



## **Executive Summary**

### **Country Report UK 2008 on measures to combat discrimination**

**By Colm O’Cinneide**

#### **1. Introduction**

The United Kingdom (UK) comprises of England, Wales, Scotland and Northern Ireland (NI), with the term Great Britain (GB) used to refer to England, Wales and Scotland. The UK is a parliamentary democracy, based around the core principle of parliamentary sovereignty. It has neither a written constitution prescribing a formal separation of legislative, executive and judicial powers, nor an entrenched constitutional bill of rights. However, an extensive set of constitutional conventions establish what has been described as an unwritten constitution, backed by a long tradition of adherence to rule of law ideology.

The English, Welsh, Scots and Irish have historically been regarded as the four major ethnic groups in the UK. However, the UK has always been a country of migration, and the increase in the size and variety of different ethnic groups since the late 1940s, added to the constant influx of migrant labour from EU and non-EU states (in particular the states of the British Commonwealth), has made the UK a multicultural state. Recent data that has been issued from the 2001 National Census showed that there were 4.6 million people from ethnic minorities (i.e. not English, Scottish, Welsh and Northern Irish) in the UK in 2001, making up 7.9% of the total population.

This diversity has lead to frequent acknowledgements by the media, politicians and by public officials that the UK is a multi-faith and multi-ethnic society, and the UK has been committed to a formal policy of integration and equal rights without cultural assimilation since the 1970s. All the major political parties share this general commitment: only the relatively small and far-right British National Party contests this consensus. Nevertheless, racism, xenophobia and prejudice against particular religious groups (especially Islam) remain a real problem within the UK.

Also, certain ethnic minorities continue to suffer from high rates of unemployment, social exclusion and poverty, including the native Traveller communities. Media campaigns against asylum-seekers and Travellers has contributed to greater hostility towards these particular groups. The events of September 11<sup>th</sup> and the London suicide bombings in July 2005 have had a similar impact upon British Muslim community: the suicide bombings have also led to a prominent national debate upon the need for unifying common ‘British’ values, as a way of achieving greater social cohesion without demanding assimilation.

Some prejudice also exists against disabled persons and persons of different sexual orientation, and age discrimination is not unknown. However, in recent years, there has been much wider social acceptance of the rights of gay men and women to full equality across the political and media spectrum, and the UK has introduced comprehensive civil partnership legislation that permits same-sex couples to register their partnership and obtain equivalent legal rights as those available to opposite-sex married couples. In Northern Ireland, the ongoing tensions between the Unionist/Protestant majority and Nationalist/Catholic minority continue to generate sectarian division, which can also arise in Scotland.

The UK permits a very limited scope in law for the use of preferential treatment for disadvantaged groups, but has introduced a wide variety of other forms of positive action programmes across the different discrimination grounds. Since 2000, a series of positive duties have been imposed upon public authorities to promote equality of opportunity on the grounds of race/ethnicity, disability and gender, while a similar duty in Northern Ireland extends across all of the six equality grounds. Regional assemblies in Scotland and Wales, as well as local authorities across England and some private companies have also adopted similar forms of positive action strategy across some or all of the equality grounds. Private employers are also subject to monitoring requirements and obligations to take action to remedy under-representation of either of the two main communities in Northern Ireland. There is extensive consultation by central, regional and local government bodies with NGOs, social partners and local communities on equality issues: sometimes, this is done in an *ad hoc* manner, sometimes in a more systematic manner involving the extensive use of regulatory impact assessment and other policy and consultation tools (especially in Northern Ireland).

The Discrimination Law Review, a recent analysis of the scope of GB discrimination law, has proposed a series of reforms. The recently introduced Equality Bill is designed to implement many of the Review's proposals: in particular, it aims to codify and clarify existing UK law, extend the ability of employers to adopt positive action measures to promote equality and will impose a single cross-ground general equality duty on all GB public authorities. Consultations are proceeding in Northern Ireland on the possibility of a single equality act for the separate Northern Irish legislation as well.

## 2. Main legislation

As the UK has no written constitution, legislation is the primary tool for establishing anti-discrimination law in the UK. The UK has ratified all the major international human rights treaties, including the European Convention on Human Rights, the UN Covenants, CEDAW, CERD, the Convention Against Torture and the Convention on the Rights of the Child. It has also ratified the main Council of Europe human rights instruments, including the ECHR, the Charter on Minority Languages and the Convention on Minority Rights. International treaties are not directly applicable in UK law unless incorporated by an Act of Parliament, so offer little protection against discrimination in domestic law, although they can be used to interpret legislation in certain circumstances. However, the Human Rights Act 1998, which incorporates the ECHR into UK law, can provide valuable protection in some contexts against discrimination and acts as a quite effective substitute for a constitutional bill of rights. The UK courts have also recognised the existence of a general principle of equality and non-discrimination in the common law.



Anti-discrimination legislation in the UK was first introduced in the field of race/ethnicity in the 1960s. It mainly consists of civil law provisions: however, incitement to racial and religious hatred are classified as criminal offences, racially and religiously aggravated violence are treated as severe offences, and some criminal sanctions are imposed for various other offences. This civil anti-discrimination law applies across all of Great Britain: in Northern Ireland, a separate legislative framework has been introduced for political and constitutional reasons.

The Race Relations Act 1976 (with subsequent amending legislation) prohibits direct and indirect discrimination on the grounds of ethnicity/colour/race/national origin and nationality in employment and occupation, access to goods and services, education, housing and the performance of public functions. The Disability Discrimination Act 1995 (with subsequent amending legislation) prohibits direct discrimination and unjustified less favourable treatment on the grounds of being disabled in employment and occupation, access to goods and services, education, housing and the performance of public functions: it also requires reasonable accommodation to be made for disabled persons across these areas. Some adjustments were made to both sets of legislation by regulations in 2003 to ensure conformity with the requirements of the Framework Equality Directive 2000. Equivalent legislation exists in Northern Ireland.

Regulations were also introduced in 2003 to give effect to the Directive by prohibiting discrimination in employment and occupation on the basis of religious belief or sexual orientation: previously, discrimination on the grounds of religious belief was only prohibited if it constituted indirect race discrimination. The subsequent Equality Act 2006 has extended protection against discrimination on the grounds of religious belief to education, housing, the provision of goods and services and to the performance of public functions. The Act also permits the government to introduce regulations making similar provision for discrimination on the grounds of sexual orientation: such regulations have recently become law in Northern Ireland and Britain. In Northern Ireland, successive Fair Employment and Treatment Orders have prohibited discrimination on the grounds of religious belief or political opinion in employment and occupation, housing, education and access to goods and services.

The UK took advantage of the extension period permitted by the Framework Equality Directive for the implementation of the Directive's provisions on age, but regulations prohibiting unjustified direct and indirect age discrimination, as well as harassment related to age and victimisation, have become law. The regulations provide for several specific exceptions to this general prohibition on unjustified age discrimination, some of which have generated controversy due to concerns about their width. The recent decision of the ECJ in the *Age Concern* case has established the appropriate approach to be adopted by UK courts in assessing whether the most controversial of these exceptions, the ability of employers to establish a mandatory retirement age from the age of 65, is objectively justified.

### **3. Main principles and definitions**

UK anti-discrimination legislation has developed in a piecemeal manner over time and differences exist between the definitions of key concepts used in the different statutes, especially where existing legislation has been modified to comply with EU law.



The Discrimination Law Review proposed a codification and simplification of the existing complex framework of GB law. The recently introduced Equality Bill, as noted above, is designed to achieve this codification and clarification.

There is no definition in statute or case law of “race” or “racial origin”: the legislation prohibits discrimination on “racial grounds”, which are defined as “*any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins*”. The meaning of “ethnic origins” and “ethnic group” has been clarified by the UK courts through precedent. “Religion”, “belief”, “age” or “sexual orientation” are not defined in detail in the various UK statutes that deal with these grounds of discrimination. Regulation 2(1) of the GB Employment Equality (Religion or Belief) Regulations 2003 defines “religion or belief” as “any religion, religious belief or similar philosophical belief”: sections 44 and 77 of the new Equality Act 2006 have slightly clarified this definition. The GB Employment Equality (Sexual Orientation) Regulations 2003 define “sexual orientation” as “a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex”.

The Disability Discrimination Act defines a “disabled person” as a “person who has a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities”. The case-law has established that a disability will only be considered to have “substantial and long-term adverse effect” if it impacts substantially upon how the plaintiff performs day-to-day activities, and has lasted for at least 12 months, or the period for which it is likely to last is at least 12 months, or it is likely to last the rest of the person's life. This appears to be in broad compliance with the decision of the European Court of Justice Case C-13/05, *Chacón Navas*, but the difficulties of satisfying this test have given rise to considerable criticism. Recent case-law has seen the UK employment tribunals refer to the *Chacón Navas* decision as a guide to applying the statutory definition.

There is a consistent definition of direct discrimination across all UK legislation (although not specifically labelled as such): “*a person discriminates against another person on racial grounds/on grounds of sexual orientation/ on grounds of religion or belief if he treats that other less favourably than he treats or would treat other persons.*” Reg. 3 of the age regulations adopt a similar approach, except that it permits direct age discrimination to be considered objectively justified in line with the Directive. In no other situation can direct discrimination be justified. Each of the UK laws includes a further provision making clear the need to have a relevant (real or hypothetical) comparator. The race discrimination legislation makes segregation on racial grounds a form of direct discrimination.

The 2003 Regulations which gave effect to the 2000 Directive introduced a new definition of indirect discrimination that applies to all activities within the scope of the Directive across the different equality grounds (with the exception of disability: see below).

*“A person ('A') discriminates against another person ('B') if ... A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same ethnic origin/sexual orientation/religion or belief as B, but (i) which puts or would put persons of the same ethnic origin/sexual orientation/religion or belief as B at a particular disadvantage when compared with other persons; (ii) which puts B at that disadvantage, and; (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.”*

The age regulations adopt a similar definition.

The original definition of indirect discrimination that was used in the UK race and gender discrimination legislation continues to apply where the ground of discrimination is nationality or where the activity in question falls outside the scope of the 2000 Directives. The Equality Act 2006 also uses a slightly different and potentially weaker definition in prohibiting indirect discrimination on the grounds of religion or belief in the provision of goods and services, as do the regulations introduced to prohibit discrimination in the same areas on the grounds of sexual orientation.

The Equality Bill recently introduced into the UK Parliament has proposed that the definition of indirect discrimination and objective justification used in the 2003 Regulations and set out above should be used across all the equality grounds.

The Disability Discrimination Act (DDA) does not prohibit indirect discrimination, although the UK government has recently examined whether this should be altered. The DDA (s. 3A) at present does however prohibit three different concepts of discrimination:

- a) Discrimination for a reason relating to a disabled person's disability, which can be objectively justified;
- b) Direct discrimination on the grounds of a person's disability in employment and occupation, i.e. where a person is treated differently because of the fact he or she is disabled and not for a related reason, which cannot be justified in law, and
- c) Discrimination by virtue of a failure to comply with the duty to make reasonable adjustments, which cannot be justified in the employment and occupation context but can in the context of goods and services.

Some instances of “less favourable treatment for a reason which relates to the disabled person's disability”, and failures to make reasonable adjustment where required to do so by the legislation, may be comparable in effect to indirect discrimination in some respects, but perhaps not all. In addition, the recent decision of the House of Lords in the *Malcolm* case has made it more difficult to establish the existence of less favourable treatment for a reason related to a disability, which has led to the UK Government considering whether to reform UK law by also prohibiting indirect discrimination on the grounds of disability. However, the recently published Equality Bill when and if enacted will prohibit direct and indirect discrimination on the grounds of disability, while also prohibiting treatment which is detrimental because of a person's disability ('discrimination arising from disability'), thereby avoiding the comparator requirement imposed by *Malcolm*.





UK law on disability and age discrimination did not prohibit discrimination based on assumed or perceived characteristics as a disabled person or on association with a disabled person. However, the UK law prohibiting discrimination on grounds of race and ethnic or national origins, religion or belief and sexual orientation does include prohibitions against discrimination based on assumed characteristics and association, either by explicit provision or by implication established through case-law. Now, following the decision of the European Court of Justice in the case of *Coleman v. Attridge Law*, employment tribunals interpret the DDA as covering discrimination based on associated with a person with a disability, and the recently introduced Equality Bill provides that discrimination based on association and perception will be prohibited as a form of direct discrimination across all the six equality grounds.

A common definition of harassment has been incorporated into the legislation that covers the scope of the 2000 Directives across all the equality grounds, as well as in the age regulations. It provides that a person subjects another person to harassment where, on racial grounds/on grounds of sexual orientation/religion or belief, he or she engages in unwanted conduct which has the purpose or effect of – (a) violating the other person's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person, and if it could, in all the circumstances (including in particular the perception of the person alleging harassment) be reasonably considered to have this effect.

Until these 2003 Regulations came into force, there was no definition of harassment in the UK anti-discrimination legislation, but case-law established that the race, gender and disability discrimination legislation prohibited harassment. The definition of harassment that emerged from this case-law is still applied outside the scope of the Directives. The new statutory definition introduced in 2003 for activities within the Directives has been criticised by some commentators for possibly narrowing the existing protection against racial and disability harassment, and therefore may conflict with Article 6.2 of the Race Directive. The Equality Bill alters this position to some degree, providing that harassment 'related to' a protected characteristic is prohibited under GB law.

Victimisation is prohibited across all the equality grounds: however, an issue has arisen in the case-law as to whether Directive 2000/78/EC requires a shift in the burden of proof in a victimisation case. Instructions to discriminate and pressure or inducement to discriminate are both explicitly prohibited under national law for grounds of race, disability, age and, in NI religious belief or political opinion. Instructions to discriminate on grounds of sexual orientation and religion or belief in GB are not explicitly prohibited, but may be implicitly covered in certain circumstances in both GB and NI. Under the UK legislation, the power of enforcement of the prohibition of discriminatory instructions lies solely with the new Equality and Human Rights Commission and the Equality Commission for Northern Ireland. Individuals can only seek legal redress for instructions to discriminate in NI when it concerns religious belief or political opinion, or in GB when they have suffered an individual detriment, or in cases based on the age ground, where again an individual detriment may have to be shown to exist.



Similarly, the prohibition on discriminatory job advertisements contained in the race, gender and disability discrimination legislation can only be enforced by the equality commissions: following the recent *Feryn* decision of the ECJ, this will have to be amended to ensure conformity with the Directives, as will the failure of UK law to prohibit job advertisements that discriminate on the grounds of sexual orientation, religion or belief and age. Provisions in the Equality Bill attempt to clarify that individuals who suffer a detriment (including being deterred from applying for a job) as a result of advertising or public statements which indicate an intention to discriminate on the basis of any of the protected characteristics may bring a legal claim.

A non-anticipatory duty to provide reasonable accommodation is established in the DDA (s.4A) by a parallel set of duties on public and private sector employers to make reasonable adjustments in relation to their disabled employees or job applicants. Similar, but anticipatory, duties exist in the context of the provision of goods and services, as well as education, and these duties are unique within UK anti-discrimination laws. Employers do not have a duty to make reasonable adjustments if they do not know a person is disabled and could not reasonably be expected to know.

The DDA does not provide an exception for genuine and determining occupational requirements. The race discrimination legislation originally listed four types of jobs where being of a particular racial group could be a genuine occupational qualification. For the ground of nationality, those exceptions remain unchanged: the Discrimination Law Review has however proposed the removal of these specific exceptions. For grounds of race and ethnic and national origins, the exceptions have been replaced by a new generic rule for genuine and determining occupational requirement, and this also forms part of the regulations on discrimination on the grounds of sexual orientation, religion and belief and age. Specific exemptions also exist in the regulations on sexual orientation and religious discrimination that reflect Articles 4(1) and 4(2) of the Directive. This has generated some controversy, but the UK courts have indicated that they will give a narrow interpretation to these exceptions. A specific exception for benefits related to 'marital status', originally contained in the 2003 Regulations, has been amended now following the introduction of civil partnerships for same-sex couples in the Civil Partnership Act 2004. As discussed above, the age regulations make provision for specific exceptions, including exceptions for mandatory retirement, age differences in minimum wage schemes and seniority-linked pay differentials. The approach to be adopted by the UK courts in assessing the objective justification for the mandatory retirement exception has been recently established by the ECJ in the *Age Concern* decision.

Different exceptions exist for national security and public order across the various legislative instruments. The Armed Forces are largely exempt. Outside the scope of the 2000 Directives, exceptions exist for actions authorised by other statutes.

Research has shown that the problem of multiple discrimination, or 'intersectional discrimination', may be relatively widespread. This need to find solutions to the problem of multiple discrimination has been one of the main reasons for the establishment of the single Equality and Human Rights Commission in GB: see below. However, little has been done to develop legal rules to address this problem. There have been few cases where multiple discrimination points have been argued.



The UK courts have considered that claimants making claims for multiple discrimination must make separate discrimination claims on each of the different relevant grounds of race, ethnicity and national origin, and such claims will fail if there is insufficient evidence to make out a successful case in respect of any one of these separate claims. Academic and political discussions on how to resolve this problem continue. In the recent Discrimination Law Review, the government took the position that there was no clear evidence that a change in the existing legislative framework was necessary to deal with cases involving multiple discrimination. However, the government has recently published a consultation paper seeking views on a new proposal to include a prohibition on discrimination based on a combination of any two of the key protected characteristics in the final text of the Equality Bill.

#### **4. Material scope**

The UK anti-discrimination legislation applies to all sectors of employment, both public and private. It also applies to some but possibly not all forms of self employment, which may fall short of the Directives, especially where voluntary work related to self-employment is concerned. Discrimination in the provision of goods and services, housing, education, social protection including social security and health care, social advantages and the performance of public functions is also now prohibited across all the equality grounds except age. The Discrimination Law Review consulted on whether the prohibition on age discrimination should be extended, and the recently introduced Equality Bill extends protection against age discrimination to the provision of goods and services, health care, social advantages and the performance of public functions (but not for children under the age of 18).

#### **5. Enforcing the law**

Individuals who consider they have been discriminated against can bring legal proceedings, with cases involving allegations of employment-related discrimination (public sector and private sector) going to the employment tribunals (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) going to the civil courts. The main remedy available is damages, which are calculated as in civil proceedings for tort. Injunctive relief can also be obtained. Compensation awards vary across the grounds, and from context to context. As yet, it is too soon to assess average compensation awards for sexual orientation and religion/belief cases. However, in 2004, the average award in disability discrimination cases was £28,889; for race discrimination, £13,720; and for sex discrimination (included here as a comparator) £11,898. Various conciliation or arbitration procedures are also available.

In the UK, there are no restrictions under the normal rules of civil procedure on any organisation offering support to complainants in discrimination cases. Some trade unions, the equality commissions and some specialised NGOs employ qualified lawyers and therefore can and do offer full support to complainants. However, such organisations cannot usually initiate a complaint, except that the equality commissions can bring a case where instructions to discriminate or unlawful advertising is concerned. Anti-discrimination cases are quite common, and attract considerable publicity. However, complainants can suffer from a lack of available skilled advice, assistance and representation in discrimination cases.





Remedies are in general reasonably dissuasive, although the inability of courts and tribunals to order wider remedial measures to be adopted by discriminating organisations is a real problem. The recently introduced Equality Bill extends the powers of courts and tribunals to make recommendations for wider remedial action, but such recommendations will remain non-binding.

All of the relevant UK legislation makes provision for shift of the burden of proof in relation to each of the grounds of discrimination and to all of the activities considered to be within the scope of the Directives. (However, a recent issue has arisen in the case-law as to whether the Directive requires a shift in the burden of proof in victimisation cases.) Evidence obtained through situational testing is admissible if it satisfies the standard tests of fairness and relevance. Statistical evidence is frequently used, and complainants can require employers to provide them with statistical data in certain circumstances.

## **6. Equality bodies**

The three previous GB equality commissions, the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission, have been replaced by a single Equality and Human Rights Commission (EHRC) in October 2007, which can support complainants in legal proceedings, has enforcement powers of its own, and also has powers to promote and encourage respect for equality of opportunity through research, public comments and other methods. There is a separate Equality Commission for Northern Ireland, which has similar functions (and in places, greater powers relating to positive action) as the new EHRC. The UK commissions work with reasonable effectiveness and operational independence, although the EHRC has suffered a series of highly publicised internal disagreements and conflicts.