

Equality Act 2010

by Aileen McColgan



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guide to abbreviations

CEDAW	Convention on the Elimination of Discrimination Against Women
DDA	Disability Discrimination Act 1995
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice, Luxembourg
ECtHR	European Court of Human Rights, Strasbourg
EE(Age)R	Employment Equality (Age) Regulations 2006
EE (RB)R	Employment Equality (Religion or Belief) Regulations 2003
EE (SO)R	Employment Equality (Sexual Orientation), Regulations 2003
EHRC	Equality and Human Rights Commission
EqA	Equality Act 2010
EqPA	Equal Pay Act 1970
EU	European Union
GOQ	Genuine Occupational Qualification
IRLR	Industrial Relations Law Reports
JCHR	Joint Committee on Human Rights
PSED	Public Sector Equality Duty
RRA	Race Relations Act 1976
SDA	Sex Discrimination Act 1975

introduction

The Equality Act 2010 (EqA), which was largely implemented in October 2010 and April 2011, has replaced a mass of legislation including, most significantly (and in chronological order), the Equal Pay Act 1970 (EqPA), the Sex Discrimination Act 1975 (SDA) and Race Relations Act 1976 (RRA), the Disability Discrimination Act 1995 (DDA), the Employment Equality (Sexual Orientation), Regulations 2003 (SO) (Religion or Belief) Regulations 2003 (RB) and (Age) Regulations 2006, Part 2 of the Equality Act 2006, and the Equality Act 2006 (Sexual Orientation) Regulations 2007. The only major discrimination legislation which survives the implementation of the EqA is the Equality Act 2006 insofar as it establishes the Equality and Human Rights Commission.

The EqA had a lengthy gestation and an uncertain birth. The Discrimination Law and Equalities Reviews were announced in 2005 and reported in mid 2007, the former with the publication of a consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*.¹ *A Framework for Fairness*, which proposed a consolidation of discrimination law together with an assortment of specific adjustments to the existing law, was criticised for its lack of ambition by trade unions, the equality commissions and NGOs. This criticism appeared to fall on deaf ears, the 600 page Equality Bill 2009 proposing relatively little in the way of substantive change to equality discrimination law but some potential hostages to fortune, among them the proposed extension of the equality duties to religion or belief.

The EqA weighs in at some 239 pages, 105 of them devoted to the 28 Schedules to the Act. The body of the Act contains the basic structure of the streamlined discrimination law, the detail relegated to schedules. Thus, for example, ss 4-12 set out the 'protected characteristics' (age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation); ss 13-27 definitions of discrimination, harassment etc.; and ss 39-83 (Part 5, Chapters 1-4) the prohibitions on employment related discrimination, including the provisions on equal pay (Chapter 3) and

pensions (Chapter 2)). Schedule 1 then sets out additional detail on the definition of disability; Schedule 8 disability-related reasonable adjustments in the employment context; Schedule 9 exceptions to prohibitions on discrimination in employment and Schedule 23 general exceptions.

The consolidating and rationalising functions of the Act are certainly to be welcomed. However long the Act, it is easier to master than the previous thicket of discrimination legislation. Valuable also is the elimination of unnecessary complexities such as the distinction which existed in the Race Relations Act 1976 and Disability Discrimination Act 1995 between those aspects of discrimination which are and are not covered by European Union (EU) law, and which accordingly did or did not qualify for (for example) the modernised definitions of indirect discrimination and the reversed burden of proof (s 136). The definition of harassment is also harmonised across the 'protected characteristics' of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, though the material scope of the harassment provisions varies across the protected characteristics.

Oddities remain, such as the absence of any prohibition on harassment related to pregnancy or on indirect pregnancy discrimination (though such conduct is likely to be covered by the prohibitions on sexual harassment or harassment related to sex and indirect sex discrimination) and the retention of a provision to the effect that discrimination connected with gender reassignment periods of absence is discriminatory only if unreasonable and involving less favourable treatment of the person than had they needed the period of absence in connection with sickness or injury (s 16). More fundamental, the Act was a disappointment to those who hoped, however optimistically, for radical improvement to the previous, largely individually focused, domestic equality provisions it replaced. This is particularly apparent in the case of the equal pay provisions, considered further in chapters 3 and 5.

In this booklet I will attempt to discuss the main employment related provisions of the Act and those which effect significant change. I will also consider the Act's new 'public sector equality duty' given its significance to unions, and to questions of public spending. Finally, I will spend some time on a number of issues, in particular the question of equal pay, in relation to which the law is, and remains, particularly unsatisfactory notwithstanding the implementation of the EqA.

What is the Institute?

The Institute of Employment Rights was launched on 28th February 1989 and was granted charitable status in 1994. As a labour law “think-tank”, supported by the trade union movement, our purpose is to provide research, ideas and detailed argument on all aspects of employment law. As a charity, however, we are not a campaigning organisation.

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The results of our work are published in papers and booklets. We also provide short articles, free of legal jargon, for trade union journals and other publications. Dissemination of our ideas is increasingly achieved through seminars and conferences as well as our educational courses.

The Institute does not assume that legal measures can offer ultimate solutions for political, economic and social problems. However, we recognise that law has a part to play in influencing the employment relationship, both individually and collectively.

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One of the aims of the Equality Act 2010 was to streamline the mass of discrimination legislation built up over recent decades. And, as Aileen McColgan, the author of this report notes, the consolidating and rationalising functions of the Act are to be welcomed. However, she goes on to comment that some “oddities” remain and, more fundamentally, that the Act was a disappointment to those who hoped for a radical shift away from the individually focused provisions it replaced.

Aileen McColgan is a leading expert in equality law and this publication assumes a degree of knowledge of both statutory and case law developments. Rejecting a step by step guide to the law, the author instead provides a critical insight into three focused areas: First, those aspects of the Equality Act which have effected significant change; second, the Act’s new public sector equality duty and third, those aspects of the law which remain unsatisfactory and in need of further reform, particularly around equal pay.

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