

# The evolution of equality

The brand new Equality Act, which wraps up 55 years of evolving anti-discrimination legislation, has major implications for public agencies. But as **Stuart Watson** finds, decisions over implementation now rest with the new government

**The Equality** Act, which passed in April, will provide a significant challenge for civil service managers as they struggle to come to terms with the potentially far-reaching implications of the new law.

For more than 40 years, governments have legislated to tackle inequality and discrimination in the UK. Successive new laws have gradually brought more groups under the protection of the state; first ethnic minorities, then women, the disabled, gays and lesbians, religious groups and old people.

In 2008 the government announced that it would introduce a new Single Equality Bill to replace the complex patchwork of rules, comprising nine major pieces of discrimination legislation and 100 other measures, which had built up. As well as harmonising and clarifying existing law, the bill also sought to introduce new provisions to address outstanding discrimination issues and provide a framework that would support wider efforts to promote equality.

The Equality Bill was introduced by deputy prime minister Harriet Harman in April 2009 and passed intact – despite Conservative opposition to some key clauses – a day before the wash-up at the end of the parliamentary session formally began. However, a commencement order signed by the secretary of state – now Theresa May, whose Home Office brief includes the women and equality role – is required to enact all of the act's major provisions. If the government doesn't want to implement a certain aspect of the law, it can simply fail to sign the required commencement order.

The new government has not yet formulated its position on which clauses it will enact; Theresa May is likely to concentrate first on mastering the Home Office brief, which she's never held before. However, she criticised the bill during the second reading debate in the Commons for "including unworkable and overly bureaucratic proposals".

Meanwhile Lynne Featherstone, the Liberal Democrat spokesperson on youth and equality – and now a junior minister under May, with the equalities brief – welcomed the bill in Parliament, but criticised it for not doing enough to reduce socio-economic equality and ensure equal pay for women. Given that May voted against repeal of Section 28, equalising the age of consent and gay adoption, the two ministers may struggle to agree a position on enacting the Act.

The act is 239 pages long, with 16 parts and 28 schedules, and the explanatory notes run to a further 215 pages. Further statutory and non-statutory guidance explaining how the provisions should work in practice will follow from the Government Equalities Office (GEO) and the Equality and Human Rights Commission over the coming months and years.

"It is a mammoth piece of legislation," says Rachel Dineley, head of the Diversity and Discrimination Unit at law firm Beachcroft. "There is a huge amount for public bodies to get to grips with." While the act has many sections that apply to tackling discrimination in wider society, some of its provisions deal specifically with the responsibilities of the public sector, or have significant implications for the civil service.

## Single Equality Duty

To date, public authorities have been required to have due regard to eliminating discrimination, advancing equality and fostering good relations with and between people who share three "protected characteristics": race, sex and disability. Under the Equality Act this duty is expanded to include the other protected characteristics identified in the legislation, with the exception of marriage and civil partnership: age, sexual orientation, gender reassignment, pregnancy and maternity, and religion or belief.

The GEO consulted on proposals for specific duties contained within the general duty last year, and



Pay pioneers: women petition Downing Street for equal pay in the 1960s (left); Marching for respect: gay rights activists campaign for an end to discrimination (above)

in January published a policy statement, *Equality Bill: Making it Work*. A further round of consultation will be carried out in the summer on the secondary legislation necessary to implement the specific duties.

The January statement proposes a move away from a detailed legislative description of processes that public bodies should follow, adopting a more flexible approach focusing on outcomes. In taking this approach, GEO hopes to ensure that fostering equality is embedded in public bodies' strategic decision-making, rather than being a 'box-ticking' exercise.

Asif Afridi, deputy chief executive of the Birmingham Race Action Partnership, welcomes the change in style: "In the past, approaches to regulating delivery on equality have been largely punitive. That hasn't worked," he argues. "It can mean there is a blame culture where people worry about getting it wrong. The Equality Act puts public sector workers more in the driving seat."

Equality Impact Assessments, which currently have to be produced for all new policies and updated for existing policies every three years, will need to be altered to take into consideration the new protected characteristics. Jane Hatton, managing director of diversity consultancy Public Sector Providers, says this need not mean a mountain of additional paperwork, however. "It sounds complicated, with six or seven

strands of protection, but it's not that difficult to do and it's just good practice anyway," she says.

Linda Stewart, senior equality policy officer for the TUC, is less impressed with the non-prescriptive approach to specific duties: "The effect will be that public bodies think: 'Okay, we are under pressure to make cuts, so the first things that will go are the equality schemes'," she warns.

With a longer list of protected characteristics there is an increased likelihood that decision-makers will have to balance the sometimes competing needs of different protected groups. The recent McFarlane case – in which Relate relationship counsellor Gary McFarlane, an observant Christian, was sacked for refusing to give sex advice to a gay couple – highlighted the kind of conflict that could emerge.

Stephen Hocking, head of public law at Beachcroft, says that there is considerable scope for legal challenges: "You can't anticipate all the possible grounds for challenge. However, provided you can show that you have had regard to issues across the protected characteristics and you put it in writing, then even if you don't get it exactly right, I think courts will be sympathetic," he advises. "They won't be sympathetic to those who [only] carry out a perfunctory exercise, though."

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## Long walk to freedom

**The Equality Act 2010 replaces all or part of a series of anti-discrimination laws enacted over more than 40 years.**

<b>1965</b>	Race Relations Act is the first legislation in the UK to address racial discrimination	<b>2000</b>	Race Relations (Amendment) Act includes a statutory duty on public bodies to promote race equality
<b>1970</b>	Equal Pay Act prohibits less favourable treatment of women in terms of pay and conditions of employment, but does not come into force until 1975	<b>2003-6</b>	Three sets of Employment Equality Regulations extend the protections provided by UK labour law to prevent discrimination on the grounds of religion and belief, sexual orientation and age
<b>1975</b>	Sex Discrimination Act outlaws discrimination on the grounds of sex or marital status	<b>2006</b>	Equality Act introduces a public duty to promote equality on the grounds of gender and creates the Equality and Human Rights Commission. It also outlaws discrimination in the provision of goods and services on the grounds of religion and belief.
<b>1976</b>	Race Relations Act incorporates and extends previous racial discrimination legislation and establishes the Commission for Racial Equality	<b>2007</b>	The Equality Act (Sexual Orientation) Regulations extend the provisions of the 2006 Act to cover gays and lesbians
<b>1995</b>	Disability Discrimination Act makes it unlawful to discriminate	<b>2010</b>	The Equality Act harmonises UK anti-discrimination law

against disabled people in relation to employment and the provision of goods and services

### Procurement

Public bodies should already be taking equality into consideration as part of their procurement processes under existing public sector duties, but the GEO is not satisfied that this happens as frequently or consistently as it could. In its policy statement on the public sector equality duty, GEO suggests that equality factors should be considered at the early stages of the procurement process and that public bodies should consider applying equality-related award criteria and contract conditions where they are relevant and proportionate.

While it stops short of recommending the creation of a 'national equality standard' for suppliers, or of regulations on how to deal with contractors who have breached discrimination law, the guidance adds: "We continue to believe that poor equality performers should not benefit from public sector procurement and that this explicit message should be made clear to public authorities when considering who to invite to bid for contracts."

"Procurement is one of the areas where government wants to drive equality into the private sector," says Les Venus, chief executive of the UK Council for Access and Equality, a not-for-profit organisation set up by the private sector to help build inclusive organisations. "As a public sector body, if you are not certain that a supplier is taking on the same values as you are, then you can be vicariously discriminating. The questions you ask suppliers regarding equality need to be robust."

### Socio-economic duty

The act introduces a new socio-economic duty for some public bodies; notably government departments, local authorities, primary care trusts and police authorities. Under the duty an organisation "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".

Stephen Otter, chief constable of Devon and Cornwall, and the lead on equality and diversity for the Association of Chief Police Officers (ACPO), cites an example of how the socio-economic duty may impact on public bodies' decision-making: "This could include consideration of options such as reviewing station opening hours or working in partnership with local authorities to address access and public transport issues, particularly in rural areas," he says.

Hocking argues that this could have a radical effect on some policy decisions. It might, for example, be used to justify a decision by the Department of Health to target funding at preventative medicine in poorer areas rather than pay for cancer drugs more likely to



**Equality test:** New home secretary and minister for women and equality Theresa May (above) must decide how to implement the Act. **Right to buy:** Les Venus (above right) warns against the risk of 'vicarious discrimination' in purchasing.

be given to wealthy older people. "Those advising the minister will need to say: 'You need to think about this as well,'" he says. "Of course, it's only a duty to 'have regard'. We can't make inequality illegal *per se*."

The socio-economic duty is one of the aspects of the act that the Conservatives have said they will not enforce. Theresa May said in a Commons debate that "giving people a legal right to a better life will not magic up a better life for them". The Liberal Democrats have also criticised the duty – but on the grounds that it is too weak a measure, and that a specific bill is needed to tackle socio-economic inequality. It remains to be seen how the new government will reconcile these opposing views.

### Gender pay and equality reports

GEO's policy statement says that under the public sector equality duty, public bodies with 150 or more employees will be required to publish their gender pay discrepancy, their ethnic minority employment rate and their disability employment rate from 2011. The proposals require only one figure to be published for each of the three areas.

The act also includes powers to impose compulsory gender pay reporting on private sector companies employing more than 250 people from 2013 if insufficient voluntary progress has been made by then. The Tories have opposed this provision as a burden on business, while the Liberal Democrats have argued that comprehensive gender pay reporting should be introduced more quickly.

Stewart believes that – despite the recent employment tribunal decision which found Birmingham City Council had underpaid 4,000 female workers by a total of around £200m – there is already much good practice in this area being carried out by



public sector bodies. "The challenge is really for the private sector," she says.

### Positive action

Another section of the act that the Conservatives have said they will not enact (but which the Liberal Democrats support) introduces the possibility of positive action to reduce inequality. The provision would allow employers to recruit or promote a person with a protected characteristic in preference to a candidate without that characteristic if they were otherwise equal in skills and experience.

Dianah Worman, diversity adviser for the Chartered Institute of Personnel and Development, says that this provision is unlikely to have a significant impact on recruitment practices: "It will only be allowed in very unusual circumstances. The law will not allow you to recruit someone simply because they are black or a woman," she says.

### Employment tribunals

Under the new law, the powers of employment tribunals will be strengthened and extended, by allowing them to make wide recommendations that would benefit the whole workforce and not be limited solely to the person who brought the claim.

Stewart applauds this measure, arguing that it will reduce the likelihood of multiple legal claims against a single organisation over the same issue, as in the Birmingham case. Some local authorities are repeat offenders, she notes, with public services union Unison alone pursuing 45,000 separate claims at present. Stewart argues that public sector employers should consult with union equality reps to make sure that they avoid tribunals which could damage their reputation and force them to change their practices.

### Conclusion

Given sign-off by Theresa May, the sections of the act on employment, equal pay and services, public functions and associations will come into force from October this year. However, public sector bodies will have more time to prepare for the measures that will affect them most, with the single equality duty applying from April 2011, and the provisions on age discrimination outside the workplace not due to come into force in April 2012.

If the law is introduced and works in practice in the way that the drafters intend, it will not only provide minority groups with greater protection from discrimination, but will also allow and encourage – if not compel – public sector organisations to consider the equality impacts of their work in a more systematic, strategic and creative way.

Venus argues that the promotion of equality should not be seen as an onerous duty, but as a necessity and also an opportunity: "The majority of undergraduates are now female. The retirement age will go up, so people will be working longer and more of them will be disabled. There are more ethnic minority people working now than before, with a greater mixture of religions and beliefs," he says. "The fit Anglo-Saxon bloke below 55 years old is no longer in a majority in the workplace."

"Organisations need to look up and look out. If they proceed as they always have, they will miss the opportunities to engage with an ever-changing customer base, supplier base and workforce." ■



**Freedom in faith:** Recent legislation has extended equality law to religious minorities (left) **Class action:** civil servants in Northern Ireland recently protested at a gender pay gap (above)