The Equality Bill: Harmonising UK Discrimination Law and Progressing Equality

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At a Glance

The long awaited Equality Bill (the "Bill") was published on 27 April 2009 and is expected to come into force by October 2010. The Bill has two main purposes: to harmonise existing UK discrimination law and to strengthen the law to promote equality. The Bill will affect all employers with staff in the UK.

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1. Background

Following its own, and independent, reviews of discrimination and equality in the UK, the Government sought to tackle identified areas of weakness in UK legislation. These included the complicated and inconsistent treatment of various grounds of discrimination, and deep-seated socio-economic inequalities. These issues are addressed in the Bill, which is a significant piece of social legislation with important implications for all UK employers.

2. Harmonisation of Existing UK Discrimination Law

The Bill includes the following key proposals, which seek to harmonise and simplify in one Act of Parliament the plethora of existing UK discrimination statutes and regulations:

- **Protected Characteristics**: the Bill sets out a list of "protected characteristics", which form the backbone of the new discrimination law. These essentially mirror the characteristics currently protected by UK discrimination law. They are: age; disability; gender reassignment; marriage and civil partnership; pregnancy; maternity; race; religion or belief; and sex and sexual orientation (the "Protected Characteristics");

- **Direct Discrimination**: the Bill retains the current requirement in direct discrimination cases for a claimant to show they have been treated less favourably than a real or hypothetical comparator due to a particular characteristic (except in pregnancy and maternity cases). However, direct discrimination is also extended to include 'perceptive discrimination' (where an
individual is treated less favourably than another on the grounds of a perceived characteristic), and ‘associative discrimination’ (where an individual is treated less favourably than another on the grounds of a characteristic of a person with whom the individual associates) in relation to all Protected Characteristics. Protection against perceptive and associative discrimination currently only exists in relation to a few grounds of discrimination and the law in this area has previously developed unsatisfactorily in a piecemeal fashion;

- **Indirect Discrimination**: the scope of indirect discrimination is extended to cover gender reassignment and disability (neither of which are currently covered by this form of protection). The Bill also harmonises the definition of indirect discrimination across all Protected Characteristics and introduces the new concept of ‘discrimination arising from disability’ to replace the existing disability-related discrimination provisions;

- **Objective Justification**: currently, indirect discrimination (and, uniquely, direct age discrimination) is not unlawful if it can be justified as a "proportionate means of achieving a legitimate aim". The Bill maintains the test for justification and extends it to the two new forms of disability discrimination (indirect discrimination and discrimination arising from a disability); and

- **Harassment**: the Bill harmonises protection from harassment across the Protected Characteristics (excluding pregnancy and maternity, and marriage and civil partnership). It also extends the concept of employer liability for third-party harassment to the same range of Protected Characteristics (UK employers are currently only liable under sex discrimination legislation for discriminatory harassment by third parties).

3. Promotion of Equality

The Bill includes the following key proposals which seek to address socio-economic inequalities, including the gender pay gap:

- **Positive Action**: extending the scope of positive action to allow UK employers to recruit or promote someone from under-represented groups where there is a choice between two or more equally-qualified candidates, one of whom is from that under-represented group;

- **Employment Tribunal Recommendations**: Employment Tribunals will have a new power in discrimination cases to make recommendations which benefit the whole workforce and not just the individual who issued the claim, which is the current position;

- **Pay Secrecy Clauses**: banning ‘secrecy clauses’ which seek to prevent employees discussing their pay or bonuses with colleagues. Any adverse action taken against an employee for having such a discussion will amount to victimisation;

- **Pay Audit**: the Government will have the power to introduce new laws requiring private sector employers with at least 250 employees to publish information about the differences in pay between their male and female employees. The Government does not intend to introduce any such law before April 2013 - and only if employers have not voluntarily published these details; and

- **Obligations on Public Bodies**: widening the existing equality duty imposed on public bodies to require them to advance equality of opportunity and foster good relations between those with a Protected Characteristic (excluding marriage and civil partnership) and the wider community. Public bodies will need to consider socio-economic disadvantage when making strategic decisions about how to exercise
their functions.

4. What Employers Should Be Doing Now

HR, ER and relevant in-house legal professionals should begin preparing for the new regime by familiarising themselves with the proposed changes. The Bill will be debated and no doubt amended to some extent via the Parliamentary process before it becomes law, but the basic concepts and principles are unlikely to change radically.

It is clear that obligations on employers will be wider. In order to manage this potential liability, managers and employees will need to be made aware of the extended parameters of the new discrimination law. Employers with written discrimination and equality policies should start to review employee handbooks and policies, and consider updating relevant management/employee training, to ensure they comply with the new law when it comes into force in October 2010. Employers currently without written policies in this area should consider, as a minimum, in due course implementing equal opportunities and anti-harassment policies which comply with the new legislation. Workforce training is also recommended.

Many UK employers will need to carefully consider the implications of the provisions intended to eradicate the gender pay gap. Employers may wish to assess whether such a pay gap exists in their workforce - and address any resulting inequalities - before the enhanced obligations are imposed by the new law. However, such an audit carries risks for employers who are not fully committed to rectifying discrepancies, as, unless created by lawyers on a privileged basis, audit materials would be subject to disclosure in any equal pay litigation as potential evidence of unequal treatment between men and women.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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