

## The Equality Bill – Clarity or Confusion?

The Equality Bill provides a once in a generation opportunity not only to consolidate and harmonise discrimination law but also to improve its effectiveness. **Richard Kenyon**, Head of Employment and Pensions at Field Fisher Waterhouse LLP, asks whether impatience for change will lead to hastily implemented measures that hinder rather than help our move to greater equality.

Discrimination law was founded on the simple concept of equal treatment. In the employment context, decisions had to be merit-based, and blind to race or gender. There are only limited exceptions where being of a particular race or gender is a genuine requirement for the job. Also, as the law currently stands, an employer can take limited positive action to address under-representation of a particular group (for example, women) in the workforce. This can take the form of targeted advertising or training but any subsequent selection must be carried out on merit alone.

The legal framework has become progressively more complicated over the last decade or so, as has awareness and attitudes towards individual rights and corporate social responsibility. Given the subtleties of the law, in-house and private practice lawyers should be at the centre of progressive approaches to equality whether as employers themselves or as advisers to employers. This is no longer simply about avoiding or winning litigation but about understanding shifting attitudes towards the importance of the composition of a workforce. At its most extreme, employers who fail to take note could find themselves excluded from contracts with Government or major companies.

It has become fashionable to talk of valuing “diversity” and how important it is for employers and public institutions to reflect their customer and user base. This elevates the perceived benefit of factors such as race or gender above the idea of judging individuals on merit without stereotyping. It can also lead to recruitment programmes aimed at improving the diversity of a workforce that stray into unlawful positive discrimination, where individuals are selected for employment on the basis, for example, of their race or gender.

The Equality Bill white paper proposes that where two candidates for a job are equally qualified, under-representation could be used to decide between them. This proposal would extend permissible positive action into what is currently unlawful positive discrimination. The inevitable media backlash has focused on the potential for white men to be discriminated against. In most situations it will be groups other than white men which are under-represented in a workforce. In those situations, some white men will potentially lose out if employers adopt positive discrimination. There may however, be situations where white men are under-represented in a workforce. In those situations under-representation would become a

permissible tie-breaker, allowing an employer to select white men on the basis of their race or gender.

This proposal shifts the emphasis of discrimination law away from the right of the individual to be treated on merit alone, to one where being a member of a particular group (defined for example, by gender or race) can determine a person's employment opportunities. This is confusing because the Ministerial Foreword to the white paper begins "Everyone has the right to be treated fairly ....." The proposal actually means that someone who, through no fault of their own, happens to be in an over-represented group will potentially be treated less favourably simply by membership of that group. This might help to provide a "quick fix" for organisations such as the police who are struggling to hit centrally imposed diversity targets but at the probable expense of resentment from those who lose out and a possible damaging perception that candidates have not been successful on merit alone.

There are a number of measures outlined in the white paper which will help to clarify and improve the law. In particular, there are a range of measures aimed at increasing transparency including; banning pay confidentiality provisions to help close the equal pay gap; an equality "kite-mark" for businesses which demonstrate their equality credentials; and, in the public sector (although disappointingly not in the private sector), revised equality reporting requirements.

The Bill is also likely to include a number of new enforcement powers including allowing Tribunals to make wider recommendations to employers in discrimination cases and the possible introduction of representative actions, allowing unions to bring a single claim on behalf of a group of employees.

Given the transparency measures and new enforcement powers it is a pity that the Government feels the need to extend the Equality Bill into positive discrimination which has already proved a hugely negative distraction. Such measures will need to be carefully framed to ensure compliance with European law but no amount of subtle drafting is likely to persuade the wider public that this is anything other than a measure designed to favour minority groups. That risks undermining social cohesion rather than promoting it.

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