman related to pregnancy or maternity leave’.³⁸ At the same time, there are some shortcomings with the approach in the Equality Act. Notably, it talks about unfavourable treatment ‘because of’ pregnancy/maternity, whereas the EU Directive refers to less favourable treatment ‘related to’ pregnancy/maternity. This gives rise to potential difficulties concerning the approach to establishing causation and there is a risk that ‘because of’ infers a higher level of proximity than ‘related to’.³⁹ Case-law on harassment in Britain already established that the SDA was not compliant with EU

³³ s. 1(2) RRA 1976.

³⁴ *K. Boyle and A. Baldaccini*, A critical evaluation of international human rights approaches to racism, in: *S. Fredman* (ed.), *Discrimination and human rights – the case of racism* (Oxford: Oxford University Press, 2001) 135.

³⁵ *F. Bettio and A. Verashchagina*, *Gender segregation in the labour market – root causes, implications and policy responses in the EU* (Luxembourg: Publications Office of the European Union, 2009).

³⁶ ss. 17 and 18.

³⁷ s. 23.

³⁸ Art 2(2)(c), Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

³⁹ On the meaning of ‘because of’, see *K. Monaghan* (n. 28 above) 526.

legislation because it did not adopt the broader 'related to' test.⁴⁰ Furthermore, harassment related to the characteristic of pregnancy and maternity is not forbidden in the Equality Act. Presumably, it will be possible for such conduct to be challenged as harassment related to sex, which is forbidden,⁴¹ but it is difficult to identify the rationale for excluding pregnancy and maternity from the prohibition of harassment.

The final example of complexity concerns the characteristic of marriage and civil partnership. The origin of this characteristic lies in the SDA, which prohibited discrimination against a person because he/she was married.⁴² This reflected the obstacles that married women encountered in the labour market, such as formal bars on employing married women that were common prior to the SDA. The Civil Partnership Act 2004 created a legally-recognised status for same-sex couples in the UK, which is very similar in terms of rights and duties to the status of marriage. Accordingly, civil partnership was inserted into the SDA provisions on discrimination against those who are married. The Equality Act carries over these provisions from the SDA. Although marriage and civil partnership appears, at first glance, to be ranked alongside the other characteristics, the Act's provisions are actually quite narrow. The protection conferred is asymmetrical. It only prohibits discrimination against those who are married or in a civil partnership; there is no protection for an individual who faces discrimination because she is single.⁴³ Direct and indirect discrimination are prohibited, but not harassment. Moreover, this is the only characteristic where protection is limited to the field of employment. Ultimately, it is unclear why there is a need for this characteristic to be included within the Act. It would seem that discrimination related to this characteristic will already be prohibited under either the characteristics of sex or sexual orientation. This element of the Act is an example of the tendency to import the legacy of the earlier legislation without a thorough reappraisal of its present-day necessity.

2. Harmonising the material scope of the legislation

Another key element of the harmonising agenda was to ensure consistent coverage of the legislation across all protected characteristics. As above, the Act initially seems to introduce a uniform prohibition of discrimination across a wide range of social activities. The Act covers the following areas: services and public functions; premises; employment; education; and associations. The prohibition of discrimination in these areas applies to all characteristics with the exception of marriage and civil partnership

⁴⁰ R(EOC) v Secretary of State for Trade and Industry [2007] ICR 1234.

⁴¹ s. 26.

⁴² s. 3 SDA 1975.

⁴³ s. 13(4).

(which is limited to employment) and age. In relation to the latter, there was no pre-existing legislation on age discrimination outside employment or further and higher education. The Equality Act extends the prohibition of age discrimination to the provision of services and the exercise of any public function. This is subject to the exclusion of persons under the age of 18,⁴⁴ while the definition of the exceptions applicable in this area remains to be fleshed out in delegated legislation.⁴⁵ The Act does not prohibit age discrimination in relation to premises or schools.

Delving further into the legislation, there are additional distinctions in relation to the material scope of the prohibition of harassment. Harassment in the areas of employment and further and higher education is prohibited when it is related to the characteristics of sex, race, disability, age, gender reassignment, religion or belief, and sexual orientation. Yet for other parts of the Act's material scope, some of these characteristics are excluded. As regards service provision and exercise of a public function,⁴⁶ disposal and management of premises,⁴⁷ schools,⁴⁸ and associations,⁴⁹ the prohibition of harassment does not apply to the characteristics of religion or belief and sexual orientation. In addition, protection from harassment related to gender reassignment does not apply to schools.⁵⁰ The origins of this confusing picture lie in debates surrounding the Equality Act 2006, which extended the prohibition of discrimination on grounds of religion or belief to areas outside employment. There were concerns that explaining religious beliefs (for example, in relation to homosexuality) or criticism of religions could be construed as unlawful harassment.⁵¹ Ultimately, this led to the exclusion of harassment from the Equality Act 2006 and a corresponding exclusion of harassment from the Equality Act (Sexual Orientation) Regulations 2007,⁵² which extended the prohibition of sexual orientation discrimination to areas outside employment. The treatment of harassment in the Equality Act 2010 gives a telling insight into the reluctance of the government to conduct a truly searching inquiry into the inheritance from the existing legislation and to re-open past controversies. While this may have been politically expedient, it damages the Act's potential to address discrimina-

⁴⁴ s. 28(1).

⁴⁵ s. 197.

⁴⁶ s. 29.

⁴⁷ ss. 33-35.

⁴⁸ s. 85.

⁴⁹ s. 103.

⁵⁰ s. 85(10).

⁵¹ See further, A. Lester and P. Uccellari, *Extending the equality duty to religion, conscience and belief: proceed with caution* (2008) *European Human Rights Law Review* 567, 569.

⁵² SI 2007/1263.

tion in a coherent and consistent fashion. The approach taken to harassment leaves the law opaque and uncertain. Even where harassment is not forbidden, direct discrimination remains unlawful. Therefore, claimants encountering harassment in situations where this is not prohibited by the Act still have the alternative of arguing that the harassing conduct amounted to less favourable treatment. Legally, this is more complex because the complainant then needs to identify a comparator and this has proven problematic in earlier case-law on harassment.⁵³ For example, consider the situation of a Muslim pupil subject to derogatory remarks about her religious beliefs by her school teacher. Although harassment on grounds of religion or belief is not prohibited in schools, this conduct might constitute direct discrimination (which is unlawful). If, however, the teacher makes offensive remarks about a range of different religious beliefs then it may be difficult for the Muslim pupil to show that she has been treated less favourably than a person of another religion.⁵⁴

3. Reforming the protection against discrimination

In a number of areas, the Act goes beyond a mere codification of existing legislation and introduces new elements that expand protection against discrimination. Two prominent examples are discrimination by association and intersectional discrimination.

Under the existing legislation, there was a highly complicated treatment of discrimination based on perception or association. The former relates to situations where discrimination is based on an assumption; for instance, where a woman faces discrimination because she is believed to be a Muslim, even though she is not. Discrimination by association was exemplified by the Coleman case,⁵⁵ where a woman encountered discrimination and harassment at work that was related to her son's disability. Some of these scenarios could be adequately dealt with under the existing legislation. The laws on race, religion or belief and sexual orientation were framed openly, referring to discrimination 'on grounds of ...'. This had been interpreted purposively by the courts to include a range of situations where discrimination was not because of the race/religion/sexual orientation of the vic-

⁵³ *A. McColgan* (n. 9 above) 58.

⁵⁴ This is akin to earlier cases such as *Stewart v Cleveland Guest (Engineering) Ltd* [1996] ICR 535, where the display of pictures of nude and semi-naked women was not held to constitute harassment of a woman on grounds of sex because a man might have also found the pictures offensive.

⁵⁵ Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

tim.⁵⁶ Other legislation was worded more narrowly; for example, the SDA referred to discrimination ‘on the ground of her sex’.⁵⁷ In order to bring coherence to the legislation, as well as to comply with the judgment of the Court of Justice in *Coleman*, the government decided to ensure that discrimination based on perception or by association would be rendered unlawful. Strangely, there is nothing in the Act that expressly reflects this intent. Instead, the government relied on the way in which it worded the definition of direct discrimination. This states:

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.⁵⁸

The explanatory notes accompanying the Equality Act take the view that this wording means that there is no need to demonstrate that B possesses a particular characteristic, such as disability; it is sufficient to establish that the less favourable treatment was because of that characteristic.⁵⁹ This appears to be a robust legal argument, but arguably it would have been clearer for individuals and organisations if the Act dealt with these issues in a more transparent fashion. Moreover, for an extra twist of complexity, this principle does not apply to the characteristic of marriage or civil partnership, where the victim must actually be married or in a civil partnership.⁶⁰

The second area where the concept of discrimination should have been enhanced is in relation to discrimination on more than one ground. Throughout the debates leading up to the Act, one of the central issues was improving the protection of persons who experience intersectional discrimination, such as discrimination based on sex and ethnic origin. The British legal framework, with its predilection for ground-specific legislation, created obstacles for those who encountered discrimination that could not be neatly classified according to one specific ground.⁶¹ Although the government was initially resistant to addressing this issue within the legislation, it subsequently amended the original Bill to add section 14 on ‘combined discrimination: dual characteristics’:

⁵⁶ eg *Saini v All Saints Haque Centre and others* [2009] IRLR 74 (religious discrimination by association) and *English v Thomas Sanderson Blinds Ltd* [2009] IRLR 206 (homophobic harassment of a heterosexual man).

⁵⁷ s. 1(1)(a) SDA 1975.

⁵⁸ s. 13(1).

⁵⁹ para. 59, Explanatory Notes: <http://www.equalities.gov.uk/equality_bill.aspx> accessed 5 July 2010.

⁶⁰ s. 13(4).

⁶¹ *S. Hannett*, *Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination* (2003) 23 *Oxford Journal of Legal Studies* 68; *A. McColgan*, *Reconfiguring discrimination law* (2007) *Public Law* 74.

(1) A person (A) also discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

Insofar as this marked a first step in recognising (within law) the phenomenon of intersectional discrimination, it can be welcomed as a sign of progress. Yet it contains several limitations. First, it only applies to direct discrimination. This is surprising because there were already examples in British case-law of harassment that involved more than one ground.⁶² Secondly, it only applies to combinations of two protected characteristics. If we consider the hypothetical example of a headscarf-wearing Muslim woman who is refused a job because the employer thinks that she would not be an appropriate image for the company, then this provides an illustration of a situation where discrimination might be related to more than two characteristics: ethnic origin, religion and sex in this example. Our imaginary complainant would have to select two of those three characteristics when seeking to rely upon section 14, while the other characteristic could be the subject of a separate discrimination claim. Thirdly, there are no other steps to respond to intersectional discrimination within the Act. For instance, there are no measures to address whether remedies should be adjusted to take into account a case where discrimination has affected more than one ground.⁶³ Finally, it should be noted that section 14 does not apply to the characteristics of marriage and civil partnership or maternity and pregnancy.

Notwithstanding the cautious approach found within section 14, the coalition government subsequently decided that this section of the Act should not be brought into force due to concerns about the costs that it could place on businesses.⁶⁴ Therefore, individuals facing discrimination based on more than one protected characteristic will continue to have to challenge this as several separate instances of unlawful discrimination.

4. Merely an exercise in legislative tidying?

It would be churlish to deny the concrete improvements to the framework of British equality law that are ushered in by the Act. The gathering of most of the legislation into a single legal instrument injects a higher level of rational consistency across protected characteristics. As a signal, it is a

⁶² *M. Malik* (n. 2 above) 83.

⁶³ *Ibid.*

⁶⁴ '2011 Budget statement by the Chancellor of the Exchequer', available at: <http://www.hm-treasury.gov.uk/2011budget_speech.htm> accessed 13 June 2011.

firm rejection of the prior approach, which tended to construct discrimination grounds in isolation from each other. Tucked within the new legislation, there are discrete advancements in the substantive content of the law, not all of which can be explored within the confines of this chapter.⁶⁵ The changes made should deliver a modest enhancement in legal protection for individuals, and it is a valuable contribution to making the general pattern of the law (if not the detailed contents of the statute) more understandable to individuals and organisations. Nevertheless, the discussion above has exposed shortcomings in the extent to which the harmonisation objective has been successfully pursued. It is true that there are differences between the protected characteristics and these should be appropriately reflected in the legislation. If harmonisation was blindly pursued across the board, this would become a stifling straight-jacket that would ultimately hinder the pursuit of equality. Yet too often the Act simply imports complexities and inconsistencies from the inherited legislative framework rather than a penetrating evaluation of whether these provisions continue to be relevant or required.⁶⁶

V. Increasing Equality of Opportunity

In the extended period of debate and analysis that preceded the Act, the government established the Equalities Review in order to take stock of the progress made in bringing about equality within British society. The findings of the Review confirmed that on a range of socio-economic indicators there remained deep-seated inequalities linked to the protected characteristics.⁶⁷ For example, ethnic minorities are 13% less likely to find work than a white person,⁶⁸ while white students are over four times more likely to graduate with a first class degree than black Caribbean students.⁶⁹ Moreover, the rate of progress in closing gaps between different social groups

⁶⁵ eg there are new rules designed to restrict the circumstances in which employers can ask job applicants questions about their state of health (s. 60) and the definition of gender reassignment has been expanded (s. 7). A detailed analysis of the whole Act is available in Income Data Services, *Equality Act 2010: the future of fairness* (2010), available at: <<http://www.incomesdata.co.uk/areas-of-expertise/employment-law/downloads/Feature900.pdf>> accessed 5 July 2010.

⁶⁶ A classic instance of this is the long list of exceptions contained in the Schedules to the Act.

⁶⁷ The Equalities Review, *Fairness and freedom: the final report of the Equalities Review* (2007) <<http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>> accessed 29 June 2010.

⁶⁸ Government Equalities Office (n. 19 above) 6.

⁶⁹ Equalities Review (n. 67 above) 61.

was slow; the current trend would mean that the gender pay gap would not be closed until 2085.⁷⁰ The statistical information on inequality was a key element of the government's argument that the Act needed to go beyond a simple consolidation of the existing legislation. If forty years of race and sex discrimination legislation had not been sufficient to eliminate significant socio-economic gaps linked to these characteristics, then there was a need for additional measures to increase equality of opportunity. The measures found within the Act that relate to this objective will be grouped under two headings: positive action and duties to promote equality.

1. Positive action

The existing legislation was highly prescriptive about the (limited) forms of positive action that were permissible. In the main, these were training programmes targeted at under-represented groups and outreach measures, such as encouraging under-represented groups to apply for jobs. The independent review of the legislation in 2000 criticised this approach as unduly restrictive and outdated.⁷¹ Moreover, studies suggested that organisations were, in fact, engaging in a wide variety of positive action schemes, albeit with considerable uncertainty as to their legality.⁷² The Equality Act adopts a completely different approach that aims to facilitate positive action subject to general criteria. Section 158 permits positive action in respect of three situations: to overcome or minimise disadvantage linked to a protected characteristic; to meet the needs of persons sharing a protected characteristic where these are different from the needs of others; to enable or encourage the participation of persons sharing a particular characteristic where their participation is currently disproportionately low. In order to trigger this section, it is sufficient that the person taking the positive action 'reasonably thinks' that these circumstances apply.⁷³ The key threshold test for determining legality is whether the action taken is a proportionate means of achieving the aims set out above.⁷⁴

The focus on proportionality reflects the trajectory in EU case-law and the explanatory notes emphasise that it must be interpreted in accordance with EU law.⁷⁵ In one sense, the new approach throws open the doors, encouraging organisations to explore different types of positive action.

⁷⁰ Government Equalities Office (n. 19 above) 6.

⁷¹ *B. Hepple et al* (n. 13 above) 38.

⁷² *L. Barmes*, Equality law and experimentation: the positive action challenge (2009) 68 *Cambridge Law Journal* 623.

⁷³ s. 158(1).

⁷⁴ s. 158(2).

⁷⁵ para. 520 (n. 59 above).

Barnes argues that this may be a double-edged sword.⁷⁶ Organisations could be misled into measures that stray beyond the boundaries of EU law. This is especially true in relation to positive action in areas outside employment where the outlook of the Court of Justice is unknown. The explanatory notes provide the following example of permitted positive action: ‘having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.’⁷⁷ There must be at least some doubt over how the Court of Justice would view a challenge to this scheme from the parents of a black girl who is also struggling with maths and where they would like her to have access to these supplementary classes.

Although the general approach is non-prescriptive, section 159 lays down specific rules for the application of positive action to recruitment and promotion decisions. In this case, positive action can be taken if a person reasonably thinks that persons sharing a particular characteristic suffer disadvantage or have disproportionately low participation. In these circumstances, section 159 allows more favourable treatment in recruitment or promotion where the person with the protected characteristic is ‘as qualified as’ persons without the characteristic. Put more simply, this is a conscious attempt to allow employers to have recourse to the ‘tiebreaker’ type of positive action scheme already witnessed in Court of Justice decisions such as *Marschall*⁷⁸ and *Badeck*.⁷⁹ In those cases, the Court clarified that automatic and unconditional preferential treatment was not permitted and that such schemes needed to include a ‘an objective assessment which takes account of the specific personal situations of all candidates’.⁸⁰ In practical terms, this means that an organisation cannot automatically promote an equally qualified woman; instead they must compare her situation with that of the alternative male candidates in order to determine if there are other reasons that could outweigh applying the preferential treatment to her. For example, if the choice were between a white woman from a privileged social background and a disabled Asian man from a deprived neighbourhood, then the interests of equality might be better served by awarding the position to the man rather than the woman.⁸¹

⁷⁶ L. Barnes, Navigating multi-layered uncertainty: EU, Member State and organizational perspectives on positive action, in: G. Healy, G. Kirton and M. Noon (eds.), *Equality, Inequalities and Diversity: contemporary challenges and strategies* (London: Palgrave MacMillan, 2010) 56.

⁷⁷ para. 525 (n. 59 above).

⁷⁸ Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

⁷⁹ Case C-158/97 *Badeck and others* [2000] ECR I-1875.

⁸⁰ *Ibid* para 38.

⁸¹ See further, P. Kapotas, *Positive action as a means to achieve full and effective equality in Europe*, Ph.D. thesis, London School of Economics, 2010.

Section 159(4) imposes two conditions on when more favourable treatment in promotion and recruitment can be applied: (i) the action must be proportionate; and (ii) the person taking the action must not have a policy of more favourable treatment in relation to recruitment or promotion. On the one hand, this does not transpose clearly the insistence of the Court of Justice on an individual assessment of the different candidates. The explanatory notes refer to taking into consideration the ‘comparative merits’ of the other candidates.⁸² This is an unfortunate wording, because the assessment at this stage is not about ‘merit’ in the sense of capability to perform the job; the candidates are already deemed to be as qualified as each other. Arguably, it would have been more transparent if the individualised assessment required by the Court of Justice had been expressly incorporated into the wording of the Equality Act. On the other hand, the prohibition of any policy of more favourable treatment is correctly described by Barmes as ‘bizarre’.⁸³ If an organisation is going to have recourse to this kind of positive action, it evidently needs considerable planning and care in order to avoid straying into unlawful discrimination. If more favourable treatment is applied in an arbitrary fashion, there would be a real risk that the actions are not proportionate and therefore unlawful. Consequently, it is unavoidable that the organisation must have some ‘policy’ as to when such positive action will be applied and who is authorised to invoke this possibility. The legislation only makes sense if policy is read as meaning that there cannot be an automatic application of the rule across all promotion and recruitment decisions without regard to the situation of other candidates.⁸⁴

There are a number of other provisions in the Act that relate to positive action. Space does not permit detailed scrutiny, but two measures can be highlighted. First, section 104 permits proportionate measures to reduce inequality when political parties select candidates for election.⁸⁵ Until 2030, political parties may have recourse to women-only shortlists when selecting election candidates.⁸⁶ Moreover, there is the power to issue regulations requiring political parties to publish data relating to the characteristics of their election candidates (for example, the proportion of female candidates).⁸⁷ Secondly, in relation to private sector employers with 250 or more employees, there is the power to adopt regulations requiring them to

⁸² para. 529 (n. 59 above).

⁸³ *L. Barmes* (n. 76 above) 72.

⁸⁴ para. 526, Explanatory Notes (n. 59 above).

⁸⁵ It applies to elections for local government, the devolved legislatures in Scotland and Wales, Parliament and the European Parliament (s. 104(8)).

⁸⁶ s. 105.

⁸⁷ s. 106.

publish data on the pay of their employees, disaggregated by gender.⁸⁸ The coalition government has announced its intention to promote a voluntary gender pay reporting scheme for businesses; the option of making this mandatory is, though, a future option in the event that voluntary compliance is not successful.⁸⁹

The overall tone struck by the government when introducing the Equality Act was much more enthusiastic towards positive action than the preceding legislative framework: ‘to end inequality you have to take positive action to redress disadvantage as well as tackle discrimination.’⁹⁰ Despite acknowledging the necessity of positive action, the Equality Act remains founded on a voluntary approach. The capacity of the Act to be a catalyst for widespread use of positive action rests entirely on the willingness of organisations to engage with this agenda. The previous government took an optimistic outlook, arguing that both business and trade unions supported positive action.⁹¹ Yet there was no political consensus that this was the correct strategy to pursue; during the Bill’s passage through Parliament the Conservative Party opposed the new legislative provisions on positive action.⁹² Nevertheless, the coalition ultimately decided that these provision should be brought into effect and this occurred in April 2011.⁹³

2. Duties to promote equality

Alongside positive action, the Act aims to increase equality of opportunity through a reform and expansion of the duties on public bodies to promote equality. As discussed earlier, this approach grew in popularity during the period since 2000, but it only applied to the characteristics of race, disability and sex. It placed public authorities under a duty to have ‘due regard’ to the promotion of equality of opportunity.⁹⁴ This general legal duty was supplemented by specific duties found within delegated legislation.⁹⁵ These varied in their detailed contents, but they typically required public authorities to have a plan explaining how they will promote equality and how they will conduct ‘equality impact assessments’ of existing and future

⁸⁸ s. 78. Public sector organisations will also be obliged to publish gender pay data, but this is regulated separately under the duty on all public bodies to promote gender equality (see below).

⁸⁹ Government Equalities Office, ‘The equality strategy – building a fairer Britain’ (London: Government Equalities Office, 2010) 14.

⁹⁰ *Ibid* 26.

⁹¹ *Ibid* 27.

⁹² Income Data Services (n. 65 above) 15.

⁹³ Government Equalities Office (n. 89 above) 15.

⁹⁴ s. 71(1) RRA 1976; s. 49A DDA 1995; s. 76A SDA 1975.

⁹⁵ eg Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458).

policies.⁹⁶ The virtue of the equality duties is that they break free of the complaints-based model of enforcement, which has tended to dominate British equality law.⁹⁷ They oblige public bodies to weave equality considerations into all of their activities and to take active measures to advance equality. There is, though, some uncertainty about the effectiveness in practice of the duties. Empirical evidence remains rather limited⁹⁸ and there have been concerns that organisations are too focused on procedures rather than outcomes.⁹⁹ Put more bluntly, public bodies may reduce the equality duty to a box-ticking exercise in bureaucratic compliance.¹⁰⁰

Given the general scheme of the Equality Act 2010, it is unsurprising that the Act extends the public sector equality duty to all of the protected characteristics, with the exception of marriage and civil partnership.¹⁰¹ It goes further than the existing duties in trying to spell out what advancing equality entails. Mirroring the provision on positive action, it requires public authorities to have due regard to removing disadvantages; taking steps to meet specific needs of persons with a particular characteristic; and encouraging participation where this is disproportionately low.¹⁰² The reference to meeting needs is underscored by recognition that advancing equality ‘may involve treating some persons more favourably than others’.¹⁰³ The version of equality that emerges is pluralistic and rejects the idea that advancing equality means the same measures for all groups in every situation. Some of the existing case-law exposed ways in which a monolithic reading of equality could stifle recognition of difference. For example, *Kaur and Shah* concerned a local authority decision to remove funding from an organisation that worked on domestic violence experienced by ethnic minority women.¹⁰⁴ The authority’s approach was to require domestic violence projects to assist all persons regardless of the protected characteristics. This emphasis on formal equal treatment ultimately damages the realisation of full equality in practice because it becomes blind to the different needs that exist in social reality.

⁹⁶ *K. Monaghan* (n. 12 above).

⁹⁷ *S. Fredman*, *Discrimination Law* (Oxford: Oxford University Press, 2002) 177.

⁹⁸ *C. McCrudden*, *Equality legislation and reflexive regulation: a response to the Discrimination Law Review’s consultative paper* (2007) 36 *Industrial Law Journal* 255, 264.

⁹⁹ *S. Fredman* and *S. Spencer*, *Beyond discrimination: it’s time for enforceable duties on public bodies to promote equality outcomes* (2006) *European Human Rights Law Review* 598, 602.

¹⁰⁰ This view of the duty has been rejected by the courts: *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin), para. 25.

¹⁰¹ s. 149(7).

¹⁰² s. 149(3).

¹⁰³ s. 149(6).

¹⁰⁴ *Kaur and Shah* (n. 100 above).

Although the definition of the equality duty is promising, much rests on the specific duties that will be adopted in subsequent delegated legislation. These put flesh on the bones of the general duty by requiring specific actions from public authorities, such as collecting data on the ethnicity of employees or auditing progress in achieving equal pay for women and men. During the consultation process, the previous government indicated its desire to reduce the bureaucratic burden of the equality duties on public authorities. It floated the idea that public authorities will identify for themselves a limited number priority objectives and that the obligation to conduct equality impact assessments would be relaxed.¹⁰⁵ This approach has been continued by the coalition government, which has sought to minimize the obligations on public authorities within the specific duties in order to reduce ‘unnecessary burdens and bureaucracy.’¹⁰⁶ The new general equality duty entered into force on 5 April 2011, but the government has yet to adopt any specific duties.

Perhaps the most novel element of the Act is found in section 1. This introduces an entirely new duty on a range of larger public authorities, such as government departments, local government and health authorities. Such a body:

must, when making decisions of a strategic nature about how to exercise its functions, 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.

Like the public sector equality duty, this is aspirational in the sense that it does not impose a particular outcome on decision-makers; the obligation is only to have due regard to this issue. Understandably, this raises similar doubts about the ultimate impact in practice of this measure. Nevertheless, it is an important symbolic recognition that socio-economic disadvantage should be included within the broader equality agenda. The tendency in equality law has been to focus on inequalities linked to sex, race, disability, etc, with little regard to socio-economic inequalities across society as a whole. This overlooks the inter-relationships between poverty and equality. Linking these is especially beneficial in identifying the most disadvantaged groups within society and developing a more refined approach to the

¹⁰⁵ Government Equalities Office, *Equality Bill: making it work. Policy proposals for specific duties* (London: Government Equalities Office, 2009).

¹⁰⁶ T May, ‘Written Ministerial Statement: Equality Act 2010: public sector equality duty specific duties’, available at:

<http://www.equalities.gov.uk/news/equality_duty.aspx> accessed 13 June 2011. It should be noted that different approaches are being followed by the devolved administrations in Scotland and Wales.

use of positive action. In this respect, the socio-economic duty can be characterised as a first step in trying to alter the perceived boundaries of equality legislation. Nevertheless, the Conservative Party opposed this provision during the passage of the Bill through Parliament and the coalition government subsequently decided that it should not be brought into force on the basis that it would ‘create more bureaucracy, not greater equality.’¹⁰⁷

3. Increasing equality of opportunity: a gentle evolution

The discourse surrounding the Equality Act revealed a shift in mindset insofar as there was a clear recognition by the (then) government of the need for law to go beyond the mere prohibition of discrimination. This consolidated the trajectory that emerged in the wake of the Stephen Lawrence Inquiry and the creation of the public sector equality duties. Despite the rhetoric on using law to increase equality of opportunity, the final results display caution rather than ambition. Although positive action is liberalised, it remains purely optional. The timidity of the measures taken is especially evident in relation to the private sector, which accounts for 80% of the workforce in Britain.¹⁰⁸ The regulatory philosophy for the private sector is one that rests heavily on the voluntary promotion of equality.¹⁰⁹ The reluctance to impose more demanding requirements is exemplified in relation to equal pay. Notwithstanding the well-established evidence of an entrenched gender pay gap, and the existence of equal pay legislation since 1970, the government shied away from more interventionist measures, such as mandatory equal pay reviews.¹¹⁰ Given that employers have had 40 years in which to take voluntarily the measures needed to close the gender pay gap, it is difficult to justify the reticence towards more forceful measures, or to sustain the government’s confidence in the potential impact of self-regulation.¹¹¹

VI. Conclusion

¹⁰⁷ Government Equalities Office (n. 89 above) 8.

¹⁰⁸ Government Equalities Office, *Framework for a fairer future – the Equality Bill Cm 7431* (London: Government Equalities Office, 2008) 21.

¹⁰⁹ *M. Malik* (n. 2 above) 91.

¹¹⁰ Discrimination Law Association, *Response to the Discrimination Law Review report – a framework for fairness* (2007), p. 6, available at: <<http://www.discriminationlaw.org.uk/node/107>> accessed 6 July 2010.

¹¹¹ *C. McCrudden* (n. 98 above) 262-263.

This chapter set out to explore the extent to which the Equality Act 2010 fulfils its aims of reforming and harmonising the law, as well as increasing equality of opportunity. The evidence suggests that material progress has been made in relation to the first of these aims. The legislative framework is more coherent and consistent than before, even if there are significant areas where the reform and harmonisation process could have been more thoroughly embraced. The second aim of increasing equality of opportunity is where the Act's contribution is most in doubt.¹¹² It creates potential: if the private sector embraced positive action and the public sector wholeheartedly engaged with the equality duty, then significant social reform would be possible. Yet the austere economic climate into which the Act is born provokes justified scepticism towards this prospect. Given the complete reorganisation of the legislative framework, and the extended process of deliberation that preceded the Act, a lingering sense remains that an opportunity for more imaginative thinking has not been fully exploited.

¹¹² *M. Malik* (n. 2 above) 92.

