

EQUAL PROTECTION: WORKING FOR A SINGLE EQUALITY ACT

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DISHARMONY AMONG THE UK DISCRIMINATION LAWS

UK discrimination laws have developed pragmatically as piecemeal responses to immediate problems. Just how extensive are the inconsistencies and inequalities between them?

Introduction

Anti-discrimination legislation in the UK has developed in a piecemeal fashion; legislation has been passed in response to immediate problems; in response to determined lobbying by groups seeking protection from discrimination; or in response to the legal developments of the European Community.

As a result of this patchwork piecemeal approach, gaps and inconsistencies have developed. Inconsistencies are an inevitable consequence and function of the current approach. No amount of occasional repair work to the pieces can provide the cohesion of a single equality act. This paper will sketch out some of the inconsistencies that exist in the current legislation and suggest that the effect of this inconsistency is to create a hierarchy of protection within the equality legislation. In other words legislation that attempts to promote equality perpetuates inequality; the framework of anti-discrimination legislation itself discriminates.

Grounds of Discrimination Covered

The failure of the common law to provide equal protection of the law and effective protection against discrimination led to the enactment of anti-discrimination legislation. Until the 1990s, while there was UK wide legislation on sex discrimination, race discrimination was only prohibited in Great Britain but not in Northern Ireland. In Northern Ireland there was protection from discrimination on the grounds of religious belief or political opinion but this was absent in Great Britain. Disability only became a prohibited ground of discrimination in 1995. . As a consequence of European Community law sex discrimination legislation was

amended to ensure that it covered direct discrimination on the grounds of gender reassignment.

So today UK anti-discrimination legislation prohibits discrimination on a significant but limited number of protected grounds: sex,¹ gender reassignment,² marriage,³ colour, race, nationality or ethnic or national origins,⁴ disability⁵ and, in Northern Ireland, religious belief, political opinion⁶ and membership of the Irish Traveller community.⁷ There is also protection from unfavourable treatment on the grounds of trade union membership⁸ and for part-time workers.⁹ In 2000 the European Community agreed a Directive for establishing a general framework for equal treatment in employment and occupation, the implementation of which will require the introduction of domestic legislation to cover, for the first time, discrimination in employment on the grounds of age, religion or belief and sexual orientation.¹⁰ There is also protection from unfavourable treatment on the grounds of trade union membership,¹¹ for workers on fixed-term contracts¹² and for part-time workers.¹³ The proposals for a Single Equality Bill in Northern Ireland consider extending the protected categories to persons with or without dependents, and family¹⁴ or marital status.¹⁵

As well as the anti-discrimination legislation, protection also comes from the Human Rights Act, which gives effect in domestic courts to the European Convention on Human Rights including its anti-discrimination provision article 14. Article 14 covers

¹ SDA, s.1; SD(NI)O, art. 3

² SDA, s.2A(1), as amended by the Sex Discrimination (Gender Reassignment) Regulation 1999, SI 1102; SD(NI)O, art. 4A, as amended by Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999, SI 311.

³ SDA, s. 3; SD(NI)O, art. 5; this covers discrimination against a married person, but not against single or unmarried persons.

⁴ RRA, s.3; RR(NI)O, art. 5(1).

⁵ DDA.

⁶ FETO 1998.

⁷ RR(NI)O, art. 5(3)(a).

⁸ See: Trade Union and Labour Relations (Consolidation) Act 1992.

⁹ Council Directive 97/81/EC, (OJ [1998] L 14/9) implemented from 1 July 2000 by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI No. 1551.

¹⁰ Council Directive 2000/78 (OJ [2000] L 303/16), hereafter "the Employment Directive".

¹¹ Trade Union and Labour Relations (Consolidation) Act 1992.

¹² Council Directive 99/70/EC.

¹³ Council Directive 97/81/EC, (OJ [1998] L 14/9) implemented from 2000 by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI No. 1551.

¹⁴ *Murray v Navy Army Air Force Institute* 1997, case 3100459/96 36 EORDCLD the tribunal rejected the argument that the ETD prohibited discrimination on the grounds of family status, cited in A. McColgan, *Discrimination Law: text, cases and materials*, Oxford: Hart Publishing, 2000, p. 346, fn.11.

¹⁵ *A Single Equality Bill for Northern Ireland*, Belfast: Office of the First Minister and Deputy First Minister, 2001, p. 31.

discrimination on any grounds such as “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Sexual orientation,¹⁶ marital status, illegitimacy,¹⁷ status as a trade union, military status, conscientious objection, professional status and imprisonment¹⁸ have all been taken into account in the phrase “other status”.

Already we have a confusing picture in which different grounds of discrimination are covered by different pieces of legislation. This confusion is further exacerbated by the fact that the scope of different pieces of legislation also differs.

Rights and Freedoms Affected

The RRA, the SDA (in relation to sex) the DDA and FETO cover discrimination in employment,¹⁹ education,²⁰ the provision of goods, services and facilities²¹ and the disposal and management of premises.²² The RRA also covers planning matters.²³ The SDA's prohibitions on discrimination against married persons and on the grounds of gender reassignment are restricted to employment.²⁴ Outside these areas discrimination on these grounds remains legal.

Even in the areas of activity covered by the legislation there are significant exemptions and exclusions. Some of these are explicitly set out in the legislation, for example, the employment provisions of the DDA do not apply to small sized employers and the SDA allows religious bodies to discriminate on the grounds of sex where this is needed to comply with the doctrines of a religion or to avoid offending the religious susceptibilities of its followers.²⁵ Other areas have been taken out of the scope of the legislation as a consequence of judicial interpretation, for example, the

¹⁶ *Dudgeon v UK* (1981) 4 EHRR 149.

¹⁷ *Marckx v Belgium* (1979) 2 EHRR 330.

¹⁸ D.J. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights*, London: Butterworths, 1995, at p. 470.

¹⁹ SDA, ss. 6-16; SD(NI)O, arts. 8-18; RRA, ss.4-16; RR(NI)O, arts. 6-17; DDA, ss.4-18; FETO, arts. 19-26.

²⁰ SDA, s.22; SD(NI)O, art. 24; RRA, s.17; RR(NI)O, arts. 18-20; DDA, s. 28A-X (as amended by the Special Educational Needs and Disability Act 2001); FETO, art. 27 (this covers only further and higher education).

²¹ SDA, s.29; SD(NI)O, art. 30; RRA, s. 20; RR(NI)O, art. 21; DDA, s. 19; FETO, art. 28.

²² SDA, ss. 30-31; SD(NI)O, arts. 31-32; RRA, ss. 21-24; RR(NI)O, art. 22-24; FETO, art. 29-31.

²³ RRA, 19A.

²⁴ SDA, s.2A; SD(NI)O, art. 4A.

²⁵ SDA, s. 19; SD(NI)O, art. 21.

House of Lords in *Amin* held that the SDA s29 only applied to acts done on behalf of the Crown which “are at least similar to acts that could be done by private persons”.²⁶ Such judicial interpretation has limited the impact of the legislation in tackling discrimination by public bodies. The need to bring public bodies within the scope of the RRA became imperative following the finding in the Stephen Lawrence Inquiry Report that “institutional racism exists both in the Metropolitan Police Service and in other Police services and other institutions country wide”.²⁷ In Great Britain the RRA has been amended so that it is unlawful for a public authority to discriminate in carrying out any functions.²⁸ A similar provision exists in Northern Ireland in relation to discrimination on the grounds of religious belief or political opinion.²⁹ It remains lawful for public authorities to discriminate in relations to carrying out their functions on all other grounds.

The implementation of the Race Directive will, as highlighted below, bring some significant changes, in particular to the definition of indirect discrimination. However, because the Government have chosen to implement this by statutory instrument, the protected grounds are only those of “race” or “ethnic or national origins” and not those of “colour” or “nationality”. This will create a two-tier system of protection for race discrimination which has been widely criticised.³⁰ The new regulations will create a new definition of indirect discrimination as well as a new definition of genuine occupational qualification. They will also remove the exclusion in relation to partnerships of less than six people, the exclusion for discrimination in the disposal and management of premises as well as the exclusion for events occurring after a dismissal or the termination of a relevant relationship.

The implementation of the Employment Directive will ensure protection from discrimination on the grounds of religion or belief, sexual orientation and age, but only in the area of employment, albeit widely defined.³¹ Discrimination on these grounds in the provision of goods, services and facilities, and by public authorities in carrying out their public functions, remains unregulated.

²⁶ *R. v Entry Clearance Officer, Bombay, Ex parte Amin* [1983] 2 AC 818.

²⁷ *The Stephen Lawrence Inquiry*, Report of an Inquiry by Sir William MacPherson of Cluny, Cm-4262-I, London: HMSO, 1999, para. 6.39.

²⁸ RRA, s.19B, as amended by the Race Relations Amendment Act 2000 (RR(A)A), s.1.

²⁹ NIA, s. 76.

³⁰ See, for example, CRE and JUSTICE responses to the Government Consultation Paper *Equality and Diversity: the way ahead* together with the draft regulations.

³¹ See: Employment Directive, art. 3(1).

The HRA, through ECHR article 14, only protects against discrimination in relation to the civil and political rights mentioned in the Convention. Protocol 12 aims to provide a more comprehensive protection from discrimination under the Convention. It provides that the enjoyment of any rights set forth by law shall be secured without discrimination on any grounds, and that no one shall be discriminated against by any public authority on any grounds.³² The UK government has so far refused to sign the Protocol.³³ In its view the Protocol is “too general and open ended” and “it does not make clear whether ‘rights set forth in law’ includes international law as well as national law.”³⁴ The government is concerned that “the European Court of Human Rights might hold that a right set out in an international agreement, but not incorporated into United Kingdom law is covered by Protocol 12.”³⁵ It also notes: “new rights are not necessarily cost free (especially when they are economic, social and cultural rights) and may affect the rights of others, as many rights have to be balanced against each other.”³⁶ The Government’s objections have been criticised as unconvincing.

A sophisticated approach to different forms of discrimination has been developed in UK legislation. Domestic anti-discrimination laws distinguish between direct and indirect discrimination. All UK anti-discrimination legislation and the EC Article 13 Directives cover direct discrimination, which is defined as less favourable treatment of a person on the prohibited grounds.³⁷ They also recognise harassment³⁸ and victimisation³⁹ as forms of direct discrimination.

Domestic legislation also provides protection from indirect discrimination on all protected grounds, with the exception of disability and gender reassignment.⁴⁰ However there are different definitions of indirect discrimination operating in the UK anti-discrimination laws. Prior to the changes brought about by EC Directives, indirect

³² This was opened for signature on November 4th 2000.

³³ House of Lords, 9 November 2000, WA 174, see also House of Lords, 11 October 2000, WA 37; House of Lords, 23 October 2000, WA 14 and House of Lords, 25 October 2000, WA 45.

³⁴ House of Lords, 11 October 2000, WA 37.

³⁵ House of Lords, 23 October 2000, WA 14.

³⁶ House of Lords, 25 October 2000, WA 45.

³⁷ SDA, ss.1(1)(a), 1(2)(a), 2A(1), 3(1)(a); SD(NI)O, arts. 3(1)(a), 3(2)(a), 4A(1), 5(1)(a); RRA, s.1(1)(a); RR(NI)O, art. 3(1)(a); FETO, art. 3(1)(a); DDA, s. 5(1)(a), 20(1)(a), 24(1)(a) and 28B(1)(a); Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, art. 5; Race Directive art. 2(2)(a); Employment Directive art. 2(2)(a).

³⁸ *Porcelli v. Strathclyde Regional Council* [1986] ICR 564.

³⁹ SDA, s.4; SD(NI)O, art. 6; RRA, s.2; RR(NI)O, art. 4; DDA, s. 55; FETO, art. 3(4); Race Directive, art. 9; Employment Directive, art. 11.

⁴⁰ SDA, ss. 1(1)(b), 1(2)(b), 3(1)(b); SD(NI)O, arts. 3(1)(b), 3(2)(b), 5(1)(b); RRA, s.1(1)(a), RR(NI)O, art. 3(1)(b)

discrimination required the application of a “requirement or condition”. The courts held that a condition must be an absolute bar before it can be termed a “requirement or condition”.⁴¹ This interpretation places a significant hurdle in the way of tackling indirect discrimination; it permits the application of discriminatory preferences as long as they are not expressed as absolute requirements.⁴² Parts of the domestic legislation have been or are being changed in response to EC Directives which define indirect discrimination as resulting from the application of a “provision, criterion or practice”.⁴³ As a consequence of EC law the new definition is applied in areas that come under EC competence, namely discrimination in employment on the grounds of sex, race (but not to colour or nationality), religion, age, disability and sexual orientation. The old definition will apply to discrimination on the grounds of colour or nationality in employment and on the other grounds in cases involving the provision of goods, services, facilities, and education.

A carefully constructed articulation of indirect discrimination is missing from the ECHR jurisprudence. The Convention’s approach has been characterized as one based on “proportionality...rather than one based on direct or indirect discrimination”.⁴⁴ The focus of ECHR article 14 is therefore not on whether discrimination is direct or indirect but on whether it is justified (which issue is examined below). In theory the Convention can cover indirect discrimination, for example in the Belgian Linguistics Case the Court held that “the existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration” (emphasis added).⁴⁵ This was further developed in the case of *Thlimmenos v Greece*⁴⁶, when the Court noted that:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

⁴¹ *Perera v. Civil Service Commission and Department of Customs and Excise (No.2)* [1983] I.R.L.R. 166.

⁴² See: *Meer v Tower Hamlets* [1988] I.R.L.R. 399, at 403.

⁴³ Burden of Proof Directive No. 97/80 (*O.J.* 1998, L. 14/6), art. 2; Race Directive art. 2(2)(b); Employment Directive, art. 2(2)(b).

⁴⁴ S. Fredman, *Discrimination Law*, (Oxford: Oxford University Press, 2002), at p. 116.

⁴⁵ [1968] Series A, No. 6, 1 E.H.R.R. 252.

⁴⁶ (2001) 36 EHRR 15.

The reception of the Convention into domestic law through the HRA does provide an opportunity for domestic courts to develop the protection article 14 provides against indirect discrimination. The early signs are of judicial openness to this possibility. Sedley LJ in *R (S) v Chief Constable of the South Yorkshire Police* was particularly concerned that the Court of Appeal in applying article 14 should ensure that it covered indirect discrimination.⁴⁷ However the court would have to decide which of the definitions of indirect discrimination they want to apply to their understanding of article 14. A single equality act with a single definition of indirect discrimination would have made this much easier.

Positive duties to promote equality

In the domestic anti-discrimination legislation there has been a move towards a focus on positive duties. But again there are inconsistencies and gaps in the legislation.

The Race Relations (Amendment) Act 2000 created a duty on specified public authorities to “promote equality of opportunity and good relations between persons of different racial groups”.⁴⁸ The aim is to ensure that public authorities take positive steps to remove barriers to race equality and that race equality and good race relations are central considerations in their policy making, service delivery and employment practices. The government has committed itself to extending to the duty to promote equality of opportunity between men and women and for persons with disabilities “when legislative time permits”.⁴⁹ But not to the other grounds covered by anti-discrimination legislation

Positive duties to promote equality are also a feature of the various pieces of devolution legislation. The Scotland Act defines equal opportunities as “the prevention, elimination or regulation of discrimination between persons on grounds of sex, or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions”.⁵⁰ While the Scottish Parliament cannot legislate on designated “reserved matters,” including anti-discrimination legislation, there is an exception allowing “the encouragement (other than by prohibition or regulation) of equal

⁴⁷ *R (S) v. Chief Constable of South Yorkshire Police (CA)*, [2002] 1 WLR 3223, at 3248.

⁴⁸ RRA, s.71.

⁴⁹ Cabinet Office, Equality Statement, 30 November 2000.

⁵⁰ Scotland Act 1998, Schedule 5, Part II, L2.

opportunities, and in particular of the observance of the equal opportunity requirements” and for imposing duties on office-holders in the Scottish Administration or any Scottish public authority to make arrangements to ensure their duties are carried out with due regard to the equal opportunities requirement. The Scottish Parliament has acted on this and included duties to promote equality in recent legislation.⁵¹

The National Assembly for Wales is required to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people.⁵² Unlike in Scotland, there is no definition of equal opportunities in the Government of Wales Act, the legislation referring to equality of opportunity for “all people”.⁵³

The most extensive equality duty is found in Northern Ireland. A public authority in carrying out its functions in Northern Ireland must have due regard to the need to promote equality of opportunity:

Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
between men and women generally;
between person with a disability and persons without; and
between persons with dependents and persons without.

FETO contains the most active obligations for achieving substantive equality. The aim of these duties is to secure “fair participation” in employment for members of the Roman Catholic and members of the Protestant communities. FETO does not define fair participation, but the Fair Employment Commission adopted an interpretation which involves redressing imbalances and under-representation in employment between the two communities in Northern Ireland. The aims are to secure greater fairness in the distribution of jobs and opportunities between the two communities, and to reduce the relative segregation of the two communities at work.⁵⁴ FETO

⁵¹ See: Standards in Scotland’s Schools Act 2000, s.5(2)(b); Housing (Scotland) Act 2001, s. 106; Regulation of Care (Scotland) Act 2001, s.(1)(2)(b).

⁵² Government of Wales Act 1998, ss. 48 and 120.

⁵³ See: P. Chaney, “New and Unexplored Possibilities – The Welsh Legislature’s Statutory duty to Promote Equality of Opportunity”, 21(1) *Equal Opportunities International* 2002 19.

⁵⁴ *The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On*, House of Commons, Northern Ireland Affairs Committee- Fourth Report, HC 98, Session 1998-99, para. 36-65. See also Fair Employment Code of Practice

contains a duty on employers to monitor their workforce on the basis of religious affiliation and it requires employers to undertake a periodic review (once every three years) of their employment practices to determine whether members of each community are enjoying or are likely to continue to enjoy fair participation in the employment of the firm. Where fair participation is not evident, the employer must engage in affirmative action.

Conclusion

The above analysis should indicate the extent to which there is inconsistency in the anti-discrimination legislation. The effect of this inconsistency is to create a hierarchy of protection within the equality legislation. This hierarchy emerges from the different levels of protection given to the different forms of discrimination. The highest levels of protection are given to discrimination on racial grounds (other than for colour or nationality against non-EU nationals). The prohibition of such discrimination is UK wide and covers the broadest range of activity. Through the RRAA it encompasses duties on public authorities not to discriminate in the exercise of their functions and to promote equality of opportunity and good relations between persons of different racial groups; with the implementation of the Race Directive it will extend to social protection including social security and healthcare. Below this is discrimination on the grounds of colour or nationality for non-EU nationals, which enjoys the same level of protection as other race discrimination but it is not clear that the all areas covered by the Race Directive apply to discrimination on these grounds. Sex discrimination receives a similar level of protection as race discrimination in employment and the provision of goods, services and facilities but there is no duty on public bodies not to discriminate on the grounds of sex; or, outside Northern Ireland, to promote equality between men and women. Disability discrimination also covers employment but its coverage of the provision of goods, services and facilities remains patchy, and only in Northern Ireland is there a duty to promote equality between persons with disabilities and persons without. Discrimination on the grounds of religious belief and political opinion receives significant protection in Northern Ireland. In Great Britain, however, such discrimination will be prohibited only in relation to employment once the Employment Directive is implemented. Implementation of the Directive will also ensure protection from discrimination on the grounds of age, sexual orientation and against married persons, but again only in relation to employment. Discrimination on

the grounds of gender reassignment receives the lowest level of protection, since it is confined not just to employment but to direct discrimination in employment.