

EQUALITY BILL UPDATE

Insight

This issue

ISSUE NUMBER 5
15 June 2009

The Equality Bill (the "Bill") was published on 27 April 2009 with the stated aims of harmonising and strengthening discrimination law to support progress on equality. The first provisions are expected to come into force in Autumn 2010, although this may change depending on the legislative timetable adopted by the government in power at that time!

Introduction

The Bill brings together the existing discrimination legislation, and whilst it re-states much of the existing law, it also contains a number of new provisions. This note addresses the potential practical impacts of the Bill, particularly for private sector employers.

Protected Characteristics

The Bill sets out nine protected characteristics and applies standard definitions of direct and indirect discrimination to all (other than disability):-

- Age
- Disability
- Gender Reassignment
- Marriage & Civil Partnership
- Pregnancy & Maternity
- Race
- Religion or Belief
- Sex
- Sexual Orientation

Gender Pay Gap

The Bill will contain a power to require gender pay gap reporting by employers with 250 or more employees. Although the government has stated that it intends to delay implementation of this provision for private sector employers until 2013, we anticipate that the impact may be felt more quickly. (See

Practical Issues below)

The Bill will ban pay secrecy clauses, prohibiting employers from preventing employees from sharing pay information with their colleagues.



Age Discrimination

The Bill will make it unlawful to discriminate against people aged 18 and over in relation to provision of goods and services, with a substantial impact on insurers and others providing services to certain age groups. Differentials in products/ services will only be permissible where they can be objectively justified.

Positive Action

One of the most controversial aspects of the Bill, there are provisions to expand the use of "positive discrimination". Employers will be permitted (but not required) to take into account under-representation of particular groups when selecting from two equally-qualified candidates, provided there is no general policy for automatic selection of under-represented groups.

The selection of a less-well qualified candidate will not be permitted and the Bill will not allow employment quotas.

Disability discrimination

A new concept of Indirect Disability Discrimination is established, meaning that it will be easier for employees to establish disability discrimination. Effectively the Bill reverses the effect of the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* and brings back disability-related discrimination by another name.

Associative discrimination

It is already unlawful to discriminate against someone because they are associated with a person who is of another sexual orientation, race, or religion or belief, for example, sending an employee to Coventry because they are friendly with a gay person (the third party does not need to be a colleague for this to apply). *Coleman v Attridge Law* extended this protection to disability too. In that case, a mother was held to be a victim of associative discrimination because of her relationship with her disabled son. This protection does not presently apply in relation to age, sex, or gender reassignment. The Bill will strengthen the law and will protect people from discrimination when they are associated with someone with any of the protected characteristics, for example, as their carer.

Third party harassment

These provisions, which were extended in relation to sex discrimination in 2008 to bring in the "three strikes and you're out" test, will apply across all of the protected characteristics.

Perceptive Discrimination

At the moment, discrimination by perception (i.e. thinking someone has a certain characteristic and treating them adversely because of that) applies only in relation to the "newer" discriminations. This will extend to all areas other than marriage and civil partnership.



Any teasing or banter could therefore be discriminatory regardless of whether the person actually has the protected characteristic.

Public Sector Equality Duty

The existing obligations on the public sector to consider equality issues in certain areas will be broadened to cover all of the protected characteristics other than marital status.

Strengthening the Powers of Employment Tribunals

Currently, employment tribunals can make recommendations about institutional policies and practices where an employer has discriminated against an employee. However, such a recommendation would benefit only the individual who brought the claim. The Bill will allow employment tribunals to make recommendations in discrimination cases which benefit the whole workforce.

Practical Issues

Employers should:-

1 Gender pay gap

- Although they may not have to publish pay gap information until 2013, private sector employers should be thinking about this now.
- Review contracts and bonus arrangements for pay transparency.
- Remove pay secrecy clauses.

2 Age discrimination

- Review existing service offerings.
- Educate workforce on age discrimination in relation to service provision.

3 Positive action

- Review and come to a view on whether your business will apply positive action sometimes, always or never.
- Educate managers, recruiters and the general employee population about positive action.

4 Disability discrimination

- Review existing policies and procedures.
- Educate workforce and managers in particular on the new regime.



5 **Associative & Perceptive discrimination**

- Educate workforce about the new regime.

6 **Employment Tribunal powers**

- Review strategy for dealing with employment tribunals (given that ET decision could now impact on whole workforce rather than individual claimant only).

7 **Public Sector Equality - Tenders/ Procurement**

Harriet Harman said - "If you want to do business with the public sector, you need to tell us what your pay gap is". This will undermine the 2013 cushion for private sector employers wanting to provide services to the public sector. The duty on public services to use procurement to promote equality (e.g. by asking potential contractors what percentage of their staff is from ethnic minorities), could well result in a significant early impact on private sector businesses.

- Be prepared to demonstrate any pay gap (and justify this where there is one!)
- Think about what equality credentials can be used for tenders/ procurement, for example:-
 - evidence of flexible working numbers;
 - numbers of women returning after maternity leave;
 - equal opportunities monitoring (and steps taken after equal opportunities monitoring to show that this is an ongoing process).

8 **EHRC Investigations**

- Although not linked directly to the Bill, the Equality & Human Rights Commission has launched special investigations into race discrimination in the Construction sector, and sex discrimination and gender pay gap in the Financial Services sector.
- Employers in these sectors should be aware of what to expect in relation to these investigations, for example:-
 - What is the obligation to respond?
 - What information needs to be provided?

Comment

This is a fast-moving time in the equality sphere. Employers would be well advised to start tackling these issues now, so that the Bill does not impact adversely on their business.

STUART NEILSON

Partner

McGrigors LLP

Tel +44 (0) 141 567 9432

Email stuart.neilson@mcgrigors.com



This newsletter is provided for general information purposes only and does not constitute legal or other professional advice. If you require advice on a specific legal problem please contact the relevant partner listed on our website or alternatively you can send an email to enquiries@mcgrigors.com. McGrigors LLP accepts no responsibility for any loss which may arise from reliance on information contained in this newsletter. Links to external websites are provided for information only. McGrigors LLP takes no responsibility for the content of these external websites nor for any viruses transmitted through the links. The views expressed in this newsletter are not necessarily those of McGrigors LLP.
All rights reserved. The contents of these pages may not be altered, reproduced, recorded, transmitted, stored in a retrieval system or made available in whole or in part in whatever medium, without the prior written consent of McGrigors LLP. © McGrigors LLP 2009.

McGrigors LLP is a multi-national legal practice regulated by both the Solicitors Regulation Authority and the Law Society of Scotland. McGrigors LLP is a limited liability partnership registered in Scotland with registered number SO300918 and having its registered office at Princess Exchange, 1 Earl Grey Street, Edinburgh.
A list of members is open to inspection at each of our offices. Any reference to a partner in relation to McGrigors LLP means a member of McGrigors LLP.