

**An Examination of Positive Action and Harassment as forms of Discrimination,
and the proposed changes in the Equality Bill 2009.**

Jackie Lane

University of Huddersfield

Background to the Equality Bill

The White Paper “Framework for a Fairer Future – the Equality Bill”¹ states that the government’s commitment to equality is:

- a. Necessary for the individual
- b. Necessary for society
- c. Necessary for the economy

It states that it is time to “declutter the law” – over the 40 years that discrimination legislation has been evolving it has become very complex, and has been described as a “proverbial dog’s breakfast, with significant differences *between* the strands, and even differences *within* the strands, depending on whether the provisions relate to areas falling within the scope of one of the new Directives”² . There are now nine major pieces of legislation and around 100 statutory instruments, not to mention the guidance and codes of practice that accompany them.

It also states that it is time to strengthen the law, quoting the following disturbing statistics:³

- The gender pay gap means that a woman’s pay is on average 12.6% less per hour than a man’s;
- If disabled, you are two and a half times more likely to be out of work than a non-disabled person;
- If from an ethnic minority, you are 15.5% less likely to find work than if you are white.

¹ Cm 7431, 2008. “Framework for a Fairer Future- the Equality Bill”

² Smith, I, Thomas, G, *Smith and Wood’s Employment Law*; Oxford, 9th edn., p.248

³ *Ibid* p.7

Although improvements have been made, statistics like these mean that the pay gap would not close for over 70 years and ethnic minorities would not have the same job prospects as white people for almost 100 years. Clearly, something had to be done to speed up the process to eliminate discrimination and the Equality Bill is an attempt to bring together all the strands into one comprehensible piece of legislation, and eliminate the confusion that inevitably accompanies the piecemeal introduction of law with one common purpose – the elimination of discrimination and inequality.

Within the various acts and regulations are to be found similarities; for instance, all protect against harassment and victimisation.

Harassment

Harassment as a form of discrimination has been only recently recognised. The civil and criminal law have protected citizens from the harm caused by harassment through the torts of defamation and trespass to person, the crimes of assault and battery and those under the Protection from Harassment Act, and privacy laws. A complainant may also sue for damages in a civil action under the Protection from Harassment Act. Harassment can cause marginalisation of minority groups, distress and possible psychological harm to both individuals and groups.⁴

ACAS defines bullying and harassment in its advice leaflet for employees:⁵

“What are bullying and harassment?”

These terms are used interchangeably by most people, and many definitions include bullying as a form of harassment. Harassment, in general terms is unwanted conduct affecting the dignity of men and women in the workplace. It may be related to age, sex, race, disability, religion, sexual orientation, nationality or any personal characteristic of the individual, and may be persistent or an isolated incident. The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient.

⁴ Bamforth, N; Malik, M; and O’Cinneide, C; *Discrimination Law: Theory and Context*. Thomson, Sweet and Maxwell. London 2008

⁵ ACAS Advice leaflet – bullying and harassment at work: guidance for employees. www.acas.org.uk accessed 9.9.9

Bullying may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient. Bullying or harassment may be by an individual against an individual (perhaps by someone in a position of authority such as a manager or supervisor) or involve groups of people. It may be obvious or it may be insidious. Whatever form it takes, it is unwarranted and unwelcome to the individual.

Examples of bullying/harassing behaviour include:

- spreading malicious rumours, or insulting someone by word or behaviour (particularly on the grounds of age, race, sex, disability, sexual orientation and religion or belief)
- copying memos that are critical about someone to others who do not need to know
- ridiculing or demeaning someone – picking on them or setting them up to fail
- exclusion or victimisation
- unfair treatment
- overbearing supervision or other misuse of power or position
- unwelcome sexual advances – touching, standing too close, the display of offensive materials, asking for sexual favours, making decisions on the basis of sexual advances being accepted or rejected
- making threats or comments about job security without foundation
- deliberately undermining a competent worker by overloading and constant criticism
- preventing individuals progressing by intentionally blocking promotion or training opportunities.

Bullying and harassment are not necessarily face to face. They may also occur in written communications, email, phone, and automatic supervision methods such as computer recording of downtime from work or the number of calls handled if these are not applied to all workers.

Bullying and harassment make someone feel anxious and humiliated. Feelings of anger and frustration at being unable to cope may be triggered. Some people may

try to retaliate in some way. Others may become frightened and de-motivated. Stress, loss of self-confidence and self-esteem caused by harassment or bullying can lead to job insecurity, illness, absence from work, and even resignation. Almost always job performance is affected and relations in the workplace suffer.”

This definition relates to bullying and harassment generally, though not all harassment is discriminatory, so an employee will only have a legal remedy where the harassment is on the grounds of a protected characteristic. Other forms of harassment would have to be dealt with internally through workplace grievance procedures. If the complainant feels she has no choice but to resign, she may also have a remedy through a constructive dismissal action.

How extensive is the problem of harassment in the workplace?

The Fair Treatment at Work Survey carried out by the Department of Trade and Industry (now the department for Business, Innovation and Skills) in 2005⁶ included a question on sexual harassment and results were as follows:

- Much lower than bullying
 - Only 9 in every thousand employees (0.9%)
- More women (1.1%) than men (0.7%)
 - though men account for two-fifths
- Disabled employees five times as likely as non-disabled to be sexually harassed
- Managers twice as likely as non-managers to harass
- Almost 4% of employees *who worked with others* said they were aware of others at work being sexually harassed

A report of the TUC’s “Rooting out Racism” Hotline confirms that racial harassment at work is a continuing problem.⁷

⁶ <http://www.berr.gov.uk/files/file38386.pdf> accessed 9.9.9

The Employment Tribunal statistics for 2008-9 showed a decrease of sex discrimination cases generally, down 10,000 from two years ago to 18,637. Race discrimination claims were up from 3,780 in 06/07 to 4,983 in 08/09.⁸

Figures specifically for harassment claims were not available; however, these figures for sex discrimination are very encouraging and may reflect a growing awareness among employers of the need to treat women as equals.

Protection from harassment

Currently there is protection from harassment in all areas of discrimination except on grounds of religion or belief, sexual orientation and disability *outside* the workplace. Within the workplace, workers are protected from harassment on the grounds of religion or belief, sexual orientation, age, sex, race and disability.

The Bill aims to achieve uniformity across all protected characteristics and in all the fields where the main types of harassment is prohibited. Courts and tribunals will continue to be required to balance competing rights on the facts of a particular case; this would include consideration of the value of freedom of expression (Article 10 European Convention on Human Rights).⁹ Clause 24 of the Bill gives a definition of harassment, dividing it into three types. The first involves unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, or of violating his or her dignity.

An example would be where a white worker, seeing a black worker being subjected to racially abusive language, can demonstrate that this also causes an offensive environment for her; she may have a case for harassment.

The second is unwanted conduct *of a sexual nature* where this has the same purpose or effect as the first type, i.e. creating an intimidating, hostile, etc., environment, or violating his dignity. Thus, if an employer displays sexually explicit material (for example a nude calendar), this could be harassment of employees if it

⁷ Report of the TUC's "Rooting out Racism" Hotline: Exposing Racism at Work, Published by the TUC's Campaigns and Communications Department, TUC Congress House: London 1998.

⁸ Employment Tribunal and EAT Statistics (GB) 1 April 2008 to 31 March 2009 http://www.employmenttribunals.gov.uk/Documents/Publications/ET_EAT_Stats_0809_FINAL.pdf (accessed 5.10.9)

⁹ Equality Bill, explanatory note 101

makes the workplace an offensive place to work. This could be true for both male and female staff, as both could find the calendar offensive

The third type is less favourable treatment as a result of rejection or failure to submit to sexual harassment, or harassment related to sex or gender reassignment. For example, if a woman rejects the sexual advances of her manager, it may be harassment if she is subsequently passed over for a promotion which she had a legitimate expectation of receiving.

Clause 24 of the Equality Bill aims at achieving a uniform approach across *all* relevant protected characteristics, including age, disability, gender reassignment, race, sex, religion and belief and sexual orientation. This extends the circumstances in which a person is protected against harassment.

It is interesting to note that Clause 24, as in much of the existing legislation, refers to unwanted conduct which has the purpose *or effect*, indicating that unintentional conduct is covered. Subsection 3 gives some guidance on whether such conduct can have had such an effect:

In deciding whether conduct has that effect, each of the following must be taken into account-

- (a) The perception of B [the complainant]*
- (b) The other circumstances of the case;*
- (c) Whether it is reasonable for the conduct to have that effect*

Although this does not substantially alter existing legislation, it does simplify it, and does appear to give first consideration to the perception of the complainant.

POSITIVE ACTION

Positive action may seem similar to discrimination, but is permissible in limited circumstances where certain groups are disadvantaged or underrepresented. EU law ultimately controls the scope for Member States to introduce positive action measures. The measures proposed in the Bill are all within the scope permitted by EU law. The UK is already proactive in employing positive action strategies through public authorities, now reflected in more private sector employers, that are aimed at eliminating discriminatory practices and ensure greater integration for disadvantaged

groups. However, in the main, UK legislation and policy has eschewed preferential treatment on the grounds that it constitutes “reverse discrimination”.

The current test for direct discrimination is the “but for” test adopted by the House of Lords in *Eastleigh BC v James*¹⁰. This objective test does not discriminate between action taken to compensate or ameliorate, and that which is based on prejudice. The Council permitted free entrance to its swimming pools to those on a State pension, with no reference to age or gender. The effect was to discriminate between Mr James and his wife, the latter enjoying free swimming while her husband was still required to pay, even though they were of the same age. The intention was to encourage older people to take more exercise – a laudable motive, but this is to be disregarded in law. The Council’s action constituted unlawful discrimination.

Existing positive action measures are limited.

Under the Race Relations Act 1976, sections 37 and 38 allow the provision of access to facilities or training to persons from a particular racial or ethnic group, to hold certain posts, do certain types of work or join an organisation, *where that group is particularly under-represented in a certain workforce*. These sections thus permit certain actions to encourage candidates from ethnic minority groups. However, any automatic preferment or advantage given to minority candidates other than “training and encouragement” would be contrary to the Act.

The Act permits education, training and ancillary benefits if necessary to meet the needs of particular racial groups. However, this does not extend to providing job opportunities, thus giving preferential treatment to those groups.¹¹ Therefore “encouragement” is permitted under the RRA76, but preferential treatment is not. This barrier appears to be removed by the Equality Bill.

Similar provisions are contained within the Sex Discrimination Act 1975, sections 47 and 48. However, section 49 permits limited positive action by trade unions, employer organisations and professional bodies in selecting elected representative bodies to reserve seats specifically for members of one sex to “secure a reasonable minimum number”. Similarly, section 33 applies to political parties that have as its

¹⁰ [1990] 2 A.C. 751

¹¹ *Hughes v Hackney LBC*, ET, February 6 1986, unreported; *Lambeth LBC v Commission for Racial Equality* [1990] I.R.L.R. 231

main object, or one of its main objects, the promotion of parliamentary candidatures for the UK Parliament, and that nothing in section 29(l) [provision of goods, facilities or services] shall be construed as affecting any special provision for persons of one sex only in the constitution, organisation or administration of the political party.

However, when the Labour Party introduced all-women shortlists before the 1997 General Election, a challenge was brought in the case of *Jepson v Labour Party*¹², the tribunal concluding that the selection of candidates did not fall within s.33 and making a declaration that the Party had acted unlawfully. The response of the government was to pass the Sex Discrimination (Election Candidates) Act 2002 which inserted s42A into the SDA 75 to ensure that the Act did not make unlawful any arrangements made by a registered political party which “are adopted for the purpose of reducing inequality in the numbers of men and women elected...”

The section was due to expire in 2015, but the Equality Act proposes to extend this to 2030, possibly as it is unlikely that equality will have been achieved as soon as 2015. Currently less than one in five MPs are women. “Out of the 27 EU Member States, the UK currently ranks 15th in terms of women’s representation in national Parliaments. In global terms, the UK Parliament is 68th of the countries included in the 30 September 2008 Inter-Parliamentary Union’s monitoring report.”¹³ Not a result to be particularly proud of, and evidence of how far the UK has to go to equalise opportunity between the sexes. This surely cannot be achieved without some form of positive action.

Disability

The Disability Act differs from other anti-discrimination laws in that it is not based on a symmetrical model that seeks to achieve equality; rather, it protects disabled persons against discrimination and it is therefore lawful to give such persons preferential treatment. Thus, most positive action measures can already be used in respect of the disabled.

Religion, Belief and Sexual Orientation

¹² [1998] I.R.L.R. 116

¹³ Cracknell, R, Groat, R, Marshall, J. “Women in Parliament and Government” Standard Note SN/SG/1250 <http://www.parliament.uk/commons/lib/research/briefings/snsg-01250.pdf> accessed 21.9.2009

The Regulations relating to these areas allow preferential treatment only where being of a particular sexual orientation or religion constitutes a genuine occupational requirement, such as where a homosexual man may be given preference to a heterosexual man when applying for work in a gay bar.

Age

The Employment Equality (Age) Regulations do provide for limited positive action in section 29 –

“ (1) Nothing in Part 2 or 3 shall render unlawful any act done in or in connection with-

- (a) Affording persons of a particular age or age group access to facilities for training which would help fit them for particular work; or
- (b) Encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work

It is interesting to note that this, the most recent anti-discrimination law (2006) goes no further in terms of positive action than the earliest legislation (the RRA 1976 and SDA 75) in that it permits only “encouragement” and “training” to disadvantaged groups.

Proposed changes in the Bill

There are two clauses in the Bill relating to Positive Action:

Clause 152: general

Clause 153: recruitment and promotion

Clause 152 is new and extends to all protected characteristics; it provides that the Bill does not *prohibit* using positive action to reduce potential disadvantage experienced by those who share a protected characteristic (e.g. sex, race, disability etc.), reduce their under-representation in certain areas, and meet their particular needs. It aims to *enable* these groups to encourage *participation* in certain activities.

S.152(1) Positive action: general

(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.

Examples may include providing training or health services to certain groups. A school would be permitted to put on extra English classes if it identified that white males were underperforming in this area. Similarly, if a survey revealed that Asian women were more likely to suffer breast cancer due to a lower take-up of breast screening, a local NHS Trust could set up a screening programme targeted directly at this group. Any measures that are taken must, however, be a proportionate way of achieving the relevant aim.

Regulations will provide details of various types of action that would *not* be allowed, but clause 152 specifically excludes application to action within s153(3) (recruitment and selection) or s99. (Section 99 relates to the already-permissible all-female candidate short-lists for Parliamentary elections – the Bill extends this exception to 2030 in an attempt to increase the number of women in Parliament). If positive action measures are taken in recruitment or promotion under these clauses, *those* provisions would apply rather than clause 152.

Clause 153: recruitment and promotion

This clause permits an employer to take into consideration a protected characteristic when making decisions involving recruitment or promotion, where people having the protected characteristic are at a disadvantage or are under-represented. This would only apply where people are equally well qualified and does not allow employers to

have a broad policy of automatically recruiting or promoting simply on the basis of people having that characteristic.

This clause is also new, and is drafted quite broadly to include not only employees, but partners in a firm and barristers in chambers.

While existing legislation permits employers to undertake certain positive action measures, this is currently not permissible at the point of recruitment or promotion.

Examples could include a police service that recruits a disproportionately low number of people from an ethnic minority background, identifies a number of equally well qualified candidates but gives preference to those from an ethnic minority background.

Similarly, an employer may choose to promote a female employee to managerial level over an equally well qualified male where he has identified a disproportionately low number of women managers in his company. If that male had been better qualified, however, that would be unlawful direct discrimination.

Human Rights

A summary of European Convention of Human Rights (ECHR) issues arising from or connected with the Equality Bill 2009 is provided by the Solicitor General¹⁴ who confirms that the Bill is “creating, continuing and protecting the rights of individuals not to be discriminated against on certain specified grounds or to suffer other treatment related to discrimination...and...is very much in line with the principles of the Convention”.

There will be competing rights in certain circumstances, e.g. where issues of academic freedom or freedom of expression under Article 10 of the ECHR arise, and it will be up to courts and tribunals to strive to balance these competing rights.

Conclusion

¹⁴ Baird, Vera QC MP, Solicitor General; *Equality Bill, Summary of ECHR issues* 27 April 2009.

In conclusion, the Bill clearly simplifies the existing legislation, and has addressed issues of positive action and harassment. However, even though constrained in what it can achieve by the ECHR and European law, it is very restrained and is unlikely to have a significant impact on the the major areas of inequality that exist in our society.

Bibliography

ACAS Advice leaflet – bullying and harassment at work: guidance for employees. www.acas.org.uk accessed 9.9.9

Command Paper 7431, “Framework for a Fairer Future – The Equality Bill” June 2008

Cracknell, R, Groat, R, Marshall, J. “Women in Parliament and Government” Standard Note SN/SG/1250 <http://www.parliament.uk/commons/lib/research/briefings/snsg-01250.pdf> accessed 21.9.2009

Equality Bill: Summary of ECHR issues [submitted by Vera Baird QC MP, Solicitor General, 27 April 2009

The Equality Bill, accessed 4.9.9 at www.publications.parliament.uk/pa/cm200809

The Fair Treatment at Work Survey carried out by the Department of Trade and Industry (now the department for Business, Innovation and Skills) in 2005 <http://www.berr.gov.uk/files/file38386.pdf> accessed 9.9.9

Report of the TUC’s “Rooting out Racism” Hotline: Exposing Racism at Work, Published by the TUC’s Campaigns and Communications Department, TUC Congress House: London 1998.

Books:

Bamforth, N., Malik, M., O’Cinneide, C., *Discrimination Law: Theory and Context; Text and Materials*. London: Thomson, Sweet and Maxwell, 2008, 1st Edition

Smith, I., Thomas, G., *Smith and Wood’s Employment Law*. Oxford: Oxford University Press, 2008, 9th edition