

THE EQUALITY BILL: A BRIEFING NOTE

February 2010

The progress of the Bill

1. The Equality Bill was introduced in the House of Commons in April last year. Since then it has passed through all its stages in that House and has completed its Committee Stage in the House of Lords. After completion of the Bill's remaining stages in the House of Lords, it will return to the House of Commons for consideration of amendments made by the House of Lords. It is the hope of the Government that the Bill will reach the statute book before the General Election.
2. The progress of the Equality Bill can be followed at: <http://services.parliament.uk/bills/2009-10/equality.html> which also provides a link to its text and related documents.

The Bill and its background

3. The Bill's publication follows a lengthy period of consultation on the report of the Discrimination Law Review published in June 2007 and the Government's proposals in the light of responses to this, published in July 2008 in *The Equality Bill – Government Response to the Consultation*.
4. The declared purpose of the Bill is to bring together and restate a range of existing discrimination legislation and also to bring forward additional measures 'to strengthen the law to support progress on equality'.
5. The Bill includes 205 clauses and 28 schedules. In an interesting trial innovation, the Bill was published with the explanatory notes on it interleaved with the text of the Bill itself. Taken together, the Bill and the explanatory notes run to nearly 600 pages and obviously cannot be readily summarised. The explanatory notes give examples of how the provisions of the Bill might apply in specific instances. This briefing note focuses in particular on provisions in the Bill which are relevant to an individual's religious identity or to the work of a religious or faith-based organisation.
6. The introduction to the explanatory notes on the Bill sets out the historical background to its presentation and the legislation which it is designed to consolidate and replace (and in some aspects to harmonise). The intention is that Part 1 of the Equality Act 2006 relating to the constitution and operation of the Equality and Human Rights Commission will remain in force.

The Bill's content

7. The present Bill replicates the provisions providing special treatment for religion and belief organisations contained at present in the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual

Orientation) Regulations 2003; Part 2 of the Equality Act 2006; and the Equality Act (Sexual Orientation Regulations) 2007.¹

8. The term ‘strand’ has often been used in the past (but not in legislation) to identify the ‘grounds’ on which protection against discrimination in various ways has been enacted. The new Bill lists what are described as ‘protected characteristics’. They are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex [i.e. gender]; and sexual orientation. In line with earlier legislation in terms of religion or belief, a person who has a particular ‘protected characteristic’ is defined as meaning a person of a particular religion or belief; with ‘religion’ meaning any religion (or a lack of religion) and ‘belief’ meaning any religious or philosophical belief (or lack of belief).
9. The Bill, in addition to consolidating and harmonising existing legislation, includes a number of provisions intended to strengthen the law in a number of areas. It:
 - Places a new duty on Government departments, local authorities, regional development agencies, police authorities in England and NHS bodies to consider socio-economic disadvantage when taking strategic decisions about how to exercise their functions.
 - Extends the circumstances in which a person is protected against discrimination, harassment or victimisation because of a ‘protected characteristic’, including, for example, to age in the context of the supply of goods and services, (which was already covered in previous legislation for the ‘protected characteristic’ of ‘religion and belief’).
 - Creates a new general duty on listed public authorities when carrying out their functions to have due regard to: the need to eliminate conduct which the Bill prohibits, [i.e. discrimination, harassment and victimisation].; the need to advance equality of opportunity between persons who share a

¹ On this basis Schedule 9 to the Bill contains provisions relating to employment covering three circumstances affecting religious or faith based organisations:

- (a) In paragraph 1, provisions which permit employers to discriminate in relation to one of the ‘protected characteristics’ listed in Clauses 4 to 12 of the Bill where there is an ‘occupational requirement’ for an employee to be, for example, of a particular ‘religion or belief’ and the application of the requirement is a proportionate means of achieving a legitimate aim;
- (b) In paragraph 2 provisions which permit discrimination in relation to the protected characteristics of gender; gender assignment; marriage; and civil partnership where the employment is ‘for the purposes of an organised religion’;
- (c) In paragraph 3 in relation to employment where the employer has ‘an ethos based on religion or belief’ and ‘having regard to that ethos and to the nature or context of the work’ there is an ‘occupational requirement’ for an employee to be of a particular religion or belief and the application of the requirement is a proportionate means of achieving a legitimate aim.

The Equality Act 2006 included, in Part 2, provisions relating to discrimination in the supply of goods, facilities and services, on the grounds of religion and belief. These provisions also included exceptions relating to religion and belief organisations, as did the regulations subsequently made under the Act relating to discrimination in the supply of goods, facilities and services on the grounds of sexual orientation. These provisions are to be found in Schedules 2 and 3 of the present Bill.

relevant ‘protected characteristic’ and those who do not; and the need to foster good relations between people who share a relevant ‘protected characteristic’ and people who do not (which will therefore cover good relations between people of different faiths and between people who have a religious faith and those who do not).

The practical effect is that listed public authorities will have to consider how their policies, programmes and service delivery will affect people with all the ‘protected characteristics’ listed in the Bill. At present there are ‘public duties’, with variations between them, only in the case of disability, gender and race. This general ‘public sector equality duty’ will also apply to bodies which are not themselves public authorities but which exercise public functions. In such cases the duty will apply to the exercise of those functions rather than to the organisation as a whole.

The Bill enables specific duties to be prescribed through regulations in secondary legislation. The Government consulted last summer on what these more specific duties should involve and has published its response to the submissions it received, which sets out its future plans for handling this issue (see below in paragraphs 19 to 24 under **Specific public duties**)

- Allows an employer or service provider or other organisation to take broader positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a ‘protected characteristic’.

Currently the law only allows for limited positive action measures in relation to this context. The Bill provides scope for the adoption of voluntary ‘positive action’ measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce under-representation in relation to particular activities and to meet particular needs, providing such measures are a proportionate way of achieving the relevant aim.

- Enables employment tribunals to make recommendations in discrimination cases which apply to the whole workforce and not just to the successful complainant (who may have already left the organisation concerned).
- Seeks to promote greater transparency about pay in the workplace by outlawing contractual pay secrecy provisions; protecting those who wish to discuss their pay with colleagues; and taking a new power to introduce regulations requiring private sector employers with at least 250 employees to publish information about the gender pay gap within their workforce.
- Extends the permission for political parties to use women-only shortlists for election candidates to 2030;

10. In the course of the Bill’s consideration in the House of Commons, a Government amendment was accepted to make provision to deal with cases of ‘dual discrimination’. This followed the Government’s prior consultation exercise on how to handle cases of ‘multiple discrimination’. The new provision allows people to make a claim that they have been directly discriminated against because

of a combination of two relevant protected characteristics, eg race and gender or disability and sexual orientation.

Amendments made to the Bill's provisions on exceptions 'for the purposes of organised religion' to discrimination provisions in relation to employment

11. The provisions in the Bill on discrimination in employment and related matters are included as part of the consolidation of existing legislation which reflected the UK Government's obligations to give effect in UK law to the provisions of the European Union Directive of 2000 on discrimination in employment. When that Directive was under discussion the UK Government gave strong support to the inclusion of provisions recognising the special concerns of religious organisations. The Bill also consolidates provisions from earlier legislation, including for example on sex discrimination.
12. On 20 November last year the European Commission announced that it had sent a 'reasoned opinion' to the UK Government that the Employment Equality (Sexual Orientation) Regulations of 2003 'incorrectly' implemented the 2000 Directive. This 'reasoned opinion', according to the Commission, argued that the exceptions incorporated in the Regulations to the principle of non-discrimination on the basis of sexual orientation for religious employers were, in the Commission's view, too wide. The Government has always taken the view that the Regulations did correctly implement the Directive.
13. A provision (in paragraph 2 of Schedule 9) in the Equality Bill, as the Government introduced this into the House of Commons, appeared to limit the application of the provision in the 2003 Regulations for exceptions from the Bill's discrimination measures over employment 'for the purposes of organised religion'. This was because the Bill added words to define this exception as applying only to employment which 'wholly or mainly involves leading or assisting in the observation of liturgical or ritualistic practices of religion; or promoting or explaining the doctrine of the religion (whether to followers of the religion or others)'.²
14. The Government has consistently maintained that the added wording in the Bill clarified the original intention of the relevant provision in the 2003 Regulations and was not intended to limit this; whereas others have argued equally consistently that the added wording altered and limited its effect. Strong representations against the change in the Bill have been made over a period of months by Churches and other religious groups; and in the course of the Committee stage in the House of Commons, attempts were made, unsuccessfully, to persuade the Government to return to the original wording.
15. Because paragraph 2 of Schedule 9 of the Bill brings together a range of provisions from other separate legislation relating to gender, gender assignment, marriage and civil partnership, the new wording would also have applied to discrimination in employment 'for the purposes of organised religion' by religious

² This addition reflected what Lord Sainsbury said about the scope of the exception when the Regulations were being considered in Parliament in 2003, when he stated that in drafting the relevant part of the Regulations the Government 'had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion.'

organisations on the grounds of those protected characteristics as well as on the grounds of sexual orientation, in other words permitting them to take into account these other characteristics in making appointments to particular posts.

16. On 25 January the House of Lords voted in Committee on the Bill to accept amendments deleting the additional wording which had been included in the Bill, rejecting a compromise amendment which the Government had tabled. On the same day the Government was also defeated over a related amendment, dealing with the somewhat complex but important legal issue of 'proportionality'. This amendment substituted the words 'requirement is applied so as to comply' for the words requiring it to be 'a proportionate means of complying' in the Bill's references to what is needed in making use of the exceptions in order to '[comply] with the doctrines of the religion' or '[avoid] conflict with a significant number of the religion's followers'. It was argued in the debate on this amendment that the Government's added reference in these provisions to the exercise of the relevant exceptions being 'a proportionate means' was unnecessary, as these exceptions in themselves strike a proportionate balance. The High Court has in the past taken the Employment Equality (Sexual Orientation) Regulations of 2003 as carrying with it a proportionality test, in the light of European law, even if the Regulations did not explicitly include one.

17. The Government has decided not to seek to reverse these amendments when the Bill returns to the House of Commons. On 4 February, Ms Harriet Harman, the Minister with responsibility for the Bill, in response to a question from Ms Kitty Ussher on the following week's business in the House of Commons, told the House that the Government will not be seeking to reverse these amendments. She said:

'The Government's policy is clear and has not changed. Our view remains that religious organisations employing people should comply with the law that applies to all other employers, whether that is the requirement to have written contracts, pay sick pay or the minimum wage, or the requirement not to sack people unfairly or discriminate against them. However, our position has always been that for specifically religious work - as a vicar, priest, rabbi or imam - religious organisations would be exempt from non-discrimination law. A religious organisation cannot discriminate against gay people or women when it hires a bookkeeper, but it can when choosing a minister of religion.

The amendment that we proposed in the House of Lords did not intend to change that policy position. What it sought to do was make the distinction between religious and non-religious jobs clearer. The Lords did not regard our amendment as helpful. We will therefore leave the law as it is, and not bring the amendment back to this House. The law will remain as it was: in anti-discrimination law there is an exemption for religious jobs but not for non-religious jobs.'

18. It should be noted, by way of background, that there are exceptions of various kinds for other kinds of institutions and organisations included elsewhere in the Bill.

Specific public duties

19. As noted above, the Bill creates a new general duty on listed public authorities. It also contains powers to provide for specific public duties to be contained in secondary legislation after the Bill's enactment. The Government has recently published its response to the consultation which it held last summer on the framing of these specific public duties. It says that the Government wishes to see a set of specific duties that are 'flexible, proportionate and non-bureaucratic' and, above all, that are 'effective in helping public bodies meet their obligations under the Equality Duty and improve life choices and opportunities for everyone'. The document says that the planned secondary legislation will specify that public bodies should take into account national equality priorities (for example in relation to the gender pay gap) but that they would not be required to accept them so that local and regional priorities can be taken into account. There will be an obligation on public bodies to consult and involve people when setting and reviewing progress on their organisation's equality objectives and they will need to demonstrate the outcome of what they have done.
20. In response to concerns raised in response to the consultation, the Government has sought to clarify the potential impact of these specific duties on faith-based service providers. Paragraphs 5.13 and 5.14 of the document say:

'Government fully realises the value third sector providers, including faith-based providers, bring to the provision of public services. Nothing in the general or proposed specific duties will undermine that valuable work, and nor will the Duty override or 'trump' any existing exceptions elsewhere in discrimination law. A public body should award a contract to whomever is best able to deliver the requirements of the contract, and who can deliver best value for money (which encompasses a number of considerations including price). As with the current position, a public body will be free to award contracts to a faith-based provider if that provider is best placed to perform the contract.

The new specific duties will require public bodies to actively consider the equality requirements of every contract they tender and, if it is relevant and proportionate, to consider including equality-related award criteria or contract conditions. If a faith-based provider can meet the criteria or conditions established by the contracting authority, then it is free to bid for the contract like any other organisation. If an equality-related award criterion cannot be justified as relevant and proportionate, then a contracting authority should not include it.'
21. The Government's document, *Equality Bill: Making it work – Policy proposals for specific duties: Policy Statement* can be found at:
www.equalities.gov.uk/PDF/psdresp_GEO_MakingItWork_acc.pdf
22. The Government's policy statement on specific duties will be followed by a consultation on the draft regulations for them. The Government intends to consult on these in the course of the summer providing that the Equality Bill receives the Royal Assent before the dissolution of Parliament. The Equality and Human Rights Commission (EHRC) is drafting the statutory code of practice to accompany the Equality Duty and will also consult publicly on the draft of this.

The Government's aim is that the general and specific Equality Duties should come into force in April 2011.

23. The secondary legislation setting out the 'specific duties' under the powers to do so contained in the Bill are to be accompanied by statutory guidance covering what equality requirements it might be appropriate to attach to a contract for the delivery of a public service.³ It is worth noting in this context that during the Committee stage on the Equality Bill the Government rejected attempts to curtail, in cases where an organisation is carrying out a contract for the delivery of a public service, the exemptions which religious organisations have relating to their employment of staff.
24. The draft regulations and the associated guidance will, it can be assumed, be the subject of consultation after the forthcoming general election (if the Equality Bill receives the Royal Assent before then).

Some general observations

25. It should be noted that, where an obligation rests on a public body to observe particular equalities requirements, it is that public body which is responsible for meeting them. This does not, therefore, preclude the public body from seeking to accommodate requirements of conscience derived from commitment to a particular religion or belief in the case of individual employees, eg the rostering of registrars of marriages and civil partnerships, if this can be achieved without detriment to the service which is required and to do so could reasonably be considered good practice. There are, however, obligations on employing organisations to ensure that their staff are not harassed or placed in a hostile or intimidating employment environment. So both considerations apply to dealing with staff within the same organisation who have conflicting beliefs and practices.
26. The European Convention for the Protection of Human Rights (incorporated in UK law through the Human Rights Act 1998) provides protection in Article 9 for 'freedom of thought, conscience and religion'. But 'freedom to manifest one's religion or beliefs' is 'subject [only] to such limitations as are prescribed by law and are necessary within a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' So the provisions in equality legislation which place restrictions on the freedom of action to engage in certain practices or behaviour by way of manifesting one's religion or belief are not inconsistent with the human rights enshrined in UK law. At the same time, the affirmation of rights relating to religion and belief, subject to certain limitations, in the Human Rights Act supports the case for appropriate exceptions for religion and belief organisations embodied in equality legislation. The present exceptions have been repeated in the Government's new Equality Bill.

³ There are two distinctions which it is important to bear in mind in this context. The first is between the provisions in Part 2 of the Equality Act 2006 and in the present Bill which relate to the provision of goods, facilities and services by religious organisations; and provisions which are or may become relevant to their contracting to provide public services. The second is between the delivery by an organisation under contract from central or local government, of a public service; and work undertaken with grant funding in pursuit of a public policy objective, such as community cohesion.

Statutory codes of practice and non-statutory guidance

27. There are provisions in the Equality Bill which require the EHRC to produce statutory codes of practice and also non-statutory guidance on the Bill's provisions. The Commission is currently consulting on a wide range of this material in draft so that it can be finalised if and when the Bill becomes law. The drafts can be found at: <http://www.equalityhumanrights.com/legislative-framework/equality-bill/equality-bill-consultations/>. The consultation on the statutory codes of practice closes on 2 April; and on the non-statutory guidance on the Bill's provisions on 16 April.

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