



Equality Act 2010

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1. The Equality Bill was published on 27 April 2009 and became an Act of Parliament just before the last general election on 8 April 2010. Much of the Act came into force on 1 October 2010, although a significant number of provisions have not yet come into force and it is not certain that they ever will. The Explanatory Notes state that the Act has two main purposes: to harmonise discrimination law, and to strengthen the law to support progress on equality.
2. The Act brings together and re-states all the existing discrimination legislation, most of which now repealed. Only the Equality Act 2006 remains in force (as amended) so far as it relates to the constitution and operation of the Equality and Human Rights Commission ("the EHRC"); the Disability Discrimination Act 1995 will also remain in force so far as it relates to Northern Ireland.
3. The Act runs to over 250 pages and the Explanatory Notes run to over 210. It has 218 sections and 28 schedules. This paper cannot therefore hope to provide more than overview of the Act. What it does is to deal in summary with:
 - (1) The main new features
 - (2) Key concepts
 - (3) Points of interest
 - (4) Timetable

(1) The main new features

4. The major intended changes to the law included in the Act are as follows:
 - new duty on certain public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions;
 - new combined general equality duty requiring public authorities and others carrying out public functions to have due regard to the need to advance equality opportunity and eliminate discrimination in relation to (nearly) all the protected grounds;
 - harmonized provisions for discrimination, harassment and victimization on most protected grounds and in most fields (i.e. employment, education, goods and services, and public authorities);
 - broader protection against discrimination because of association with someone with a protected characteristic, or because of perceived possession of a protected characteristic;
 - protection against 'dual discrimination', i.e. discrimination because of a combination of two relevant protected characteristics;

- positive action provisions enabling existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic;
- extended permission for political parties to use women-only shortlists for election candidates to 2030;
- power for an employment tribunal to make a recommendation to a respondent who has lost a discrimination claim to take certain steps to remedy matters not just for the benefit of the individual claimant (who may have already left the organisation concerned) but also the wider workforce;
- amends family property law to remove discriminatory provisions and provides additional statutory property rights for civil partners in England and Wales (e.g. the common law rule that a husband should maintain his wife is abolished (s 198), as is the common law presumption that anything a husband gives his wife is a gift (s 199), and the Married Women's Property Act 1964 has finally been named the Matrimonial Property Act 1964 and housekeeping allowances are therefore henceforth deemed to be jointly owned (s 200)).
- amends the Civil Partnership Act 2004 to remove the prohibition on civil partnerships being registered in religious premises.

(2) Key concepts

5. The Act is drafted by reference to a list of **'protected characteristics'**, which are set out at s 4 as follows:
 - Age
 - Disability
 - Gender reassignment
 - Marriage and civil partnership
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex
 - Sexual Orientation
6. The definitions of each of those protected characteristics (given in ss 5-12) largely reflect existing definitions, but note:
 - There is a power to include "caste" in the definition of race (s 9(5)). The Government has commissioned research from National Institute of Economic and Social Research into how widespread/severe caste-based discrimination is.
 - In relation to disability (s.6 and Sch.1) the old list of specific "capacities" under DDA 1995, Sch.1 para.4(1) (eg. mobility, manual dexterity, physical co-ordination etc) removed so that all that needs to be established is that the person has an impairment that has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities, thus making it easier to establish disability in cases to which the closed list of capacities did not easily apply.
 - Definition of gender reassignment (s 7) is changed so that the person is no longer required to be under medical supervision to come within it, or to be changing sex physiologically, but only to be a 'person [who] is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.

7. The Act prohibits discrimination in:
- employment (Part 5);
 - provision of services (Part 3) (though this does not apply to discrimination because of age, so far as relating to under 18s, or to discrimination because of marriage and civil partnership: s 28(1));
 - management and disposal of premises (whether by way of sale or lease) (Part 4) (though this does not apply to discrimination because of age, or because of marriage/civil partnership: s 32(1));
 - education in schools (Part 6, Ch 1) (though this does not apply to discrimination because of age or marriage/civil partnership (s 84(1));
 - further and higher education (Part 6, Ch 2) (this does not apply to discrimination because of marriage/civil partnership (s 90));
 - general qualifications bodies (Part 6, Ch 3) (this does not apply to discrimination because of marriage/civil partnership (s 95));
 - associations (Part 7).
8. The definition of **direct discrimination** remains largely unchanged, but note:
- Direct discrimination is defined in s 13(1) as occurring where A treats B less favourably than he treats or would treat others “because of” a protected characteristic. The Explanatory Notes state that this means the same as “on grounds of”, but was intended to be more readily understood by the ‘ordinary user’. However, arguably, “on grounds of” is more objective (not requiring any consideration of conscious motivation) and more capable of dealing with situations where there are multiple causes of the treatment, only one of which is discriminatory.
 - The definition of direct discrimination also covers associative discrimination (i.e. of the *Coleman v Attridge Law* [2008] ICR 1128-type) where someone is discriminated against because of someone else’s protected characteristic.
 - The definition of direct discrimination also covers discrimination on the basis of a perceived characteristic (i.e. of the *English v Thomas Sanderson Ltd* [2009] IRLR 206-type) where someone is discriminated against because they are thought to have a protected characteristic, although they do not.
 - Associative and perceived discrimination do not apply where the protected characteristic is marriage or civil partnership: s 13(4). Nor do they apply to associative age discrimination where an employer restricts benefits relating to the provision of child care to children of a particular age group: para 15, Part 2, Sch 9. There are also oddities in relation to pregnancy and maternity – see further below.
9. Rules governing **comparators** remain largely unchanged:
- “there must be no material difference between the circumstances relating to each case” (s.23(1))
 - In relation to disability, “circumstances” include individual’s abilities (s.23(2))
 - In relation to sexual orientation, the fact that someone is civil partner while another is married is not a material difference (s.23(2))

- It is expressly provided that it does not matter whether the alleged discriminator has the protected characteristic him-/herself (s.24).
10. The definition of **indirect discrimination** remains largely unchanged, but note:
- The 'modern' formulation that refers to a 'provision, criterion or practice' is applied for all protected characteristics (s 19(1))
 - There is a new obligation not indirectly to discriminate because of disability (s.19(3))
 - Pregnancy and maternity leave is still excluded (s.19(3))
 - The modern definition of indirect discrimination now applies to colour, nationality and ethnic and national origin (see s.19(3) read with s.9(1))
11. The definition of **harassment** remains largely unchanged, but note:
- The unwanted conduct need only be 'related to' a protected characteristic (s 26(1)) so a claimant can bring a claim even if the conduct is not directed at them and they do not possess the relevant protected characteristic (provided that the conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile degrading, humiliating, or offensive environment for them)
 - It does not apply to the protected characteristics of marriage/civil partnership and pregnancy/maternity leave (as to the latter, more below).
 - Specific provision for unwanted conduct of a sexual nature (s 26(2)), unwanted conduct because A has rejected or submitted to unwanted conduct of a sexual nature, or unwanted conduct related to gender reassignment or sex (s 26(3)) is retained
 - Specific provision is made rendering employers liable for harassment of their employees by third parties, but only where the employer fails to take reasonably practicable steps to prevent the harassment and even then only where the particular employee has been harassed on at least two previous occasions by a third party (whether the same third party or not): see ss 40(2)-(4).
12. The definition of **victimisation** is simplified:
- The definition no longer requires a claimant to establish that s/he has been less favourably treated than someone who has not performed a protected act – all that is required is A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act (s 27(1))
 - Only an individual can complain of victimisation (s 27(4)) (in principle any legal person (including a company) can complain of the other forms of discrimination)
13. The Act simplifies considerably the existing **genuine occupational qualification / requirement** ("GOQs"/"GORs") defences. Rather than the existing raft of specific instances when GOQs/GORs can be relied on (e.g. exceptions for physiology or authenticity in dramatic performances or work in particular restaurants etc., or in order to preserve decency/privacy, etc.), there is just a single general exception in para 1 of Sch 9 to the Act. A person will not contravene the Act by discriminating if he applies in relation to work a requirement to have a particular protected characteristic and if he shows that, having regard to the nature or context of the work, it is

- a. an occupational requirement;
 - b. the application of the requirement is a proportionate means of achieving a legitimate aim and
 - c. the person to whom the requirement is applied does not meet it (or, for all protected characteristics except sex, the employer has reasonable grounds for not being satisfied that the person meets it).
14. The exception applies only in relation to discrimination in determining how and to whom to offer employment, in the way that persons are afforded access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service and (unlike under the present law) in relation to dismissal. It does not apply, however, to discrimination in the terms of someone's employment (or offer of employment).
15. It does, however, apply for the first time to disability as well as to the other protected characteristics. Hence, the Explanatory Notes state that 'an organisation for deaf people might legitimately employ a deaf person who uses BSL to work as a counsellor to other deaf people whose first or preferred language is BSL'. This suggests a fairly low standard for 'occupational requirement', at least where disability is concerned – the Explanatory Notes do not suggest that there is no need for a particular disability to be indispensable to a person's ability to perform a particular role.
16. The only additional specific GOQs/GORs will be the following:
- a. An exception for employment for the purposes of an organised religion in respect of the protected characteristics of sex, marital or civil partnership status (including not being a divorcee), gender reassignment, sexual orientation or religion/belief. This applies wherever the requirement engages 'the compliance or non-conflict principle' and the person to whom the requirement applies does not meet it (para 2(1) of Sch 9). The 'compliance principle' is engaged if the requirement is applied so as to comply with the doctrines of the religion (para 2(5)). The 'non-conflict principle' is engaged if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (para 2(6)).
 - b. An exception for service in the armed forces if it can be shown that a requirement for someone to be a man, or not be a transsexual, is a proportionate means of ensuring the combat effectiveness of the armed forces (para 4, Sch 9).
 - c. An exception for sporting events, specifically for acts done in relation to the participation of people as competitors in a 'gender-affected activity' (s 195(1)). A 'gender-affected activity' is a sport, game or other activity of a competitive nature where the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity (s 195(3)).
17. Certain other **exceptions** available in current discrimination law are also preserved by the Act, including the exception from age discrimination for retirement of employees at age 65 or over; in relation to benefits based on length of service; the national minimum wage; redundancy pay and life assurance for people taking early retirement on account of ill health (Part 2 of Sch 9). In addition, the Act creates a new exception for age discrimination in relation to the provision of benefits which relate to the provision of child care (eg a workplace crèche for under 2s only is lawful) (para 15, Sch 9). There is also a power for a Minister of the Crown to specify

age-related exceptions relating to contributions to personal pension schemes (para 16, Sch 9).

18. Other exceptions relating to non-contractual payments to women on maternity leave, benefits dependent on marital status, provisions of benefits to employees where the same benefits are also provided to the public and discrimination in insurance policies relating to gender reassignment, marriage/civil partnership, pregnancy/maternity discrimination and sex discrimination are also preserved: see Part 3 of Sch 9 to the Act and para 2 of Sch 22 to the Act. The exception for acts done under statutory authority is also preserved (para 1 of Sch 22, save that the exception for race discrimination is removed altogether), as is that for acts done for the purpose of safeguarding national security, provided they are proportionate to the purpose (s 192)
19. In the non-employment sphere, **charities** retain the power to restrict the provision of benefits to persons who are a protected characteristic if this is provided for in the charitable instrument and so limiting the benefits provided is a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic: s 193. Persons providing supported employment can treat disabled persons more favourably: s 193(3). However, charities cannot discriminate on grounds of colour and charitable instruments that permit such discrimination are to be read as having been amended: s 193(4) and s 194(2). It is not unlawful for a charity to require members, or persons wishing to become members, to make a statement which asserts acceptance of a particular religion or belief (s 193(5)).
20. Provisions in relation to discrimination in **education** are also re-enacted in very similar form: see Part 6. A significant addition is that the duty to make reasonable adjustments will extend to the provision of auxiliary aids and services in schools (under the current regime, such things are treated as being catered for through the SEN regime and therefore the duty to make reasonable adjustments does not apply). Additional protection is also provided in relation to gender reassignment and pregnancy/maternity protected characteristics are extended to school pupils. There is a prohibition on discrimination (including harassment and victimisation) in relation to admissions and participation in school (s 85) and the duty to make reasonable adjustments applies to the same (s 85(6)). For some reason the prohibition on harassment of pupils and would-be pupils does not apply to the protected characteristics of gender reassignment, religion or belief or sexual orientation: s 85(10). In a leaflet, *Explaining the Equality Bill: Harassment protection for lesbian, gay, bisexual and trans people* (March 2010), the Government Equalities Office explains that this has been omitted because harassment will be covered by the provisions on direct discrimination anyway. Effect to this intent is given as follows. Section 212(1) defines 'detriment' for the purposes of a sex discrimination claim as not including conduct amounting to harassment, save where (s 212(5)) 'this Act disapplies a prohibition on harassment in relation to a specified protected characteristic'. This seems a bizarre way of going about providing protection: if that is insufficient for harassment in every other field, why make it the approach to harassment in education for just a few specific protected characteristics?
21. Section 86 includes a new, and much broader protection than that under existing law, against victimisation of pupils because of the conduct of their parents. For all protected characteristics, the child, parent or sibling of the child are all protected from victimisation where any one of them has made a protected complaint under the Act. In 'standard' victimisation giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith: s 27(3). However, in education cases, parents or siblings will be deprived of protection from victimisation where (even though they have acted in good faith) their child has acted in bad faith: s 86(3). In contrast, where the child has acted in good faith, then any complaint is a protected act even if the complaint by the parent or sibling is made in bad faith: s 86(4).

22. Section 87 extends the SoS's power to give directions to schools under ss 496 and 497 of the Education Act 1996 to include power to give directions in relation to a school's non-discrimination obligations in s 85.
23. Section 88 and Schedule 10 preserves existing provision about school disability accessibility strategies, etc.
24. Paragraph 3 of Sch 22 re-enacts certain exceptions in s 5 of the Employment Act 1989 relating to the employment of staff in educational establishments of a religious character or single sex establishments.
25. The Act finally achieves complete uniformity in relation to the **burden of proof** applicable to all discrimination cases, including victimisation and harassment (thus reversing the decision of the CA in *Oyarce v Cheshire CC* [2008] ICR 1179 in relation to race victimisation claims, and the decision of the EAT in *Edozie v Group 4 Securicor plc* in relation to nationality discrimination). Under s 136 the reverse burden of proof applies to all proceedings relating to a contravention of the Act.
26. Specific provision is made to cover **post-termination discrimination** in respect of all relationships covered by the Act (s 108) where the discrimination or harassment 'arises out of and is closely connected to a relationship which used to exist between them'.
27. **Liability of employers** for the acts of their **employees**, and of **principals** for their **agents** is covered by s 109. The reasonable steps defence for employers is recreated at s 109(4). Personal liability of employees and agents is covered by s 110 and the defence of relying on a statement by the employer or principal is not a contravention of the Act is preserved at s 110(3). It remains an offence for an employer to knowingly or recklessly make a false statement in this regard (s 110(4)).
28. There are new, broader provisions in relation to **instructing, causing or inducing** contraventions of the Act at s 111. It is specifically provided that both the person instructed/caused/induced and the ultimate victim may bring proceedings if they have been personally subjected to a detriment as a result: s 111(5). Alternatively, the Commission can take enforcement action: s 111(5)(c).
29. There is also a prohibition on **knowingly aiding** contraventions of the Act: s 112.

(3) Points of interest

30. The Act creates a new concept of **combined discrimination** (s 14):

"A person (A) discriminates against another (B) if, because of a combination of two relevant characteristics, A treats B less favourably than A treats or would treat another person who does not share either of those characteristics"
31. Not all protected characteristics can be combined to allow a combined discrimination claim, only:
 - Age
 - Disability
 - Gender reassignment
 - Race
 - Religion or belief
 - Sex
 - Sexual orientation

32. Missing are: Marriage and Civil Partnership, and Pregnancy and Maternity. Also note that dual discrimination cannot be relied upon where the claim is one that can be made to the First-Tier Tribunal (Health, Education and Social Care) (formally the SENDIST): s 14(5) and s 116.
33. In order to succeed on a claim of combined discrimination a claimant does not need to show that "A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately)" (s.14(3)). However, a claimant cannot establish a contravention of the Act if, in reliance on another provision of this Act or any other enactment, A shows that A's treatment of B is not direct discrimination because of either or both of the characteristics in the combination (s.14(4)).
34. The section was designed to respond to situations of the type (to use the example from the Explanatory Notes) where, eg., a bus driver refuses to allow Muslim male on to bus because he thinks he is a terrorist, but would allow a non-Muslim male or a Muslim female onto the bus (example from Explanatory Notes to the Bill). It was partly a response to the issue highlighted by the CA *Bahl v Law Society and ors* [2004] IRLR 799:

135. Mr. de Mello submits that the ET made no error of law in saying as it did in para. 7.4.19:

"We do not distinguish between the race or sex of the Applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was because she is a black woman. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male. There was no basis in the evidence for comparing her treatment with that of a white female, or a black male, office holder. We can only draw inferences. We do not know what was in the minds of Robert Sayer and Jane Betts at any particular point. It is sufficient for our purposes to find, where appropriate, that in each case they would not have treated a white person or a man less favourably. If we need to refine our approach for the purposes of dealing with remedy the parties may address this issue at that stage."

He says that the ET was entitled to treat the two discriminatory elements together given its finding that it was a unique case.

136. This is a puzzling passage. It says that there was no basis in the evidence for comparing the treatment of Dr. Bahl with that of a white female, or a black male office holder, and yet the ET had to make a comparison on the evidence between her treatment and that of an appropriate comparator. It is not disputed that to find discrimination on the ground of race or sex the ET must find that subjectively racial or sexual considerations were in the mind of the discriminator, but here the ET says that it does not know what was in the minds of Mr. Sayer and Mrs. Betts at any particular point. It acknowledges that there may be a need to refine its approach at the remedy stage, but why should that need arise at so late a stage in the proceedings if the ET has properly found both sex and race discrimination?

137. What the ET has plainly omitted to do is to identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination. It would be surprising if the evidence for each form of discrimination was the same. For example, so rare is it to find a woman guilty of sex discrimination against another woman that one might have expected the ET to spell out the evidence which led it to infer such discrimination by Mrs. Betts against Dr. Bahl. In our judgment, it was necessary for the ET to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it

was making the inference which it did in favour of Dr. Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law.

35. However, it can certainly be argued that the problem identified by the CA in *Bahl* was really only a 'reasons' issue and that there is no need for protection against dual discrimination. It is well established that in order to establish discrimination the protected characteristic need only be "part of the reasons for the treatment in question" (**Barton v Investec Henderson Crossthwaite Securities Ltd** [2003] ICR 1205, EAT). If so, provided part of the reason for the treatment is a protected characteristic, it does not matter if another protected characteristic is also involved, the claim will succeed.
36. The real difficulty with the provisions, however, is that their very existence suggests, according the usual principles of statutory interpretation, anyone discriminated against on the grounds of two or more protected characteristics cannot succeed unless they come within the definition of dual discrimination in s 14 of the Act. In other words, it suggests that the statutory draughtsman understood the test for causation to be that the protected characteristic needs to be at least a significant part for the reason for the treatment. If so, further absurdities follow: someone who discriminates against someone on the grounds that the Muslim, female and black would then be able to say that the claim against them must fail because the offence falls outside s 14 and the claimant cannot show that any one of the protected characteristics was the significant cause for the treatment. Of course, it is highly unlikely that any court or tribunal is going to accept this interpretation, but the inclusion of the dual discrimination provisions certainly raises the possibility of such an argument being made.
37. A number of changes have been made to the law on **disability discrimination**. Currently, under the DDA 1995, we have direct discrimination (treating someone less favourably than another person without that particular disability whose relevant circumstances, including his abilities are not materially different), disability-related discrimination (treating a disabled person less favourably than others to whom that reason does not apply would be treated, where the treatment is not justified) and failure to make reasonable adjustments. Following the decision of the HL in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, [2008] IRLR 700 the position was reached whereby disability-related discrimination was effectively direct discrimination by another name because the HL held that a comparator whose circumstances were materially the same was required.
38. The Act sets out to 'rectify' the law in relation to disability discrimination. Under the Act there will now be:
 - a. *Direct discrimination* (s 13), which is the same test as for discrimination because of other protected characteristics;
 - b. *Indirect discrimination* (s 19), which is again the same test as for discrimination on other grounds (where a PCP puts persons who shares B's characteristic at a "particular disadvantage" when compared with others, which puts B at that disadvantage and which A cannot show to be a proportionate means of achieving a legitimate aim) – query whether there will be much scope for such a claim given the existence of the two disability-specific forms of discrimination which follow ...;
 - c. *Discrimination arising from disability* (s 15) – where A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim (to which it is a defence if A shows that he did not know and could not reasonably have been expected to know that B had the disability) – note that

this gets rid of the *Malcolm* difficulty by removing the requirement for a comparator altogether;

- d. *Duty to make reasonable adjustments* (s 20) - duty applies where a "PCP", physical feature or want of an auxiliary aid puts the employee at a "substantial disadvantage" in comparison with person who are not disabled – note the overlap with indirect discrimination, though what is the difference between "particular disadvantage" (s 19) and a "substantial" one (s 20)? Note also that there is express provision making clear that the duty includes a duty to provide information in an accessible format (s 20(6)) and that A cannot require B to pay A's costs of complying with the duty to make reasonable adjustments (s 20(7)).
39. In the **housing law** context, the duty on a landlord to make reasonable adjustments continues to apply only when a request is made by a tenant (s 36 and Schedule 4). It extends only to how things are done or to the provision of an auxiliary aid. Unlike the duty on service providers, it expressly does not require the removal or alteration of a physical feature (although it may include changes to certain fixtures). A new provision is that it will apply to the common parts of a building in the same way as to the premises rented. Although the rules in relation to Landlords mean that they do not themselves have to alter a physical feature, a disabled person can achieve this themselves by, for eg., claiming that a 'no alterations' clause in the lease is itself putting them at a substantial disadvantage. In such cases, that clause must be altered so far as is necessary to enable the disabled person to remove the substantial disadvantage.
 40. Note also that there is a specific prohibition in s 60 about **pre-employment enquiries** about a job applicant's health (including any disability). An employer (A) does not breach this prohibition merely by asking about a person's (B's) health, but if he subsequently relies on information given in response this may be a breach of the Act (s 60(3)). The prohibition is also not breached insofar as asking about the B's health is necessary for the purpose of:
 - a. Establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment;
 - b. Establishing whether B will be able to carry out a function that is intrinsic to the work concerned,
 - c. Monitoring diversity in the range of persons applying to A for work,
 - d. Taking action to which s 158 (positive action provisions – see below) would apply if references in that section to persons who share (or do not share) a protected characteristic were references to disabled persons (or persons who are not disabled) and the reference to the characteristic were a reference to disability or
 - e. If A applies in relation to the work a requirement to have a particular disability (see the GOQs/GORs above), establishing whether B has that disability.
 41. Finally, in relation to disability, note the raft of provisions dealing specifically with disabled access to transport such as taxis etc (Part 12, Ch 1), and also to Public Service Vehicles (Part 12, Ch 2), rail vehicles (Part 12, Ch 3).
 42. The Act is intended to strengthen the existing law in relation to **equal pay** and to encourage improvements in pay equality generally. However, as we will see, whether or not some of these provisions are likely to be brought into force are doubtful. In terms of the provisions intended essentially to re-enact the current provisions of the Equal Pay Act 1970 (ss 66-71), there are few changes to the existing law, save that:

- a. The need for a comparison between the term in the woman's contract and that of the comparator's is now stated to be a comparison with the 'corresponding term' of the contract of the relevant comparator rather than merely a 'term of a similar kind', thus reflecting the decision of the HL in *Hayward v Cammell Laird Shipbuilders Ltd* [1988] ICR 464.
- b. The need objectively to justify indirectly discriminatory (Genuine) Material Factors (now just called 'material factors') is now express (s.69(1)(b) and (2)). The employer must first show that the reason for the difference in treatment is not the difference in sex (s 69(1)(a)). Then, if the factor that is causing the difference in pay puts persons of one sex at a particular disadvantage (s 69(2)), the employer must show that the factor is a proportionate means of achieving a legitimate aim (s 69(1)(b)).
- c. The long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim when justifying indirectly discriminatory pay provisions (s.69(3)) – Proportionality will (as now) be the key issue for pay protection schemes.
- d. The mutual exclusion of 'ordinary' sex discrimination and equal pay claims is maintained, but where the 'sex equality clause' has no effect on a contractual term relating to pay (e.g. because no real comparator can be identified) then a direct (but not an indirect) discrimination claim may be brought in relation to that contractual term – something currently precluded by s 6(6) of the EqPA 1970. This means that a woman can now effectively bring an equal pay claim even if there is no man in the workforce with whom she can compare herself (such that her claim is that a man would have been paid more if he was employed) or can bring a claim based on a comparison with a successor in her job (something not possible under the current law: see *Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley* [2008] ICR 1047).
- e. One curious by-product of the new drafting, however, is that the Act may now prevent people bringing 'ordinary' sex discrimination claims in relation to contractual terms other than those related to pay (e.g. in relation to holiday entitlement, sick pay etc). This is because s 66 says that the sex equality clause applies to all terms of a woman's contract, not just those relating to pay. Section 70 then says that where a term is modified by the sex equality clause, the normal sex discrimination provisions do not apply. There is no saving for contractual benefits that do not relate to pay. Thus for such claims, it will be necessary to jump through all the equal pay 'hoops' outlined above, including the restriction on only being able to bring a claim relying on a hypothetical comparator where the claim is one of direct discrimination.

43. In addition, the law on equal pay is strengthened as follows:

- a. **Secrecy clauses** - Contractual terms that purport to prevent or restrict a person from sharing information about contractual terms with a colleague are to be unenforceable in so far as they relate to 'relevant pay disclosures' (s 77). A 'relevant pay disclosure' is one made for the purpose of finding out whether or to what extent there is a connection between pay and a particular protected characteristic (s 77(3)). Thus contractual terms forbidding discussion about pay generally will remain enforceable, but if they prevent people finding out whether there has been discrimination then they are unenforceable.
- b. **Protected pay disclosures** - Seeking to make, or making, a 'relevant pay disclosure' or receiving a 'relevant pay disclosure' is also, by virtue of s 77(4), a protected act covered by the victimisation provisions.

- c. **Gender pay reporting** - Section 78 creates a power to make regulations requiring private sector employments with 250 or more employees to publish information about the differences in pay between their male and female employees. This particular power does not apply to local authorities, but local authorities already have to produce such information as part of the general equality duties (see further below).
44. Note also that, in addition to the sex equality clause provided for in s 66 (equivalent to the current s 1(1) of the EqPA 1970), there is specific provision for a sex equality rule for pension schemes (s 67) (replacing s 62(1) and (2) of the Pensions Act 1995) and also specific provision for a maternity equality clause (s 74) (replicating s 1(2)(d)-(f) of the EqPA 1970).
45. The new provisions on **positive action** are significant. Hitherto, positive action has been governed by a few specific provisions in relation to:
- a. access to training in order to encourage members of a disadvantaged group (sex, race, religion/belief or sexual orientation only) to take advantage of opportunities for doing particular work (SDA 1975, s 48, RRA 1976, s 38; RBR 2003, reg 25, SOR 2003, reg 26);
 - b. vocational training providers where it reasonably appears that there are no, or a comparatively small number, of members of that particular group doing that work in Great Britain (s 37 RRA 1976 and s 47 SDA 1975);
 - c. encouraging membership of and postholding in trade organisations in certain circumstances (sex, race, religion/belief or sexual orientation only) – including setting quotas for men and women for elected seats in certain circumstances (SDA 1975, ss 48 and 49; RRA 1976, s 38; RBR 2003, reg 25; SOR 2003, reg 26);
 - d. special treatment in connection with pregnancy or childbirth (SDA 1975, s 2(2));
 - e. acts done to meet education, training or welfare needs of particular racial groups (s 35 RRA 1976).
46. In addition, positive action has been permitted to a certain extent under EC case law. Measures permitted have been those to the effect that where ‘all else is equal’ a female can be preferred for appointment or promotion, provided that the measure is qualified by a requirement that consideration is given to the individual circumstances of each applicant: *Marschall v Land Nordrhein-Westfalen* C-409/95 [2001] ICR 45, ECJ. However, where a national measure is not so qualified (*Kalanke v Freie Hansestadt Bremen* C-450/93 [1996] ICR 314, ECJ), or that qualification is too vague to prevent appointments being made on the basis of sex alone (*Abrahamsson v Fogelqvist* C-407/98 [2002] ICR 932, ECJ), the ECJ has held it to be incompatible with the *Equal Treatment Directive*.
47. The minimal legislative provision for positive action, coupled with uncertainty about the scope of permissions under EC law has led to little positive action being taken. The new positive action provisions in the Act should change that. Section 158 provides a general exception for positive action as follows:

“(1) This section applies if a person (P) reasonably thinks that—

- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
- (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

(3) Regulations may specify action, or descriptions of action, to which subsection (2) does not apply ...

(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.”

48. Section 159 then provides for positive action specifically in the context of recruitment and promotion:

“(1) This section applies if a person (P) reasonably thinks that-

- (a) person who share a protected characteristic suffer a disadvantage connected to the characteristic, or
- (b) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to-

- (a) overcome or minimise that disadvantage, or
- (b) participate in that activity.

(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.

(4) But subsection (2) applies only if-

- (a) A is as qualified as B to be recruited or promoted,
- (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection recruitment or promotion than persons who do not share it, and
- (c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).

... (6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.”

49. The s 159 provision has generated negative media coverage, but in fact it is fairly limited in scope. The provision does not allow for ‘quotas’ or selection regardless of merit. Further, it specifically prohibits reliance on the section as a matter of policy. There will be considerable uncertainty in practice about what ‘as qualified as’ means. The EHRC’s draft Employment Code of Practice counsels a broad approach, with the employer ‘preparing an objective set of criteria that relate to the job or post and then conducting an objective assessment or evaluation of each candidate against that set of criteria and against each other’ (i.e. so as to decide whether A is ‘as qualified as’ B for that particular job, not generally). Use of the power is voluntary and it is doubtful whether a disappointed candidate could point to an employer’s failure to act positively as evidence of a discriminatory attitude.

50. Legislative provision in respect of **maternity/pregnancy discrimination** has long been a source of difficulty. Until 2005 there was no specific prohibition on discrimination on grounds of pregnancy. Pregnancy discrimination claims would be

dealt with as cases of direct sex discrimination (SDA 1975, s.1). To treat a woman less favourably on grounds of her pregnancy was to treat her less favourably on grounds of her sex. There was no need for a comparator because pregnancy was 'sex-specific'; all that was required was unfavourable treatment on grounds of pregnancy (*Webb v EMO Air Cargo (UK) Ltd (No. 2)* [1995] 1 WLR 1454). Logically, being treated less favourably because your employer believed that you were pregnant would fall to be treated in the exactly same way.

51. In 2002, the *Equal Treatment Directive 76/207/EC* was amended to introduce a specific protection for pregnant women. In due course the SDA 1975 was amended to implement the change to the Directive and SDA s. 3A was born. In its original form s. 3A(1) prohibited an employer from treating an employee less favourably than he would have treated her had she not been pregnant:

“... a person discriminates against a woman if -

(a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably than he would treat her had she not been pregnant.”

52. The drafting of s. 3A was subject to a successful challenge on the basis that it still required a comparison even though there was no such requirement in the Directive. In 2008 the Government had another go:

“... a person discriminates against a woman if -

(a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably ~~than he would treat her had she not been pregnant.~~”

53. Putting aside the question that the section still requires 'less favourable' treatment (less favourable than what?), it is to be noted that the section as re-drafted still does not allow for claims of perceived pregnancy discrimination, or for discrimination because an employer thinks a woman may become pregnant because it applies only to the 'protected period', and that begins 'each time she becomes pregnant' (s. 3A(3)(a)). A woman who is dismissed because she is thought to be pregnant or it is thought that she may become pregnant will not therefore qualify as she will not be within a protected period. However, under the current law, perceived pregnancy-type claims can still be brought as a claim for direct sex discrimination under SDA 1975 s. 1.

54. So what happens in the Act? First, pregnancy and maternity is a 'protected characteristic' in s 4. However, s 18 'has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity' (s 18(1)). It provides:

“(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably -

(a) because of her pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy begins when the pregnancy begins, and ends

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as-

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

55. Section 17 'has effect for the purposes of the application to the protected characteristic of pregnancy and maternity of' the services and public functions provisions (Part 3), the premises provisions (Part 4), education (Part 6) and associations (Part 7) (s 17(1)). It provides as follows:

"(2) A person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers.

(3) A person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavourably because she has given birth.

(4) The reference in subsection (3) to treating a woman unfavourably because she has given birth includes, in particular, a reference to treating her unfavourably because she is breast-feeding.

(5) For the purposes of this section, the day on which a woman gives birth is the day on which-

(a) she gives birth to a living child, or

(b) she gives birth to a dead child (more than 24 weeks of the pregnancy having passed).

(6) Section 13, so far as relating to sex discrimination, does not apply to anything done in relation to a woman in so far as -

(a) it is for the reason mentioned in subsection (2), or

(b) it is in the period, and for the reason, mentioned in subsection (3).

56. Note that:

- a. There is no longer any element of comparison at all in the statutory language, finally reflecting the case law as it has been for the last 20 years.
- b. However, unlike under the current law, there is an express disapplication of the sex discrimination provisions wherever ss 17 or 18 apply (see ss 18(7) and 17(6)). Of course, that does not prevent someone discriminated against on grounds of pregnancy and maternity falling outside the express provisions in ss 17 and 18 (e.g. because their complaint is one of discrimination on perceived pregnancy grounds) from bringing a direct sex discrimination claim under s 13, but if they do then it would appear that they will have to produce a comparator that fulfils the requirements of s 13 and s 23. (I am aware that some commentators, including IDS Briefs, have taken the view that s 13 has created a new direct discrimination provision enabling a claim on the basis of direct pregnancy and maternity discrimination. On its face, it has done so because pregnancy and maternity is not specifically excluded from s 13 and s 13 applies to all the protected characteristics listed in s 4. However, my reading of ss 17(1) and 18(1) is that they are intended to be exhaustive in relation to the circumstances in which maternity and pregnancy can be relied on as protected characteristics in relation to work (s 18) and the fields covered by s 17. Accordingly, the 'fall-back' for pregnancy and maternity discrimination claims falling outside those sections is not a pregnancy and maternity discrimination claim under s 13, but a sex discrimination claim. This is reinforced by s 25 which makes clear that 'Pregnancy and maternity discrimination is discrimination within section 17 or 18')
- c. There is no express provision for associative and perceived discrimination on grounds of pregnancy and maternity, unless one takes the view that a 'freestanding' pregnancy/maternity discrimination claim can be brought under s 13. However, current case law does not indicate that such an interpretation would be required by European law, at least for associative discrimination. The recent EAT decision of *Kulikaoskas v MacDuff Shellfish and anor*, EAT, 0062-63/09 confirms that European law does not provide protection for associative discrimination on grounds of pregnancy. Nonetheless, the draft EHRC Code of Practice on Employment does suggest that 'a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination' (para 8.16).
- d. Something bizarre has happened in relation to unfavourable treatment because a woman is breast-feeding. It is expressly covered at s 17(4) in relation to non-work fields. It is also expressly covered again in relation to non-work fields as an aspect of direct sex discrimination: see s 13(6)(a). There is no express provision at all in relation to the work field and, indeed, s 13(6)(a) is expressly disapplied in relation to work by s 13(7). Normal rules of statutory interpretation would therefore suggest that it is fine to discriminate against a woman in the work field because she is breast-feeding, but I doubt that any Tribunal is going to interpret the Act in that way.
- e. There is no prohibition on indirect discrimination on grounds of pregnancy and maternity (cf s 19).
- f. Pregnancy and maternity are also omitted from the list of protected characteristics in relation to harassment (cf s 26). This would have had the effect of preventing a claim being brought for pregnancy and maternity harassment because s 212 defines detriment for the purposes of a direct discrimination so as to exclude 'conduct which amounts to harassment'. However, at the last minute an amendment to s 212 was made. Section 212(5) was added: 'Where this Act disapplies a prohibition on harassment in

relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within s 13 because of that characteristic'. Assuming one accepts that the failure to list 'pregnancy and maternity' in the list of protected characteristics in s 26 is a 'disapplication', then pregnancy and maternity harassment claims can be brought as direct discrimination claims, as they used to be for all protected characteristics prior to the enactment of specific provisions on harassment. However, note that outside the specific terms of ss 17 and 18 the claim will (in my view) have to be a direct sex discrimination claim and not a direct pregnancy and maternity discrimination claim for the reasons given above. Query, though, in that case whether s 212(5) is really necessary to permit such a claim since the claim will not be, strictly speaking, 'because of' the characteristic of maternity/pregnancy but 'because of' sex, in respect of which a claim for harassment is permissible anyway under s 26.

The decision to deal with pregnancy/maternity harassment in this bizarrely roundabout way is perhaps unfortunate. If a harassment claim has to be made as a form of direct discrimination then a comparator is required and an employer can run the 'bastard' defence, i.e. 'I harassed everyone, so I'm not guilty'.

57. Unlike current discrimination legislation, the Act says nothing about its **territorial scope**. In this respect it is like the Employment Rights Act 1996 ("ERA"). The Government has deliberately decided to follow this precedent in drafting the Act in order to leave it to Courts and Tribunals to decide when the Act applies. This means that when determining whether they have jurisdiction to hearing a claim brought under the Act Courts and Tribunals are likely to apply the *Lawson v Serco Ltd* [2006] ICR 250 test, i.e. employees will be able to claim if they were employed in or based in Great Britain at the time of the dismissal (for discrimination claims, at the time of the act in question), or they have 'strong enough' connections with Great Britain and British employment law.
58. This is in principle a narrower test than that of existing discrimination legislation, since it excludes those recruited in Britain for a British business but who work outside Great Britain, unless they fall within the categories identified by the HL in *Lawson v Serco*. However, if application of the *Lawson* criteria does result in an employee who would have been covered under the old law not being covered, it is likely that the principles in *Bleuse v MBT Transport Ltd* [2008] ICR 488, EAT and *Duncombe v Secretary of State for Children, Schools and Families* [2010] IRLR 331 will apply. In those cases it was held that the *Lawson* test must be modified in its application to domestic law where necessary to give effect to directly effective rights derived from EU law. Since most of the Act is designed to give effect to EU rights, these principles are likely to apply, both where the defendant is a public body and where it is a private body (cf *Mangold v Helm* [2006] IRLR 143).
59. In terms of **enforcement and remedies**, the Act leaves the current law virtually unchanged. The main change relates to the power given to Tribunals to make recommendations to an employer who is unsuccessful in defending a discrimination claim. Section 124(3) provides that a tribunal can make a recommendation to obviate or reduce the adverse effect on the complainant or any other person of any matter to which the proceedings relate. Note, however, that this does not apply to equal pay claims by virtue of s 113(6).
60. In addition, there is a new power to allow for the transfer of proceedings between employment tribunals and civil courts where there are multiple proceedings based on the same conduct and at least one claim involves a contravention of the prohibition in s 111 on instructing, causing or inducing contraventions: s 140. In such circumstances, the two proceedings may be joined. In any event, a court or

employment tribunal 'may not make a decision that is inconsistent with an earlier decision in proceedings arising out of the conduct' (s 140(5)).

61. The provisions on the unenforceability of discriminatory contractual terms are recreated at ss 142-144, those in respect of collective agreements at ss 145-6 and those in respect of compromise agreements at s 147.

62. One real difficulty that has come to light since the Act came into force relates to **compromise agreements**. There have always been provisions relating to compromise agreements. They have required compromise agreements, in order to be valid, to be in writing, relate to the particular complaint, etc, and for the complainant (the individual) to have received advice from an independent adviser before entering into the contract. All this is preserved in the EA 2010. But, the requirements for an independent adviser have changed: s 147(4) provides that an independent adviser may (among other things) be a qualified lawyer. However, s 147(5)(d) then says that a person who is acting for a person who is a party to the contract or the complaint cannot be the independent adviser. In other words, on its face this prevents the complainant's own lawyer from acting as independent adviser in relation to a compromise agreement. The alternative view is that the reference in this section to 'a party' is not to be construed as a reference to 'the complainant' so that the prohibition only extends to preventing the employer's lawyer from acting as independent to the complainant. We will have to wait to see how that dispute is resolved.

63. Finally, there are two areas of specific interest to public authorities.

64. First, the **socio-economic duty** in s 1(1):

"(1) An authority to which this section applies 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."

65. The duty applies to listed public bodies in Sch 19 including Ministers, govt depts, county, district and London borough councils, GLA, SHAs, PCTs, RDAs, police authorities, partner authorities (only in relation to preparation/modification of sustainable community strategy) (s.1(3)-(5)). The Explanatory Notes state:

"23. This section requires specified public bodies, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. It is for public bodies subject to the duty to determine which socio-economic inequalities they are in a position to influence.

...

25. Public bodies are required to take into account guidance issued by a Minister of the Crown when deciding how to fulfil the duty.

26. The duty does not require public bodies to consider how to reduce inequalities resulting from people being subject to immigration control.

Examples

The Department of Health decides to improve the provision of primary care services. They find evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.

Under the duty, a Regional Development Agency (RDA), when reviewing its funding programmes, could decide to amend the selection criteria for a programme designed to promote business development, to encourage more successful bids from deprived areas. The same RDA could also decide to continue a programme aimed at generating more jobs in the IT sector which, despite not contributing to a reduction in socio-economic inequalities, has wider economic benefits in attracting more well-paid jobs to the region. This decision would comply with the duty, because the RDA would have given due consideration to reducing socio-economic inequalities.

The duty could lead a local education authority, when conducting a strategic review of its school applications process, to analyse the impact of its campaign to inform parents about the applications process, looking particularly at different neighbourhoods. If the results suggest that parents in more deprived areas are less likely to access or make use of the information provided, the authority could decide to carry out additional work in those neighbourhoods in future campaigns, to ensure that children from deprived areas have a better chance of securing a place at their school of choice.”

66. Note that failure in respect of performance of duty does not confer cause of action at private law (s.3). JR would be available to challenge strategic decision that did not comply with s.1 duty.
67. Secondly, the **general and specific equality duties**. Part 11, Ch 1 of the Act imposes a new truly general public sector equality duty to replace the existing race, sex and disability duties (in the process ‘ironing out’ some annoying minor differences between the various existing provisions). Section 149:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.” (s.149(1))

...(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons’ disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

- (a) tackle prejudice, and
- (b) promote understanding.”

68. The protected characteristics to which the equality duties apply are widened to include (s 149(7)):

- Age (but not relating to the provision of education and certain other children’s services: Sch 18 para 1)
- disability
- gender reassignment
- pregnancy and maternity
- race (but not relating to immigration and nationality functions: Sch 18, para 2)
- religion or belief
- sex
- sexual orientation.

69. Missing are: marriage and civil partnership.

70. Note that:

- A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters in s.149(1) as well (s.149(2)). Persons performing judicial functions are excluded (para 3, Sch 18), as is the House of Commons, House of Lords, Government Communication Headquarters, etc (para 4, Sch 18).
- The duty does not sanction treating some people more favourably than others where this would be conduct otherwise prohibited under the Act (s.149(6)).
- A Minister (or, as appropriate, a Welsh or Scottish Govt Minister) may by regulations impose duties on a public authority for the purpose of enabling the better performance by the authority of its s.149(1) duty (s.153) (i.e. this is the replacement for the current powers to impose specific duties). There is specific reference to the power to impose specific duties on a public authority in connection with its public procurement functions: s 155. The Government had previously (in its response to the public consultation) expressed its intention to use these specific duties to compel public bodies with over 150 employees to publish annual details of their gender pay, their ethnic minority employment rate and their disability employment rate.
- Schedule 26 to the Act makes amendments to the Local Government Act 1988 so as to provide that public bodies may exercise a function by reference to a non-commercial matter to the extent that the authorities consider it necessary or expedient to do so in order to comply with the equality duty.
- A failure in respect of performance of the duty does not confer a cause of action at private law (s.156), but again JR would be available.

(4) Timetable

71. The following statutory instruments have been published so far for England and Wales:

Equality Act 2010 (Commencement No. 1) Order 2010/1736

Brought into force from 6 July 2006 provisions enabling the making of subordinate legislation and certain provisions amending the Equality Act 2006 and enabling the making of Codes of Practice.

Equality Act 2010 (Offshore Work) Order 2010/1835

Provides further definition of 'offshore work' and gives the Tribunals and Courts of England, Wales and Scotland jurisdiction to deal with claims relating to it. In force 1 October 2010.

Equality Act 2010 (Designation of Institutions with a Religious Ethos) (England and Wales) Order 2010/1915

Specifies which institutions of further and higher education are able to benefit from the exception in para 5 of Sch 12 to the Act for discrimination on religious grounds in pupil admissions. In force 1 October 2010.

Equality Act 2010 (Commencement No. 2) Order 2010/1966

Commences further provisions of the Act relating to the making of subordinate legislation and guidance and in relation to making Codes of Practice. In force 3 August 2010.

Equality Act 2010 (Disability) Regulations 2010/2128

These Regulations re-enact with amendments provisions which were previously made under the Disability Discrimination Act 1995 and which are revoked by regulation 15 of these Regulations. Part 2 contains provisions which supplement those in the Act about when a person is disabled for the purposes of that Act, e.g. excluding from the scope of the definition of disability addictions (other than those medically caused), excluding tattoos and body piercings from being disfigurements, etc. Part 3 sets out things which are to be treated as auxiliary aids or services for the purposes of paragraphs 2 to 4 of Schedule 4 to the Act (in relation to let premises). Part 4 contains provisions about reasonable adjustments to physical features of premises. In force 1 October 2010.

Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010/2132

These Regulations contain permitted exceptions to the sex equality rule provided for by sections 67–71 of the Act. They re-enact previous provisions of the Pensions Act 1995 and regulations made thereunder relating to bridging pensions paid to men before they reach the state pension age and the actuarial factors which differ for men and women in relation to the calculation of employers' contributions in certain circumstances and the provisions of certain benefits. In force 1 October 2010.

Equality Act (Age Exceptions for Pension Schemes) Order 2010/2133

This Order contains permitted exceptions for occupational pension schemes to the non-discrimination rule contained in section 61 of Part 5 of the Act (work) as it applies to age. It also contains permitted exceptions, relating to employer contributions to personal pension schemes, to the other non-discrimination provisions of Part 5 of the Act as they apply to age. They re-enact existing provisions in the *Age Regulations* providing for such exceptions. In force 1 October 2010.

Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010/2132

Provides exceptions to the sex equality rule for various aspects of pension schemes.

Equality Act 2010 (Commencement No.3) Order 2010/2191

Brings in provisions relating to the Commission's powers to prescribe matters that are not subject to the duty to make reasonable adjustments. In force 2 September 2010.

Equality Act 2010 (Qualifying Compromise Contract Specified Person) Order 2010/2192

This Order extends the category of person capable of acting as an independent adviser whose advice is necessary to establish a qualifying compromise contract under Part 10 of the Act to a Fellow of the Institute of Legal Executives practising in a solicitor's practice including an incorporated practice recognised by the Law Society under section 9(1) of the Administration of Justice Act 1985. In force 1 October 2010.

Equality Act 2010 (Obtaining Information) Order 2010/2194

This Order creates the equivalent of the *Questions and Replies Order* provisions that exist under current discrimination legislation. It prescribes forms on which a person who thinks that he or she may have been the subject of a contravention of the Act, including the breach of an equality clause or rule, (P), may ask questions of a person who he or she thinks was responsible for the contravention or breach (R) and also prescribes forms on which R may reply. Article 4 of the Order provides that for any question or answer to be admissible as evidence in proceedings under the Act, P must serve the questions either before the proceedings are commenced or within 28 days of commencement of proceedings or, if later, within a period specified by the court or tribunal. Article 6 specifies that where R reasonably asserts that a refusal to answer or an unhelpful answer is due to the purpose of safeguarding national security, then a court or tribunal must not draw an inference from the answer or lack of an answer. In force 1 October 2010.

Equality Act 2010 (General Qualifications Bodies Regulator and Relevant Qualifications) (Wales) Regulations 2010/2217

These Regulations prescribe the Welsh Ministers as the appropriate regulator for the purposes of section 96 of the Act. The appropriate regulator may specify matters which are not caught by the duty on qualifications bodies under that section to make reasonable adjustments for disabled people. These Regulations also prescribe that relevant qualifications, for the purposes of sections 96 and 97 of the Act, are those listed in the Schedule. In force 1 October 2010.

Equality Act 2010 (General Qualifications Bodies) (Appropriate Regulator and Relevant Qualifications) Regulations 2010/2245

These Regulations make provision for the purposes of section 96 of the Act. Section 96 of the Act imposes a duty on qualifications bodies not to discriminate in the conferment of relevant qualifications and also imposes a duty on them to make reasonable adjustments for disabled people. Under section 96(7) of the Act an appropriate regulator may specify matters which are not to be subject to the reasonable adjustments duty and regulation 2 provides that any such matters must be published on the regulator's website. Regulation 3 prescribes the Office of Qualifications and Examinations Regulation (Ofqual) as the appropriate regulator in relation to a qualifications body that confers qualifications in England. Regulation 4 prescribes the relevant qualifications in relation to conferments in England and these are set out in the Schedule. In force 1 October 2010.

Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2010/2285

Corrects errors in the earlier Order. In force 1 October 2010.

The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 and its Amendment Order 2010/2337

The main commencement Order, bringing the bulk of the Act into force from 1 October 2010. Made on Monday (20 September), it also sets out savings, consequential, transitional, transitory and incidental provisions and a revocation in relation to existing legislation. These savings, consequential, transitional, transitory and incidental provisions and the revocation are made as a result of the repeal and revocation of previous discrimination legislation and its replacement by the 2010 Act, and of the lapse of previous subordinate legislation because of the repeal of previous discrimination legislation by that Act.

Article 7 provides for the application of the enforcement provisions of the 2010 Act to continuing acts which begin before 1st October 2010 and continue on or after that date. Article 8 provides that complaints under provisions of previous enactments are to count as protected acts for the purposes of the victimization provisions in s 27. Article 15 provides that, where conduct complained of occurs wholly before 1st October 2010, previous legislation, procedures and remedies are applicable, as if the 2010 Act had not been commenced.

There are also a large number of provisions whose intended effect is to preserve the status quo where new provisions of the Act that were intended to replace the old legislation have not yet been brought into force and so the old provisions need to continue in force notwithstanding that the things to which they relate are now covered by the Act. This is a complicated process and no doubt there will be some lacunae.

The only significant exclusions from *Commencement No. 4* are: socio-economic equality duty (s 1); dual discrimination provisions (s 14); requirement on private employers to publish gender pay gap information (s 78); positive action in recruitment and promotion (s 159); and the single public sector equality duty (ss 149-157 – the Government is still consulting on this). Note also that Schedule 6 to the *Employment Equality (Age) Regulations 2006* relating to employee requests to work beyond retirement is to continue in force for the moment.

Equality Act 2010 (Amendment) Order 2010/2622

Amends s 76 of the EA 2010 to make clear (by the insertion of a new (1A)) that where the maternity equality clause applies, no other form of discrimination claim can be brought in relation to the complaint.

72. In summary, the provisions that came into force on 1 October 2010 are therefore:
- The basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions; premises; work; education; associations, and transport.
 - Changing the definition of gender reassignment, by removing the requirement for medical supervision.
 - Levelling up protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic, so providing new protection for people like carers.

- Clearer protection for breastfeeding mothers (though query whether this has been achieved in the light of my comments above).
- Applying the European definition of indirect discrimination to all protected characteristics.
- Extending protection from indirect discrimination to disability.
- Introducing a new concept of “discrimination arising from disability”, to replace protection under previous legislation lost as a result of a legal judgment.
- Applying the detriment model to victimisation protection (aligning with the approach in employment law).
- Harmonising the thresholds for the duty to make reasonable adjustments for disabled people.
- Extending protection from 3rd party harassment to all protected characteristics.
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs, by restricting the circumstances in which employers can ask job applicants questions about disability or health.
- Allowing hypothetical comparators for direct gender pay discrimination.
- Making pay secrecy clauses unenforceable.
- Extending protection in private clubs to sex, religion or belief, pregnancy and maternity, and gender reassignment.
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce.
- Harmonising provisions allowing voluntary positive action.

73. The Government website says that the Government is ‘consulting about how best to implement the public sector Equality Duty’ and is ‘still considering’:

- the Socio-economic Duty on public authorities
- dual discrimination
- duty to make reasonable adjustments to common parts of leasehold and commonhold premises and common parts in Scotland
- gender pay gap information
- provisions relating to auxiliary aids in schools
- diversity reporting by political parties
- positive action in recruitment and promotion
- provisions about taxi accessibility
- prohibition on age discrimination in services and public functions
- family property
- civil partnerships on religious premises

74. Statutory Codes of Practice are on their way. In the meantime the existing Codes of Practice will continue in force. Draft Codes of Practice on Employment; Services, Associations and Public Functions; and Equal Pay were laid before Parliament on

12 October 2010. Copies of them are available here: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>. A raft of other guidance documents have also been produced by the EHRC and are available on its website. The Department for Transport has also published guidance about the taxi provisions of the Act.

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