

The Aims of Equality Law

THE EQUALITY ACT 2010

THE EQUALITY ACT 2010 was a major landmark in the long struggle for equal rights. This book tells the story of why, and how it came to be enacted, what it means, what changes it can bring about in British society, and—no less important—what the Act will not do. Under the Conservative–Liberal Democrat Coalition Government the legal framework has since 2010 been undermined by a series of amendments to the Act, by the disempowerment of the Equality and Human Rights Commission (EHRC) and by restrictions on access to justice in discrimination cases. The nature and impact of these changes are assessed in this new edition.

The Act has three distinctive features which are largely unaffected by these changes. First, it is *comprehensive*, adopting a unitary or integrated perspective of equality enforced by the EHRC. The Commission was established by Part 1 of the Equality Act 2006 to replace the three former equality commissions,¹ and came into operation on 1 October 2007. The single Commission and the single Act of 2010 mark a decisive shift away from the politics and law of single identities—such as race and religion, gender, sexual orientation, disability and age—towards the politics and law of fundamental human rights. Secondly, the Act of 2010 *harmonises, clarifies and extends* the concepts of discrimination, harassment and victimisation and applies them across nine protected characteristics. Thirdly, it contains some measures, described as *transformative* equality, extending positive duties on public authorities to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different groups. It also clarifies and broadens the circumstances in which positive action may be taken voluntarily in both private and public sectors to further these objectives. The shift of focus from negative duties not to

¹ The Commission for Racial Equality (CRE), Equal Opportunities Commission (EOC), and Disability Rights Commission (DRC). Part 1 of the Equality Act (EA) 2006 remains in force with amendments effected by the 2010 Act, and by the Enterprise and Regulatory Reform Act 2013 (ERRA).

discriminate, harass or victimise, to positive duties to advance equality, justify the reinvention of this branch of the law as *equality law*, of which discrimination law is an essential but not exclusive part. The Act replaces nine major earlier pieces of legislation² covering gender, race, disability, religion or belief, sexual orientation and age. It also seeks to implement fully the principal EU directives³ in these fields.

The Act was the outcome of over 13 years of campaigning by equality specialists and human rights organisations. There were numerous reasons why the prevailing framework of anti-discrimination legislation needed to be reformed.⁴ There was fragmentation and inconsistency between three separate anti-discrimination regimes (sex, race and disability) and three commissions. There was pressure to extend the grounds of discrimination to include sexual orientation, religion or belief, and age, and to impose duties on the public sector to promote equality. The EU Race Directive and Framework Employment Directive, made under Article 13 of the EC Treaty inserted by the Treaty of Amsterdam, made it necessary for the UK to legislate on these matters, and to revise existing law on sex, race and disability discrimination. There were also several gaps between the rights and obligations guaranteed by EU law and domestic legislation, and international treaties ratified by the UK had not been fully respected.

The CRE, EOC and DRC repeatedly reported on the urgent need for reform of the legislation, and the courts and tribunals pointed out serious defects in legal procedures in areas such as equal pay for women. These were not simply the gripes of lawyers and equality activists. Social research showed that while anti-discrimination legislation had broken down many

² Equal Pay Act 1970; Sex Discrimination Act 1975 (SDA), Race Relations Act 1976 (RRA), Disability Discrimination Act 1995 (DDA), all of which had been amended on various occasions; Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660; Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661; Employment Equality (Age) Regulations 2006, SI 2006/1031; EA 2006, Pt 2; Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.

³ Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC (Framework Employment Directive) establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC (Equal Treatment Amendment Directive) implementing the principle of equal treatment between men and women in access to and supply of goods and services; European Parliament and Council Directive 2006/54/EC (Recast Equal Treatment Directive) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Also relevant in this context is Art 157 of the Treaty on the Functioning of the European Union (TFEU) (formerly Art 141 (ex 119) of the EC Treaty). In January 2008, the European Commission published a new draft Directive which would prohibit discrimination because of disability, religion or belief, sexual orientation and age in access to goods and services, housing, education, social protection, social security, and social advantage. This draft is still under negotiation.

⁴ See Hepple, Coussey and Choudhury (2000) ch 1.

barriers for individuals in their search for jobs, housing and services, and there were fewer overt expressions of discrimination than in the previous generation, women continued to face occupational segregation, concentration in low-paid, part-time work, unequal pay, pregnancy discrimination and sexual harassment, and members of ethnic minorities, disabled persons, gays, lesbians and transsexuals and older people still suffered from prejudice and stereotypes relating to their abilities. Discrimination and exclusion had become more complex and covert than they were when the first anti-discrimination laws were enacted. There were attitudes, policies and practices within organisations of the kind identified as ‘institutional racism’ by the inquiry into the murder of Stephen Lawrence, a Black teenager.⁵ It was becoming ever more obvious that eliminating institutional barriers required greater emphasis on changing organisational culture.

Shortly before the general election in 1997, Lord Lester of Herne Hill QC and I brought together a small group of equality specialists under the auspices of Justice and the Runnymede Trust.⁶ Our pamphlet set out what was wrong with the law—including incoherence and complexity, unnecessary differences between Britain and Northern Ireland, the muddled definitions of indirect discrimination, the tortuous nature of equal pay procedures, the inadequacy of provisions on the rights of pregnant women, and ineffective enforcement, as well as the failure to implement international and EU obligations. We canvassed a number of options for reform which could be undertaken by an incoming government. After the election Lord Lester and I had a meeting with the Labour Home Secretary (Jack Straw) and his officials, and proposed that the new government should review anti-discrimination law and practice. He said that the government had too much else to do, but he was sympathetic and supported our application for funding to the Nuffield Foundation and the Joseph Rowntree charitable Trust for a one-year independent review under the auspices of the Cambridge Centre for Public Law and the Judge Institute of Management Studies. This was conducted by Mary Coussey, Tufyal Choudhury and myself, with the guidance of an advisory committee chaired by Lord Lester.⁷ We undertook targeted case studies of employers in Great Britain, Northern Ireland and the USA in order to elucidate how employers behaved under different legislative regimes. There were extensive consultations and interviews in different parts of the country, and a consultative conference with key stakeholders. The Report was published in July 2000. This explained the defects in the existing law

⁵ Stephen Lawrence Inquiry (1999).

⁶ Hepple, Lester, Ellis, Rose and Singh (1997).

⁷ Hepple, Coussey and Choudhury (2000) (hereafter Cambridge Review). There was also a subsequent research paper on religious discrimination for the Home Office: Hepple and Choudhury (2001).

and made the case for a new framework which would harmonise legislation and institutions. The most important proposals were those that sought to encourage an inclusive, proactive and non-adversarial approach to achieve fair participation and fair access. This included an expanded duty on public authorities to promote equality, including the use of contract and subsidy compliance, and a duty on employers to undertake employment equity and pay equity plans. Detailed suggestions were made for improving procedures in courts and tribunals, and for making the remedies more effective.

The Report was welcomed by the Labour Government as a 'uniquely well-researched guide'.⁸ The government recognised the validity of the arguments for comprehensive reform, including harmonisation of all strands and the extension of positive duties to gender and disability, but said it needed time 'to think about how such a framework would be constructed in practice'.⁹ The hallowed 'principle of the unripe time'¹⁰ delayed the introduction by the government of single Equality Bill for a further seven years. In order to give a spur to this process and show that a single Act was feasible, the Cambridge Centre for Public Law and the Odysseus Trust published a draft single Equality Bill embodying the main recommendations in the Report and taking account of the Article 13 EU Directives. This was introduced as a Private Member's Bill in the House of Lords in January 2003 by Lord Lester of Herne Hill QC¹¹ with cross-party and cross-bench support. This Bill passed through all its stages in the House of Lords, and over 200 MPs signed an early day motion requesting the government to introduce such a Bill.

Although the government described the Lester Bill as 'outstanding' (it had been drafted by Stephanie Grundy, an experienced drafter) and promised that it 'will not die the death',¹² there was a change of tack. In 2003, the government decided on a 'salami-slicing' approach. The time was not considered ripe for a unified approach until the Article 13 EU Directives had been implemented. This was done by secondary legislation under the European Communities Act and so avoided controversial amendments which would undoubtedly have been moved in respect of religion or belief, sexual orientation and age. Although the political tactics were understandable, the result was to make the law even more complex and inconsistent than before, with three new sets of regulations on religion or belief, sexual

⁸ Lord Falconer of Thoroton QC, speaking at the launch of the Report on 25 July 2000.

⁹ Hansard HL vol 624 col 1448 (25 April 2001) (Baroness Blackstone).

¹⁰ Cornford (1908): '[P]eople should not do at the present moment what they think right at that moment, because the moment at which they think it right has not yet arrived.'

¹¹ Hansard HL vol 643 col 1636 (14 January 2003) (1R); vol 645 col 525 (28 February 2003) (2R); vol 645 col 1631 (14 March 2003) (committee); vol 646 col 1629 (4 April 2003) (Report).

¹² Hansard HL vol 645, col 584 (28 February 2003) (Lord Mcintosh of Haringey).

orientation and age, and amendments to existing legislation on sex, disability and race discrimination. But the time was still not ripe for a single Act. In 2004, the government decided that the body of existing law should remain unaltered until a new single Commission had been established. The first task of the new Commission would be to review the legislation. The birth of the EHRC, under the Equality Act 2006, was beset with difficulties and controversy, which complicated the transition process, and delayed the single Equality Act.¹³ The 2006 Act added further slices of reform, going beyond the EU Directives by prohibiting discrimination on grounds of religion or belief in the provision of goods and services and education, conferring a power to make regulations for a similar extension in respect of sexual orientation (the Regulations appeared in 2007), and extending the public sector equality duty to gender (from April 2007), as had been done for disability in 2005 (effective from December 2006). There was still no single Act.

In its manifesto for the 2005 general election, the Labour Party pledged to introduce a single Equality Bill. The time was not ripe for another two years, when the government published an Equalities Review¹⁴ and a Discrimination Law Review.¹⁵ The former brought together existing research on persistent inequalities in Britain, and recommended a number of steps to greater equality, including a simpler legal framework and a more sophisticated enforcement regime. The latter made many proposals for harmonising, modernising and simplifying the law, and making it more effective, similar to those set out in the Cambridge Review. However, several proposals were open to criticism, for example not extending indirect discrimination to cover disability discrimination law, not allowing hypothetical comparators in respect of equal pay, and maintaining the distinction between contractual and non-contractual claims in respect of equal pay. Some, but not all, of these defects were remedied following the consultation process. The most serious omission was any kind of requirement to undertake employment equity and pay equity reviews. The government received about 4,000 responses.¹⁶ After prolonged preparations—described by the Conservative front bench MP (later Home Secretary) Theresa May as a period of ‘false starts, empty announcements and more delays than I care to remember’¹⁷—the government’s Equality Bill was finally presented in April 2009, by Harriet Harman, Minister for Women and Equalities.

¹³ See p 177 below.

¹⁴ Department of Communities and Local Government (2007a). The Chair of the Panel that produced the Report was Trevor Phillips, Chair of the CRE, who later became Chair of the EHRC.

¹⁵ Department of Communities and Local Government (2007b).

¹⁶ Government Equalities Office (2008).

¹⁷ Hansard HC vol 492 cols 565–67 (11 May 2009). Theresa May became Home Secretary and Minister for Women and Equalities in the Coalition Government in May 2010.

The Conservatives opposed the Second Reading of the Bill. While claiming to ‘welcome many parts of the Bill’, they said that the Bill included ‘unworkable and overtly bureaucratic proposals’ which were ‘unnecessarily onerous’ to business in a time of deep recession.¹⁸ The Liberal Democrats supported the Bill but thought that it should go further, especially on the subject of equal pay and by incorporating an overarching ‘equality guarantee’ as proposed by the EHRC.¹⁹ The Act that emerged was the product of intense and detailed scrutiny in Parliament over a period of nearly a year. The House of Commons Public Bill Committee (PBC) heard four days of evidence by interested organisations, and considered over 300 amendments in a further 16 sessions for 38 hours, with another 5½ hours at Report stage. The Bill was also scrutinised by the Joint Committee on Human Rights (JCHR) and the Work and Pensions Select Committee. By the time the Bill reached the House of Lords, their Lordships were being pressed by Lord Lester to be disciplined and to restrict amendments so that the Bill could receive Royal Assent before the pending general election. The House managed to consider numerous amendments over eight days in committee and at the Report stage. The Bill received Royal Assent on 8 April 2010, one of the last measures to do so under the Labour Government, which lost office in May 2010. At this stage, there was cross-party support for the Act.

THE ACT SINCE 2010

The Conservative–Liberal Democrat Coalition Government, which came to power in May 2010, has faced in two directions, one regulatory, the other deregulatory.²⁰ The first direction maintains continuity with Labour’s ‘third way’ of regulating for social inclusion and competitiveness. This included bringing most of the Equality Act’s provisions into operation in stages from October 2010.²¹ There were only three sections of the Act that the Conservatives, when in opposition, said that they would not implement. The first was section 1 which created a duty on public authorities when making decisions of a strategic nature to have due regard to the desirability of reducing the inequalities that result from socio-economic disadvantage (the so-called ‘Harman clause’). This was never brought into force and was repealed in 2013, on the grounds that ‘the remedies and powers to prevent discrimina-

¹⁸ *Ibid* (Theresa May).

¹⁹ *Ibid*, cols 577–78 (Lynne Featherstone, who became Minister of State for Women and equalities in May 2010).

²⁰ Hepple (2013) 203.

²¹ This book has been written as if all sections of the Act are in force, unless otherwise stated.

tion' are quite different from solutions to 'socio-economic disadvantage'.²² Some Liberal Democrats also criticised the provision as being 'vague and unworkable'.²³ Secondly, the Conservatives opposed a provision requiring large employers to disclose gender pay gap information,²⁴ preferring to encourage employers to do so on a voluntary basis. This was not implemented by the Coalition Government. Thirdly, the Conservatives had opposed an exception to the non-discrimination principle that allows the use of a positive action tie-break in recruitment and promotion,²⁵ but once in office they agreed, under Liberal Democrat pressure, to bring this into force, although it appears to have been little used in practice.

The Coalition Government faced the difficulty of implementing the Act in a time of economic crisis, recession and cuts in public expenditure. However, it showed itself willing to pursue 'family-friendly' policies that promote flexibility and choice at work, for example the extension of the right to request flexible working to all employees, new provisions for shared parental leave, and shared parental pay, a right for the partner of a pregnant woman to accompany her to an antenatal appointment, and rights for employees to paid time-off to attend adoption proceedings.²⁶ An important concession was made to those campaigning for mandatory equal pay audits by giving employment tribunals the power to order audits by employers who are found to have breached the equality clause in employment contracts or otherwise discriminated in respect of pay on grounds of sex.²⁷

In the other direction, at the same time as these extensions of equality rights, the government launched a 'red tape challenge', purporting to remove 'burdens on business' and increase competitiveness. This resulted in many restrictions on employment rights, including raising the qualifying period to claim unfair dismissal from one to two years. One unintended effect of this is to give claimants an incentive to allege that a dismissal was discriminatory for one of the reasons prohibited by the Equality Act,²⁸ for which there continues to be no qualifying period. Moreover, in response to a ruling by the European Court of Human Rights,²⁹ the Employment Rights Act 1996 has been amended to remove the qualifying period where the dismissal is

²² PBC (EB), 5th sitting col 129 (11 June 2009) (Mark Harper).

²³ Hansard HL vol 715 col 1416 (15 December 2009) (Lord Lester of Herne Hill QC and to similar effect PBC (EB) 5th sitting (11 June 2009) (Lynne Featherstone). For a critique, see 1st edn of this book, pp 141–3.

²⁴ EA 2010, s 78.

²⁵ See p 159 below.

²⁶ Children and Families Act 2014.

²⁷ ERRA 2013, s 98. See p 133 below.

²⁸ ERA 1996, s 108.

²⁹ *Redfearn v Serco Ltd* [2013] IRLR 51.

alleged to be because of political opinion or affiliation.³⁰ A number of other deregulatory measures do not apply to discrimination claims, such as the cap on unfair dismissal awards to 12 months' pay, and changing the formula for annual uprating of awards to prevent increases above the rate of inflation.

However, 'burdens on business' were put forward as the reason for repealing some important equality rights which had been introduced in 2010. For example, provisions in the 2010 Act that made the employer liable for harassment of employees by third parties, such as customers or clients, were repealed,³¹ as were provisions to deal with intersectional discrimination (ie where two grounds for discrimination, such as age and sex, are inextricably bound together).³² The questionnaire procedure which replicated the effect of provisions of earlier legislation, for obtaining information by a person who thinks that he or she may have been unlawfully discriminated against or harassed or victimised, has also been removed.³³ The power conferred on employment tribunals by the 2010 Act to make wider recommendations than those affecting the complainant is to be repealed.³⁴ The Coalition Government pressed ahead with these deregulatory reforms although the evidence for them was largely confined to the subjective perceptions of employers rather than reality.³⁵

The most serious of all the challenges to the new legal framework relate to enforcement. First, access to justice has been made more difficult for victims of discrimination by the introduction of fees for issuing proceedings, and hearings of claims in employment tribunals, and appeals in the EAT.³⁶ Secondly, the EHRC has been deprived of some of its powers and been reduced to so-called 'core' functions, as well as suffering a cut of about two-thirds in its budget with consequent severe staff losses.³⁷

Those resisting the weakening of the vision of the 2010 Act did, however, secure one significant victory. After an effective campaign led by the TUC and Unison, the government failed in its attempt to repeal section 3 of the Equality Act 2006 which gives the EHRC a general duty to encourage and support a society based on freedom from prejudice and discrimination, individual human rights, respect for the dignity and worth of each individual, equal opportunity to participate in society and mutual respect

³⁰ ERA 2013, s 13, amending ERA 1996, s 108.

³¹ ERA 2013, s 65 repealing EA ss 40(2)–(4).

³² ERA 2013, s 65 repealing EA 2010, s 14.

³³ ERA 2013, s 66, repealing EA 2010, s 138.

³⁴ Deregulation Bill 2014, cl 2, amending EA, s 124.

³⁵ See Hepple (2013) at 213.

³⁶ See p 195 below.

³⁷ See p 191 below.

between groups based on understanding and valuing of diversity and shared respect of equality and human rights.³⁸

The government argued that this ‘has no specific legal function’ and ‘creates unrealistic expectations—both positive and negative—about what the EHRC as an equality regulator can achieve’.³⁹ It was claimed that the repeal was simply ‘legislative tidying up’ and the ‘removal of gold-plating’.⁴⁰ The parliamentary debates about the proposed repeal of section 3 proved to be of great symbolic importance. On the one side stood those who regard broad statements of universal human rights as deceptive rhetoric—a ‘noble lie’ according to the academic writings of Baroness O’Neill, appointed as Chair of the EHRC by the Coalition Government in 2012, because there is nobody whose duty it is to deliver these rights.⁴¹ It follows from this view that section 3 is not ‘of great practical significance’.⁴² It was said that the section embodies ‘aspirational provisions’⁴³ which are ‘unenforceable’.⁴⁴ On the other side of the debate were those⁴⁵ who believe that to repeal section 3 would remove the unifying principle which links the right to equality and other fundamental human rights.⁴⁶ This link is illustrated in the EHRC’s broad-ranging inquiry into the ill-treatment of old people receiving care in their own homes which is both an equality and a human rights issue. The supporters of section 3 also argued that this section serves a specific legal function by providing a useful guide to the interpretation of the Act, enabling those applying the Act to fill gaps and resolve ambiguities. In a ‘ping-pong’ between the the House of Commons and the House of Lords, the Commons voted to repeal section 3, the Lords reinstated it, the Commons disagreed, but the Lords refused to budge when the matter returned to them. After this defeat, the government reconsidered its position and withdrew the proposal. Consequently, the general duty remains part of the Act. However, the EHRC’s duty to monitor progress has been confined

³⁸ See p 17 below.

³⁹ Government Equalities Office (2011) at 11–12, para 1.8.

⁴⁰ Hansard, HC, 11 June 2013, cols 75–6 (Dr Vince Cable).

⁴¹ O’Neill (2005) at 437, and see Browne (2013) for comment.

⁴² Letter by Baroness O’Neill as Chair of EHRC to the Chair of the Joint Committee on Human Rights: see www.parliament.co.uk/documents/joint_committees/human_rights//Baroness_O’Neill_on_Enterprise_Regulatory_Reform_Bill.pdf.

⁴³ Hansard HL Deb, 14 November 2012, col 1533 (Lord Lester of Herne Hill QC).

⁴⁴ Hansard HL Deb.9 January 2013, col GC51.

⁴⁵ Lord Lloyd of Berwick, HL Deb, 22 April 2013, citing Memorandum by Prof Sir Bob Hepple on the proposed repeal of s 3 of the Equality Act 2006 by clause 52 of the Enterprise and Regulatory Reform Bill (7 March 2013).

⁴⁶ Hansard HL Deb, 15 June 2005 col 1219 (Lord Falconer of Thoroton LC), col 1230 (Lord Lester of Herne Hill QC).

to the specific human rights duties set out in sections 8 and 9 of 2006 Act rather than the general duty in section 3.⁴⁷

The two directions of law and policy under the Conservative–Liberal Democrat Coalition—one regulatory, the other deregulatory—reflect the tensions within the coalition between ‘social justice liberalism’ (or simply ‘social liberalism’) and market fundamentalism. The common core of these ideologies is the idea of individual liberty. Social liberals support economic liberalism with varying degrees of enthusiasm but also recognise a role for the state to reduce inequality and to correct the unfair distribution of wealth and power that markets produce. This has much in common with one version of New Labour’s ‘third way’, the ideology which claimed to have found a path between unrestrained markets, on the one hand, and the interventionist state and collectivism on the other.

There is an appraisal of the impact of the changes in the legal framework since 2010, and possible alternatives, in chapter 8, below.

Box 1.A **Northern Ireland, Scotland and Wales**

The Equality Act covers Great Britain (England, Wales and, with a few exceptions, Scotland) but, apart from a few provisions,⁴⁸ not Northern Ireland, which has ‘transferred’ powers on equal opportunities and discrimination, and appears to be set to continue its own patchwork of anti-discrimination legislation rather than enact a single Act, although the Equality Commission for Northern Ireland (ECNI) has set a number of priorities for reform. This book does not cover the Northern Ireland legislation, but, since that jurisdiction has been the pathfinder in terms of introducing new ways to combat inequality, some of which are reflected in the British Act, these are nevertheless mentioned. There are a number of special provisions relating to Scotland in respect of devolved matters, for example the power of Scottish ministers to impose specific equality duties on Scottish public bodies, and a number of powers for Scottish ministers to make secondary legislation.⁴⁹ The subject matter of equal opportunities is not devolved to Wales, but Welsh ministers are given certain powers by the Act, for example in relation to the public sector equality duty.⁵⁰

⁴⁷ See p 181 below.

⁴⁸ See EA, ss 82, 105.

⁴⁹ See EA, ss 2, 37, 96, 151, 153, 154, 162, sched 11 para 4, sched 14 para 2, sched 17 para 10.

⁵⁰ See EA, ss 2, 151, 152, 153, sched 19.