



## **Executive Summary**

### **Country Report UK 2010 on measures to combat discrimination**

**By Aileen McColgan**

#### **1 Introduction**

The United Kingdom (UK) comprises 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 led 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 Muslims) 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 11 September 2001 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 gay/ lesbian/ bi-sexual/ transgendered people 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 traditionally permitted very limited scope in law for the use of preferential treatment for disadvantaged groups, but 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. Positive action strategies have been adopted at national, regional and local level across the various equality grounds and private employers are also subject to monitoring requirements and obligations to take action to remedy under-representation of either of the two main communities (Catholic and Protestant) 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 Equality Act 2010, which came into force in October 2010, made a number of important changes to equality/ discrimination law in GB. In particular, and in addition to codifying and clarifying the existing law, it significantly extended the ability of employers and others to adopt positive action measures to promote equality, and from April 2011 imposes 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.

The Human Rights Act 1998, which gives effect to the ECHR in 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. Sex discrimination legislation was introduced in 1970 and 1975, disability discrimination in 1995, legislation regulating discrimination on grounds of religion or belief and sexual orientation in 2003 (in the context of employment) and in 2006 and 2007 respectively (in the context of goods and services, housing, education and public functions), and legislation regulating age discrimination in employment in 2006.

The Equality Act 2010 now prohibits direct and indirect discrimination, harassment, victimisation and instructions to discriminate because of race (defined as ethnicity, colour, national origin or nationality), sex (including married or civilly partnered status, pregnancy and gender reassignment), disability, sexual orientation, religion or belief and age in employment and occupation and (other than in the case of married or civilly partnered status or, pending full implementation, age) access to goods and services, education, housing and the performance of public functions. Duties of reasonable accommodation are imposed in relation to disability. The provisions of the Equality Act 2010 are at least broadly in conformity with the requirements of the 2000 Directives, though its material scope is considerably broader. Equivalent legislation exists in Northern Ireland though there is no single equality provision.

### 3 Main principles and definitions

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 to include colour, nationality (including citizenship), and ethnic and national origins (s.9 Equality Act 2010). 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 Equality Act 2010 or the equivalent provisions of NI law. Regulation 10 of the Equality Act 2010 now provides that “Religion means any religion and a reference to religion includes a reference to a lack of religion” and that “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.” “Sexual orientation” is defined by s.12 as “a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex”.

A person is regarded as disabled for the purposes of the Equality Act 2010 (the Act protecting only those with disabilities against disability-related discrimination) if s/he “has a physical or mental impairment ... [which] has a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.” A disability will only be considered to have “substantial and long-term adverse effect” if it impacts substantially upon how the person 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 for 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 GB legislation (s.13 Equality Act 2010): “a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.” S.13(2) goes on to provide that “If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim”, s.13(3) that “If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B”. Only in relation to age can direct discrimination be justified. S.23 of the Equality Act 2010 provides that “On a comparison of cases for the purposes [establishing discrimination] there must be no material difference between the circumstances relating to each case”. In particular, where disability discrimination is at issue: “[t]he circumstances relating to a case include a person’s abilities”. The Equality Act 2010 also makes segregation on racial grounds a form of direct discrimination (s.13(5)). The position in NI is broadly similar though the definition of direct discrimination refers to less favourable treatment “on grounds of” rather than “because of” the protected characteristic.

The Equality Act 2010 provides (s.19) that “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”, s.19(2) further providing that “a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim”. The prohibition against indirect discrimination applies in GB to all the protected grounds whereas, in NI, there is not as yet any prohibition on indirect discrimination relate to disability. The definition of indirect discrimination in NI are materially similar to that in the Equality Act 2010 except that, where the discrimination at issue falls outside the scope of the 2000 Directives, the original definition of indirect discrimination that was used in the UK race and gender discrimination legislation continues to apply.

Insofar as it applies to disability, the Equality Act prohibits direct and indirect discrimination and also prohibits unjustified discrimination “arising from disability” (s.15), and failures to make reasonable adjustments (ss.20, 21). S.15 defines the former as occurring where “A treats B unfavourably because of something arising in consequence of B’s disability, and ... A cannot show that the treatment is a proportionate means of achieving a legitimate aim”, unless “A shows that A did not know, and could not reasonably have been expected to know, that B had the disability”. In NI, the DDA does not prohibit indirect discrimination but does (s. 3A) 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, though the decision of the House of Lords in the *Malcolm* case made it more difficult to establish the existence of less favourable treatment for a reason related to a disability. The replacement of “discrimination for a reason relating to a disabled person’s disability” in the Equality act 2010 by discrimination “because of something arising in consequence of [a disabled person’s] disability” is designed to avoid the comparator requirement imposed by *Malcolm*.

The Equality Act 2010 is thought, because of prohibition of less favourable treatment “because of” any protected ground, is thought to regulate all discrimination based on assumed or perceived characteristics. In NI, robust judicial interpretation will be required to achieve this in relation to age and disability as the relevant legislation refers in each case to discrimination on the grounds of the age or disability of the person discriminated against. Such interpretation was accepted by the EAT as being possible in relation to disability following the decision of the European Court of Justice in the case of *Coleman v. Attridge Law*.

The Equality Act 2010 defines harassment as occurring (s.26(1)) where “(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—(i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”. Section 26(2) further provides that “A also harasses B if—(a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b)” and s.26(3) that “



A also harasses B if—(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, (b) the conduct has the purpose or effect referred to in subsection (1)(b), and (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct". The Equality Act imposes a partly objective test to the question whether conduct which is not intended to violate dignity etc can nevertheless be regarded as having the effect of so doing, s.26(4) providing that "In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—(a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

In NI a common definition of harassment has been incorporated into the legislation that covers the scope of the 2000 Directives across all the equality grounds, which is broadly similar to that in the Equality Act 2010, except that it refers to unwanted conduct which is engaged in "on [a protected] ground" rather than unwanted conduct "related to" a protected ground. Prior to the regulation of harassment by the 2000 Directives and the transposition of those Directives into domestic law, UK case-law had established that the race, gender and disability discrimination legislation prohibited harassment as a form of direct discrimination. The definition of harassment that emerged from this case-law is still applied to harassment falling outside the scope of the Directives and therefore outside the scope of the NI (though not the GM) legislation.

Victimisation is prohibited across all the equality grounds in GB and NI, the definitions which apply differing between the two jurisdictions. In GB the Equality Act 2010 provides (s.27(1)) that "A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act", s.27(2) defining as a "protected act" "(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act". The approach in NI is similar save that the person alleging victimization has to establish *less favourable* treatment on the ground of his or her having performed the protected act, a formulation which has given rise to significant difficulty at times. In both GB and in NI the protection from victimization does not apply if the allegation made by the victim was *both* untrue *and* made in bad faith.

Section 111 EqA provides that: "(1) A person (A) must not" instruct or cause or induce another person "(B) to do in relation to a third person (C)" anything which breaches the Act. In NI, both instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited in the case of religious belief or political opinion.

In NI, instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited on all the protected grounds, but only in the case of religion/ political belief and age can an individual bring enforcement action. In other cases the Equality Commission alone can act. Having said this, there is authority that a person who is instructed to discriminate against another can bring enforcement proceedings against the instructor where (as in *Weathersfield Ltd. v Sargent*, where the instruction was issued by an employer<sup>1</sup>) the instruction amounts to the imposition of a detriment on the person to whom it is issued.

Discriminatory advertisements are currently only explicitly prohibited in Northern Ireland, and then only when they relate to the race, religion/ belief or disability. Only the ECNI has the power to bring enforcement action in respect of such advertisements. Individuals across the UK may only bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, (as, for example, where they apply for the posts in question and are rejected on the relevant ground). Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision and it did not take the opportunity provided by the EqA to extend legislation in this area, instead removing such prohibitions (enforceable by the EHRC) as had previously applied

The EqA provides an exception for genuine and determining occupational requirements together with slightly broader exceptions applicable to religious organisations. In summary, a person (A) may discriminate in relation to appointments to jobs, etc, by requiring another person “to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work— (a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it). This exception applies across all the protected grounds. In addition, organisations whose “ethos [is] based on religion or belief” may require workers to be of a particular religion or belief where “having regard to that ethos and to the nature or context of the work—(a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it). Further, where employment is “for the purposes of an organised religion”, the employer may apply a requirement “to be of a particular sex” or “not to be a transsexual person” or “not to be married or a civil partner” or “not to be married to, or the civil partner of, a person who has a living former spouse or civil partner” or “a requirement relating to circumstances in which a marriage or civil partnership came to an end” or “related to sexual orientation” where such is necessary to comply with the doctrines of the religion or where “because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers”.

---

<sup>1</sup> [1999] IRLR 94

In NI, the DDA does not provide an exception for genuine and determining occupational requirements. In relation to nationality, NI's RRO lists four types of jobs where being of a particular nationality could be a genuine occupational qualification whereas, in relation to grounds of race and ethnic and national origins, the exceptions have been replaced by a new generic rule for genuine and determining occupational requirement which is materially identical to that in the Equality Act 2010 and which also forms part of the regulations on discrimination on the grounds of sexual orientation, religion and belief and age in NI. NI legislation also contains provisions broadly along the lines of the wider GOQs discussed above which the Equality Act 2010 applies to employment by organisations whose ethos is based on religion or belief, and to employment "for the purposes of an organized religion". While the broader GOQs in GM and NI legislation may be broader than permitted by Article 4(1)( and (2) of Directive 2000/78/EC, the UK courts have indicated that they will give a narrow interpretation to these exceptions in order to reflect EU law.

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 Equality Act 2010 and NI Age Regulations make provision for specific exceptions, including exceptions for mandatory retirement (until April 2011), age differences in minimum wage schemes and seniority-linked pay differentials.

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 was 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. Where they have, 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 and the Equality Act 2010 made provision for claims to be brought on a combination of two (but not more) grounds. The Coalition Government announced in March 2011 that this provision would not be brought into effect.

#### **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. Having said this, UK law does not contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the European Court of Justice. The Equality Act 2010 contains provisions extending protection against age discrimination for GB to the provision of goods and services, health care, social advantages and the performance of public functions. These would not apply to children under the age of 18. The Coalition Government began consultations in March 2011 on how these provisions might be implemented.

## 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. The average, median and maximum awards made by employment tribunals across the various grounds are set out in the table immediately below. No figures are available from county courts which enforce the non employment-related provisions of the legislation. Various conciliation or arbitration procedures are also available.

### Employment tribunal awards 2009-2010<sup>2</sup>

Protected ground	Average award	Median award	Maximum award
Race	£18,584	£5,392	£374,922
Disability	£52,087	£8,553	£729,347
Sexual orientation	£20,384	£5,000	£163,725
Religion/ belief	£4,886	£5,000	£9,500
Age	£10,931	£5,868	£48,710

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.

<sup>2</sup> <http://www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf>

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 Equality Act 2010 has extended the powers of courts and tribunals to make recommendations for wider remedial action, though 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.

## 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. Problematic, as regards the perceived independence of the EHRC, in particular, is the fact that the re-appointment of the current Chair of that Committee, Trevor Phillips, in July 2009 was secured by Government Minister Harriet Harman without either open competition or Parliamentary scrutiny and despite the resignation of six commissioners because of disagreements with the Chair. The Joint Committee on Human Rights warned, in March 2010, that “The minister’s decision simply to reappoint Mr Phillips without any parliamentary involvement could undermine the perceived independence of the commission and put its accreditation as a national human rights institution at risk.” It was reported in November 2010 that the Equality and Human Rights Commission “has had to agree to a cut in its annual budget of 55%” (to £32 million) as a result of existing and planned cuts to government expenditure in the wake of the May 2010 general election.<sup>3</sup>

The EOR reports a “statement on 14 October from the EHRC’s sponsoring department, the Government Equalities Office, which says that the Commission will be “radically reformed”.

<sup>3</sup> *Equal Opportunities Review* November 2010, Issue 206, 3

It explains that “the EHRC’s work will be refocused on its core functions of regulating equality and anti-discrimination law in Great Britain, of fulfilling EU equality requirements and of being a National Human Rights Institution.” Staff are to be reduced significantly, in particular “the proposed new structure will remove many of the posts dealing with the public, such as caseworkers, advisers, policy officers, grants officers and regional staff, although a new layer of very senior staff will be created”, and the Government is “considering the scope for transferring some of EHRC’s functions and services to government departments or contracting with private or voluntary sector bodies to undertake them.”