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Country report

Gender equality

How are EU rules transposed into
national law?

United Kingdom

Grace James

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI). Great Britain (GB) includes England, Wales and Scotland.¹ The UK, which has three legal jurisdictions (England and Wales, Scotland and Northern Ireland), is a parliamentary democracy with neither a written constitution prescribing separation of legislative, executive and judicial powers, nor an entrenched constitutional bill of rights.

All UK-wide law-making powers are vested in the Westminster Parliament, which legislates through both primary legislation (Acts of Parliament) and secondary laws (Statutory Instruments). These laws are subsequently 'interpreted' by the courts to create a body of case law which is based on the binding rules of legal precedent. The Westminster Parliament can only legislate in the areas which have not devolved to the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly. However it can legislate in those areas where one of those legislatures consents to legislation being passed on its behalf. Of importance in this context is that equalities legislation in Scotland and Wales is reserved to the Westminster Parliament - in other words it is only Westminster that can legislate in the area of equalities for England, Wales and Scotland.

The Northern Ireland Assembly has competence to legislate in the area of equalities

Section 2(2) of the European Communities Act 1972 permits the transposition of EU legislation into UK legislation by regulations without the need for primary legislation. However, European Union (Notification of Withdrawal) Act 2017 was passed into law on 16 March 2017 which gave the Prime Minister the legal authority to notify under Article 50. This notification was then given on 29 March 2017. The 'Repeal Bill' will repeal the European Communities Act 1972 on the day that the UK leaves the EU in March 2019. The government's approach is to 'convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU'².

Anti-discrimination legislation in the UK is enforced mainly through the civil courts, with the exception of some minor provisions that provide for criminal sanctions. The relevant judicial systems in the three jurisdictions within the UK (England and Wales, Scotland and Northern Ireland) are similar but not identical. In each there are first-instance tribunals in which all employment-related cases are heard, and separate civil courts (county courts in NI and England and Wales, sheriff courts in Scotland) for other civil claims. The final civil appeal court for all three jurisdictions is the Supreme Court which came into being in October 2009, replacing the Appellate Committee of the House of Lords (and the Judicial Committee of the Privy Council). Non-employment cases are generally heard in the county courts or (in the case of some public law claims, the Administrative Court) with appeal to the Court of Appeal and Supreme Court.

1.2 List of main legislation transposing and implementing Directives

GB

- The Equality Act 2010 (EqA)
- The Employment Rights Act 1996

¹ For purposes of transposition of EU legislation, the UK also has responsibility for Gibraltar. To comply with the Directives 2000/43/EC and 2000/78/EC the Gibraltar legislature enacted the Equal Opportunities Ordinance 2004 (or Act), which came into force on 11 March 2004. This legislation has been replaced by the Equal Opportunities Act 2006. The Gibraltar legislation is not discussed in this report.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf at para 1.12 (accessed 22/03/18).

- The Maternity and Parental Leave etc. Regulations 1999

NI

- The Sex Discrimination (Northern Ireland) Order 1976
- Equal Pay Act (NI) 1970
- The Employment Rights (Northern Ireland) Order 1996
- The Maternity and Parental Leave etc. (Northern Ireland) Regulations 1999

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

No.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No. The UK constitution is unwritten and so by definition contains no articles dealing with non-discrimination. The Human Rights Act 1998, however, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Article 14 ECHR *quasi*-constitutional force. (Public authorities can only act contrary to that provision if required by primary law to do so, with a very strong interpretive obligation applying to the courts in their interpretation of such legislation, while the devolved Parliaments in Scotland, Wales and Northern Ireland may not pass legislation incompatible with the Convention nor may their governments act incompatibly with Convention rights.)

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Yes, by means of the obligation imposed on the courts to construe domestic legislation so far as possible to be compatible with the ECHR.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes. The EqA (in Northern Ireland the Sex Discrimination (Northern Ireland) Order 1976) prohibits sex discrimination. In GB and in NI the legislation also regulates discrimination on grounds of gender reassignment, pregnancy and maternity, married and civilly partnered status, age, disability, race, religion/belief and sexual orientation.

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

In part. In GB Section 11 of the EqA provides that 'In relation to the protected characteristic of sex— (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex'. In NI the Sex Discrimination (Northern Ireland) Order 1976 (SD(NI)O) does not define gender/sex, instead prohibiting discrimination against men, women etc.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

Yes. In GB Section 7 EqA provides that '(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex', that '(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment', and that '(3) In relation to the protected characteristic of gender reassignment—(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons'. The term 'gender identity' is not used and gender must be reassigned but there is no requirement for any physical intervention, much less gender reassignment surgery. In NI the SD(NI)O makes materially similar provisions (Articles 2 & 4A).

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. In the UK direct discrimination is prohibited in national law. It is defined as follows:

GB

- Less favourable treatment 'because of a protected characteristic': Section 13 EqA:
 - o Section 23 EqA imposes an explicitly comparative approach except in the case of pregnancy (where the requirement is for unfavourable rather than less favourable treatment);³

NI

- The SD(NI)O (Article 3) defines direct discrimination as less favourable treatment 'on the ground of the complainant's] sex'. Article 7 is in materially similar terms to Section 23 EqA (above).

The author believes that the EqA's definition complies with the EU definition. The SD(NI)O's definition does not since it requires that the discrimination is on grounds of the complainant's sex.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

In GB discrimination because of pregnancy and maternity are explicitly regulated. They are free-standing grounds of discrimination which removes the need to establish less favourable as distinct from unfavourable, treatment. In NI Article 5A SD(NI)O prohibits

³ A hypothetical comparator is acceptable.

less favourable treatment on grounds of pregnancy etc. It is not clear to the author whether the latter complies with Article 2(2)(c) of Directive 2006/54 given the implied need for a comparator.

- 3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

There were difficulties as regards the recognition of pregnancy and maternity discrimination but these have been resolved.

In 2017 a case arose concerning the application of the concept of direct sex discrimination (under S13 of the EqA) in segregated schools. In *Interim Executive Board of X School v HM Chief Inspector of Education, Children's Services and Skills* (2017) IRLR 30, the High Court held that a faith school's policy of segregating girls and boys when they reached a certain age did not amount to less favourable treatment and therefore no direct sex discrimination had occurred. The Court of Appeal allowed an appeal against the decision: this was heard in November 2017. It held that the correct approach was to look at the treatment from the perspective of an individual girl or boy and that each individual was being denied the opportunity to mix with the opposite sex and that this policy of strict segregation caused a detriment and less favourable treatment for both male and female pupils⁴.

The case clarifies the fact that Parliament did not envisage or intend segregation by sex in co-educational schools (see chapter 1 of Part 6 of the Equality Act 2010- see para 71-3 of the judgment). At paragraph 80 of the judgment the Court of Appeal makes clear that it was not 'the mere fact of segregation which gives rise to discrimination, as would be the situation under section 13(5) in the case of race, but rather it is the impact on the quality of education which the pupils would receive but for their respective sex'.

3.3 Indirect sex discrimination

- 3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. In GB Section 19 EqA defines indirect discrimination as the application to the claimant of a provision, criterion or practice which is also applied to others but which places the claimant, and places or would place others with whom s/he shares a protected characteristic (here sex), at a particular disadvantage by comparison with those who do not share the characteristic, and which cannot be shown to be a proportionate means of achieving a legitimate aim.

- 3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

In the UK statistical evidence in order to establish indirect discrimination is used in practice (though indirect discrimination may be proved without such evidence: *Homer v. Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*).⁵ The use of statistical evidence is common, especially in race and gender cases where its utility may be greatest. There are no real obstacles to the use of statistical evidence in the courts, if the evidence is probative and relevant: the influence of European sex discrimination law

⁴ See <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-executive-board-of-al-hijrah-school-20171013a.pdf>. For an interesting comment, which suggests that some 25 mixed schools will need to reconsider their approach, see The Guardian at <https://www.theguardian.com/education/2017/oct/13/islamic-school-gender-segregation-unlawful-court-of-appeal>.

⁵ [2012] UKSC 15, [2012] IRLR 601.

is strong here, as is experience from the USA and Commonwealth countries. However, of course, there may be circumstances where lawyers or applicants face difficulty in finding relevant statistical evidence. In *London Underground Ltd v. Edwards (No. 2)*, for example, a woman underground train driver was able to establish a *prima facie* case of indirect sex discrimination on the basis of statistics (100 % of the male drivers could comply with a new work roster but only about 95 % of the women drivers -themselves a tiny proportion of the whole).⁶

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

The test is correctly applied by the higher courts; in *Homer v. Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*⁷ the Supreme Court adopted the test in *Bilka-Kaufhaus*. The approach of the lower courts is variable but it is clear that the case law requires them to consider both whether disparately impacting practices serve a legitimate end and whether they are proportionate to that end. In *Hardy & Hansons plc v. Lax*,⁸ for example, in which the claimant was refused flexible working on her return from maternity leave, the Court of Appeal ruled that a court must itself determine whether the employer's requirement for full-time working was 'reasonably necessary'.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are no specific difficulties except perhaps that the courts are sometimes unwilling to take into account the fact that women, as the typical primary carers for children, are disproportionately affected by a refusal to grant flexible working. By way of example, in *Hacking & Paterson v. Wilson* the EAT held that 'Society has ... changed quite dramatically since, for instance the era in which the case of *The Home Office v Holmes* [1984] IRLR 364, [1984] 3 All ER 549, was decided⁹. Many women return to full time employment after childbirth. The childcare arrangements available to some women are such that they cannot work full time. The position of some women is, though, that whilst they are able to access child care arrangements which would enable them to work full time they do not want to do so; for them, part time working is a matter of choice rather than necessity'.¹⁰

There has been some general discussion this year (in the context of other protected characteristics but the principle applies to indirect sex discrimination cases too) around the burden on the claimant to prove why a particular provision, criterion or practice (PCP) puts them or would put them at a particular disadvantage. In 2017 the Supreme Court in *Essop and ors v Home Office (UK Border Agency); Naeem v SoS for Justice (2017) ICR 640* overruled a decision at the Court of Appeal and held that there is no requirement for a claimant to prove the reason *why* a PCP puts or would put a group that shares his or her protected characteristic at a particular disadvantage. So long as there is a causal connection between the PCP and the disadvantage suffered, both by the group and the individual, the claim is established subject to the objective justification defence.

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to

⁶ [1998] IRLR 364, [1999] ICR 494.

⁷ [2012] UKSC 15, [2012] IRLR 601.

⁸ [2005] EWCA Civ 846, [2005] ICR 1565.

⁹ In that case the EAT had taken judicial notice of the fact that women were disproportionately responsible for childcare.

¹⁰ UKEATS/0054/09, [2011] EqLR 19, Paragraph 28.

produce a new and different type of discrimination - explicitly addressed in national legislation?

In the UK prohibition of multiple discrimination is included in the law, though judicial interpretation is required. Express provision is made only in the EqA which provides (Section 14) for the recognition of 'dual discrimination' in cases (involving direct discrimination alone) where 'because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics'. This provision has not come into force, however, and there is no similar provision in the SD(NI)O.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

There is some recognition of multiple discrimination in the case law. In *Ministry of Defence v. DeBique* the EAT upheld a tribunal decision that the claimant, a single mother who had originally been recruited to the British Army from St Vincent and the Grenadines, had been subject to indirect discrimination on grounds of her combined sex and race (which meant that she was particularly disadvantaged by a requirement to be available for work 24 hours a day 7 days a week).¹¹ The EAT ruled that 'the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage.' There is no record of the combined nature of the discrimination having any impact on the level of the EUR 18 333 (£15 000) damages awarded to the claimant in *Ministry of Defence v. DeBique* in respect of injury to her feelings.¹²

The possibility of multiple discrimination was also raised - and the feasibility / lawfulness of raising it was accepted - in *O'Reilly v British Broadcasting Corporation and anor (London Central Employment Tribunal, 11.1.11 (2200423/10))* in which a female presenter over 40, who was dropped from a popular television show when it moved to a primetime slot, argued that she was discriminated against because she was an older woman. In *Hewage v. Grampian Health Board* the Supreme Court accepted that a tribunal had been entitled to find that the claimant had been discriminated against on grounds of sex and race. The Supreme Court did not take issue with the fact that the claimant argued both race and sex discrimination, and that the tribunal did not identify separate facts to support findings of race discrimination and sex discrimination.¹³

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. In GB the EqA provides quite broad provisions permitting the taking of any proportionate positive action where a person 'reasonably thinks that— (a) persons who share a protected characteristic (this includes sex) suffer a disadvantage connected to the characteristic, (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or (c) participation in an activity by persons who share a protected characteristic is disproportionately low' (Section 158). Where employment is concerned, Section 159 allows more favourable treatment of those from a disadvantaged or under-represented group as regards recruitment or promotion

¹¹ [2010] IRLR 471.

¹² *DeBique v. Ministry of Defence (No.2)*, UKEAT/0075/11/SM http://www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html.

¹³ [2012] UKSC 37, [2012] IRLR 870, [2012] EqLR 884, https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0050_Judgment.pdf, accessed 6 June 2016.

where (but only where) the person appointed/promoted is as qualified as others over whom s/he is preferred. These provisions (in particular Section 159) were relatively controversial in the debates about the Equality Bill (as it then was) but have generated little discussion since.

The EqA also makes provision (Section 104) for positive action in the selection of candidates for election. Those provisions are intended to enable parties in GB to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration. Women-only shortlists for elections are lawful.

In NI, as in GB, some limited training and encouragement measures are permitted in the employment context in relation to sex (Articles 48-50 SD(NI)O), largely in the form of targeted training and encouragement to apply. In the expert's view the legislation in UK and NI complies with EU law.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Not particularly except that because the positive action provisions are regarded as exceptions to equality there is concern among employers and others about the legality of such action.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

The UK has not adopted specific legislation imposing quotas on board membership or making special provision permitting positive action in this area, preferring instead to adopt soft targets for improving representation. As at October 2015 women accounted for 26.1 % of board members in the UK's top 100 companies, meeting the target of 25 % set in 2011, and 19 % in the top 250. The current target of 33% of women on boards for the FTSE 350 by 2020¹⁴ is voluntary – a 'soft' target – as are the other recommendations of the Davies Report and the more recent Hampton-Alexander Review¹⁵. The Scottish Government's 'Partnership for Change' in 2015¹⁶ to encourage organizations (public, private and third sector) to commit to achieving parity (50/50) between men and women on boards by 2020, is also voluntary.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

Yes. UK legislation allows various measures to improve the participation of women in political life including all-women shortlists for parliamentary seats and seats in the devolved Parliaments/Assemblies. The broad public-sector equality duty (Equality Act 2010 S149), in force since 2011, states that those subject to it must, in the exercise of their functions, have due regard to, amongst other things, advancing equality of opportunity. The legislation explains how this includes encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

¹⁴ Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> (accessed 30 May 2017).

¹⁵ <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom> (accessed 1 June 2017).

¹⁶ See <http://onescotland.org/equality-themes/5050-by-2020/> (accessed 30 May 2017).

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. In the UK, harassment is defined (so far as relevant) as unwanted conduct related to a relevant protected characteristic (including sex) the purpose or effect of which is to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him or her.¹⁷ Section 26 EqA, which applies in GB, further provides that, in deciding whether conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, account must be taken of:

- the perception of the claimant;
- the other circumstances of the case;
- whether it is reasonable for the conduct to have that effect.

A similar definition of harassment applies in NI under the SD(NI)O (Article 6A). The definition complies with that in Article 2(1)(c) of Directive 2006/54.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The prohibition applies to employment; education; housing; the provision of goods, facilities and services; and the delivery of public functions.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. In GB Section 26 EqA provides that harassment also occurs where (1) a person engages in 'unwanted conduct of a sexual nature' the purpose or effect of which is to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him or her or (2) a person engages in such conduct 'that is related to gender reassignment or sex', with such purpose or effect, and 'because of [the claimant's] rejection of or submission to the conduct, [the harasser] treats [the claimant] less favourably than [he or she would have done] if [the claimant] had not rejected or submitted to the conduct'. A similar definition of harassment applies in NI under the SD(NI)O (Article 6A). The definition complies with that in Article 2(1)(c) of Directive 2006/54.

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The prohibition applies to employment; education; housing; the provision of goods, facilities and services; and the delivery of public functions.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Not in explicit terms, but the enforcement of remedies available in respect of and generally the treatment of harassment and sexual harassment in the UK are the same as that of sex discrimination.

3.7 Instruction to discriminate

¹⁷ Section 26 EqA.

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. In the UK instructions to discriminate are prohibited in national law. Instructions are not defined. Section 111 EqA, which applies in GB, prohibits the causing or inducement of discrimination as well as the issue of instructions to discriminate. The SD(NI)O expressly prohibits instructions and pressure to discriminate (Articles 40 & 41).

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No. There are no difficulties in this regard.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

In GB Section 13 EqA, which defines direct discrimination, refers to discrimination 'because of' a protected characteristic which is accepted as being sufficiently wide to encompass discrimination based on association with persons with particular characteristics. In *Saini v. All Saints Haque Centre*, for example, the EAT accepted that harassment 'on grounds of religion or belief' extended to cover harassment of the claimant because of the religion or belief of his colleague.¹⁸ The case was concerned with religion rather than sex but the legislative provision is the same.

In NI the definition of direct discrimination in the SD(NI)O (Article 3), of less favourable treatment on the ground of the claimant's sex does not on its face appear to extend to discrimination based on association with persons with particular characteristics but the Northern Irish courts are virtually certain to follow the approach of the EAT in *EBR Attridge Law LLP & Anor v. Coleman (No. 2)*¹⁹ and interpret the relevant provision to cover discrimination by association, and assumed discrimination.

¹⁸ [2009] IRLR 74, http://www.bailii.org/uk/cases/UKCAT/2008/0227_08_2410.html, accessed 6 June 2016. Support for the argument that associated discrimination is caught by the statutory regime is also provided by the decision of the House of Lords in *Ahsan v. Watt*, [2007] UKHL 51, [2008] 1 AC 696 <http://www.bailii.org/uk/cases/UKHL/2007/51.html>, accessed 6 June 2016.

¹⁹ [2010] IRLR 10, http://www.bailii.org/uk/cases/UKCAT/2009/0071_09_3010.html, accessed 6 June 2016.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. In GB the EqA provides a right to equal pay for equal work, the latter being defined by Section 65(1)(c) EqA to include work of equal value. In NI the Equal Pay (Northern Ireland) Act 1970 (EqP(NI)A) makes materially similar provision (Section 1).

4.1.2 Is the concept of pay defined in national legislation?

No.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Not as such. The EqA and, in NI, EqP(NI)A, provide a right to equal pay for equal work subject to the employer being able to show that the difference in pay is genuinely due to a material factor which is not the difference in sex (Section 69 EqA, Section 1 Equal Pay (NI) Act 1970). A factor will be 'not the difference in sex' if it is not directly discriminatory and, if it is a factor which impacts disparately on women and men, it is nevertheless justifiable for the employer to rely on it to determine pay. In NI the only challenge to sex discrimination in pay is through this mechanism (i.e. only women who are being paid less than men doing equal work ('like' work, work rated as equivalent by the employer, and work of equal value) can challenge pay discrimination). In GB the EqA provides, in addition, that women can challenge direct pay discrimination even absent a real male comparator doing equal work: Section 71 EqA.

4.1.4 Is a comparator required in national law as regards equal pay?

Yes, in NI where a real comparator is required. In GB a hypothetical comparator may be relied upon but only where direct discrimination is concerned. There is as yet no case law under Section 71 EqA (which allows a hypothetical comparator).

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

Yes. Section 65(6) EqA provides that work is of equal value if it has not been rated as equivalent by any job evaluation scheme carried out by or for the employer but if, nevertheless, it is 'equal ... in terms of the demands made on [the workers] by reference to factors such as effort, skill and decision-making'.²⁰ In NI Section 1(3) EqP(NI)A is in materially similar terms.

4.1.6 Does national (case) law address wage transparency in any way?

Yes. In GB the EqA (Section 78) allows the adoption of regulations requiring large employers (250+) to carry out and publish equal pay audits. In February 2016 the Government published draft Equality Act (Gender Pay Gap Information) Regulations for consultation. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 came into force in the UK on April 6th 2017. It applies to employers in the private and voluntary

²⁰ This is not an exhaustive list, but the legislation does not list any others.

sector with 250 or more employees on the 'snapshot' date of April 5th. Affected employers must now annually publish certain information about gender pay gaps:

1. The difference in mean and median hourly rate of pay for male and female employees;
2. The difference between the mean and median bonuses paid to male and female employees over the 12 month period ending 5th April and the proportion of male and female employees receiving a bonus in that period and
3. The proportions of male and female employees in each of four pay quartiles of the employer's overall pay distribution.

Employers *may* (but are not obliged to) also publish a narrative explaining any pay gaps/disparities and any action / plans they have to address them.

Substantially similar reporting obligations were imposed on many large public sector employers by the Equality Act 2010 (Specific Duties and Public authorities) Regulations 2017 SI 2017/353, which came into force on March 31st 2017.

The legislation is supported by guidance from ACAS (Advisory, Conciliation and Arbitration Service)²¹.

No civil penalties for non-compliance are currently proposed although this is to remain under review,²² but failure to report is 'an unlawful act' and the Equality and Human Rights Commission (EHRC) can take enforcement action (s34 of the Equality Act 2006). They may open an investigation if they suspect a considerable pay gap is being hidden by employers. Reputational risks are also a consideration if employers fail to comply with the regulations and the information is publically available online – see <https://gender-pay-gap.service.gov.uk/Viewing/search-results>.

The EqPA(NI)A does not contain any equivalent provision but there are plans to introduce it; the Employment Act (NI) 2016, which provides for the making of the gender pay reporting regulations, is yet to be progressed but the NI Equality Commission has called for urgent action in this regard. By Section 77, any term of a contract which prohibits or restricts a person from making a 'relevant pay disclosure' to anyone is unenforceable. A relevant pay disclosure is one which is about pay, and which is made for the purpose of finding out whether or to what extent there is a connection between pay and having (or not having) a protected characteristic.

In addition, the EqA (Equal Pay Audits) Regulations 2014 provide that a tribunal must (subject to certain exceptions) require an employer who loses an equal pay claim to carry out an equal pay audit. Again the EqPA(NI)A does not contain any equivalent provisions.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

Not other than in respect of the legislation, above.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

There is no list as such. Any factor which is not directly discriminatory and which, if it is such as to impact disparately on men and women, is nevertheless justified in accordance with EU law is acceptable.

²¹ <http://www.acas.org.uk/index.aspx?articleid=5768> (accessed 22/03/18).

²² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf.

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of outsourcing?

There are many difficulties in practice because the question whether work is of equal value is not one about which workers can be certain in advance of bringing a claim (this being a matter for the employment tribunal to determine). This problem is additional to the issues associated with all equal pay (and, indeed, discrimination) claims: complex laws to navigate, the requirement in practice for (expensive) specialist legal assistance, and the concerns workers have about being victimised for bringing discrimination/equal pay complaints.

In the case of outsourcing, the difficulty (which arises in all equal pay claims) is that the outsourced worker cannot generally use as a comparator a (male) worker who is working for the outsourcer, or for an organisation to which his job has been contracted out (unless this is the same organisation as that employing the claimant). This follows from the decision of the CJEU in *Lawrence v. Regent Office Care Ltd*,²³ in which that Court demanded a 'single source' for a pay comparison to be drawn. In contracted-out cases the pay is generally determined by the organisation to which the work is contracted and not the organisation for which it is (ultimately) done.

There is at least one example of a case in which contracted-out workers did successfully claim equal pay with male comparators who had remained in the employment of the original employer. In *Glasgow City Council v. Unison Claimants*²⁴ the Scottish Court of Session (equivalent to the English Court of Appeal) accepted that, on the facts of that case, the women's employer was an 'associated employer' of the respondent council. This being the case, the Equal Pay Act 1970 (now the EqA, Section 79(4)) allowed the comparison to be made. The facts of the case were unusual, however. The claimants were employed by an arms-length external organisation set up by the respondent and over which the respondent maintained close control; it received any profits made by the organisation, had the right to approve business plans and it could appoint or remove any board member, although the organisation set employees' terms and conditions without any need for approval by the respondent. The EAT and the Court of Session also suggested (though this aspect of their decision-making was *obiter* and therefore not binding on any subsequent court) that there was a 'single source' for the purpose of a *Lawrence*-type analysis since in the facts of the case the respondent 'was responsible for and could remedy the pay disparity'.

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes. In GB the UK national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, with the exceptions listed below:

- UK anti-discrimination legislation covers some, but not all, forms of self-employment. In *Jivraj v. Hashwani* the Supreme Court ruled that arbitrators were not 'employed' for the purposes of the anti-discrimination provisions²⁵ and, more significantly, that the prohibition of employment 'under a contract personally to do work' did not cover independent providers of services who were not in a relationship

²³ C-320/00 [2002] ECR I-07325.

²⁴ [2014] IRLR 532.

²⁵ [2011] UKSC 40, [2012] 1 All ER 629, [2011] IRLR 827, https://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0158_Judgment.pdf, accessed 6 June 2016.

of subordination with the person who received the services. The extent to which domestic law protects self-employed persons against discrimination is uncertain following *Jivraj* except where (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such persons are expressly covered by the legislation.

- Certain other forms of occupation, such as occupation in a voluntary capacity, fall outside the anti-discrimination legislation with the effect that the material scope of UK law may not fully reflect that of the directives in every respect: see *X v. Mid-Sussex Citizens Advice Bureau*, in which the Supreme Court ruled that the wide definition of worker protected by UK discrimination law did not include volunteers.²⁶

The relevant provisions in GB are Sections 39-83 EqA and in NI Articles 6-23 SD(NI)O. In the author's view the exclusion of many self-employed persons from the scope of the UK's discrimination provisions is not consistent with EU law.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. The relevant provisions in GB are Sections 39-83 EqA and in NI Articles 6-23 SD(NI)O. The definitions are too various and lengthy to include but the core provision in the EqA is Section 39 (to which the relevant provision of the SD(NI)O is similar except that it does not include an equivalent of Section 39(2)(a)). Section 39 provides as follows:

- 1) An employer (A) must not discriminate against a person (B)—
 - a. in the arrangements A makes for deciding to whom to offer employment;
 - b. as to the terms on which A offers B employment;
 - c. by not offering B employment.
- 2) An employer (A) must not discriminate against an employee of A's (B)—
 - a. as to B's terms of employment;
 - b. in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - c. by dismissing B;
 - d. by subjecting B to any other detriment.

Similar provision is made in relation to harassment and victimisation, and a similar material scope is provided in relation to discrimination against other categories of worker such as contract workers, barristers etc. In my view the scope is the same as the scope of Article 14(1) of Recast Directive 2006/54.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. In GB the EqA provides (Schedule 9) for a genuine occupational qualification (GOQ) in relation to sex and gender reassignment (also married and civilly partnered status) in very similar terms to Article 14(2) (Paragraph 1). In addition, specific provision is made for discrimination by religious organisation (Paragraph 2). In NI the SD(NI)O provides instead (Article 10) a 'genuine occupational qualification' defence 'only where:

(a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman; or

²⁶ [2013] UKSC 59, [2013] IRLR 146, [2013] ICR 249, <http://www.bailii.org/uk/cases/UKSC/2012/59.html>.

- (b) the job needs to be held by a man to preserve decency or privacy because—
 - (i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or
 - (ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities; or
 - (bb) the job is likely to involve the holder of the job doing his work, or living, in a private home and needs to be held by a man because objection might reasonably be taken to allowing to a woman—
 - (i) the degree of physical or social contact with a person living in the home, or
 - (ii) the knowledge of intimate details of such a person's life,
 which is likely, because of the nature or circumstances of the job or of the home, to be allowed to, or available to, the holder of the job; or]
 - (c) the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and—
 - (i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and
 - (ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women; or
 - (d) the nature of the establishment, or of the part of it within which the work is done, requires the job to be held by a man because—
 - (i) it is, or is part of, a hospital, prison or other establishment for persons requiring special supervision, attention or care, and
 - (ii) those persons are all men (disregarding any woman whose presence is exceptional), and
 - (iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman; or
 - (e) the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man, or
 - (g) the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman, or
 - (h) the job is one of two to be held
 - (i) by a married couple,
 - (ii) by a couple who are civil partners of each other, or
 - (iii) by a married couple or a couple who are civil partners of each other.

By Article 10(4) an employer may not rely on Article 10(2) (a), (b), (c), (d), (e) or (g) of Paragraph (2) 'in relation to the filling of a vacancy at a time when the employer already has male employees— (a) who are capable of carrying out the duties falling within that paragraph, and (b) whom it would be reasonable to employ on those duties, and (c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience'. Similar provision is made as regards gender reassignment by Articles 1-0A and 10B.

The author has no information as to any assessment by the UK of the occupational activities referred to in Article 14(2) (see Article 31(3) of Recast Directive 2006/54).

- 4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Article 4(2) SD(NI)O provides that 'no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth' where a man complains of sex discrimination. In GB Section 13(6) EqA is materially identical.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

Not of which the author is aware.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

No.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes, in the Management of Health and Safety at Work Regulations 1999 and the Management of Health and Safety at Work (Northern Ireland) Regulations 2000 which require risk assessments. Where a risk assessment reveals a risk to the safety or health or an adverse effect on an employee the employer is obliged temporarily to adjust the working conditions or working hours of the worker to avoid exposure to the identified risk, or where this is not possible, to move the worker to another job. The duty to find a pregnant employee alternative work where a risk is identified to her safety or health, or that of her unborn child/child, or to suspend her on full pay, only applies to employees and agency workers, and not to other workers.

There are concerns about the correctness of implementation in light of the fact, as the Court of Appeal ruled in *Madarassy v. Nomura International plc*,²⁷ that an employer need only undertake a risk assessment where the work was of a kind which could involve risk by reason of the woman's condition to the health and safety of a new or expectant mother, or to that of her baby; for most employers there is no legal requirement to conduct a risk assessment simply because an employee informs the employer that she is pregnant.²⁸ Also problematic is the fact that some workers are not entitled to alternative work or to paid leave in the event that suitable alternative work cannot be found for them.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

No.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. This is provided by Sections 92(4) and (4A) of the Employment Rights Act 1996 in GB, and in NI by Article 124A ER(NI)O. The law does not specify these grounds.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

52 weeks as set out in the Maternity and Parental Leave etc. Regulations (MAPLE) Regulation 7 in GB, in NI by the Maternity and Parental Leave etc. Regulations (Northern Ireland) (MAPLE(NI)) Regulation 7.

²⁷ [2007] EWCA Civ 33.

²⁸ Though employers have a duty to make an assessment of the risks to health and safety that all employees are exposed to and where the employer employs any women of child-bearing age any such risk assessment must include an assessment of any risk to the health and safety of an expectant mother or her unborn child from any processes, working conditions or physical, chemical or biological agents. These health and safety obligations apply to workers, rather than just simply employees.

Is there an obligatory period of maternity leave before and/or after birth?

Yes. In GB the ERA 1996 Section 72 and the MAPLE Regulation 8 provide that an employer must not permit an employee who is entitled to maternity leave to work during the period of two weeks commencing with the day on which childbirth occurs. A period of four weeks from the date of the birth applies to women who are factory workers: Public Health Act 1936 Section 205. In NI identical provision is made by Article 104 ER(NI)O and MAPLE(NI) Regulation 8.

5.2.2 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes, by Section 64-70A ERA and Articles 96-102A ER(NI)O which provide rights to suitable alternative work and to remuneration for employees and agency workers suspended from work on medical grounds.

5.2.3 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes. During maternity leave a woman is entitled to benefit from the same terms and conditions of employment that she would have enjoyed had she not been absent on maternity leave, except for those which relate to remuneration: Article 103 ER(NI)O and Regulation 9 MAPLE(NI); Section 71 ERA and Regulation 9 MAPLE.

5.2.4 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

It is higher than statutory sick pay (though an employer may pay sick pay which is higher than the statutory rate of maternity pay). Statutory maternity pay is fixed by the Statutory Maternity Pay (General) Regulations 1986 (in Northern Ireland by the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987 at 90 % of salary for 6 weeks, with an additional 33 weeks at £140.98 per week (or 90 % of salary if that is lower). There is no ceiling to the 90 %.

5.2.5 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes. Many universities, for example, pay 100 % of salary for 18 weeks, followed by SMP (for many years the full period of maternity leave during which there was an entitlement to pay was 18 weeks).

5.2.6 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes. The Statutory Maternity Pay (General) Regulations 1986 and the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987 provide that maternity pay is available to employed women who have given their employer adequate notice of their maternity leave and who earn more than the national insurance threshold (currently £113 / EUR 155 per week).

5.2.7 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in

working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Yes. Women have the right to return to the same job if returning from a period of no more than 26 weeks' leave: MAPLE Regulation 18 (in NI, MAPLE NI Regulation 18). If the employee takes a longer period of maternity leave the right to return to the same job is qualified: if return to the same job is not reasonably practicable, the right is to return to another job which is suitable for the worker and appropriate for her to do in the circumstances, and which is on terms and conditions not less favourable than those which would have applied had she not been absent: Regulation 18(2), 18A.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. The ERA Section 75A and 75B provide for ordinary and additional adoption leave which is materially identical to ordinary and additional maternity leave and to which workers become entitled at the point at which a child is placed with them. The details are in the Paternity and Adoption Leave Regulations (PAL) 2002 Regulation 15 of which sets out the conditions of entitlement; an employee must have 26 weeks' qualifying service, must have been matched with a child by an adoption agency, and must have agreed that the child should be placed with him or her for adoption. Only the primary adopter is entitled to full adoption leave. Regulation 16 allows the primary adopter to choose when the period of leave should begin, subject to the notice requirements in Regulation 17, within a period from 14 days prior to the expected date of placement of the child to the date of actual placement. Statutory Adoption Pay (SAP) is payable for a period of up to 39 weeks at whichever is the lower of flat-rate statutory maternity pay (currently EUR 194/ £140.98 from April 2015) or 90% of normal weekly earnings. (In NI the Paternity and Adoption Leave Regulations (Northern Ireland) 2002 are to materially identical effect.)

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. PAL Regulations 28–31 protect employees entitled to adoption leave against detriment or dismissal attributable to the fact that they take or seek to take such leave. In NI the PAL(NI) Regulations are to materially identical effect.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes. In GB the Parental Leave (EU Directive) Regulations 2013 amended provisions relating to parental leave in the ERA and the MAPLE Regulations, coming into force on 8 March 2013. Regulation 2 amended s80F ERA by extending the right to request a contract variation on return to work following a period of parental leave to agency workers (but most such workers are not entitled to parental leave) and Regulation 3 increased the entitlement to parental leave from 13 weeks to 18 weeks and imposed a requirement on the Secretary of State to review the implementation of the Directive, and to publish a report within 5 years, and further reports within every 5 years after that. In NI the Parental Leave (EU Directive) (Maternity and Parental Leave) Regulations (Northern Ireland) 2013 made materially identical amendments to the MAPLE(NI) Regulations and the Employment Rights (NI) Order 1996.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes, though members of the armed forces are excluded as are those who are employed in police service including police officers (though police officers have equivalent rights under Police Regulations).

- 5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

The right to parental leave applies to full-time and part-time employees. 'Employees' for this purpose are limited to those working under contracts of employment. This excludes most agency workers and many other vulnerable workers, unless they qualify as employees (in the case of agency workers whether of the agency or the end user).

- 5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The maximum total duration of leave is 18 weeks per child, with a week's parental leave being equal to the length of time that an employee is normally required to work in a week.²⁹

- 5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

Yes the (EU) parental leave entitlement is an individual right. The separate Shared Parental Leave entitlement (which is dependent on the mother 'giving up' some of her maternity leave entitlement) can be shared between parents.

- 5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Leave must be taken (unless the employer agrees to the contrary) in blocks of at least one week at a time: MAPLE Schedule 2, Paragraph 7. In *Rodway v. South Central Trains Ltd* the Court of Appeal ruled that an employee was not permitted to take a single day's leave as parental leave, even if he opted for the day to be treated as using up his entitlement of a whole week.³⁰ Paragraph 8 of Schedule 2 MAPLE provides that no more than four weeks' leave may be taken in any one year.

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

Yes. An employee must give at least 21 days' notice of the start of the proposed period of leave: MAPLE Regulations Schedule 2, Paragraph 3 (in NI, MAPLE NI Regulations Schedule 2, Paragraph 3). Where a father wants to take parental leave on the birth of a child the employer must be given 21 days' notice of the mother's expected week of childbirth: Paragraph 4. And where a parent wants to take parental (as distinct from adoption) leave on the adoption of a child the employer should be given 21 days' notice of the expected week of placement unless that is not reasonably practicable: Paragraph 5. The expert does

²⁹ MAPLE Regulations Regulation 14. There is in addition a right to "shared parental leave" which allows a mother to share the period of maternity leave discussed at 5.2 above.

³⁰ [\[2005\] EWCA Civ 443](#), [\[2005\] IRLR 583](#).

not have an opinion as to whether this period takes sufficient account of the interests of workers and of employers.

5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Not of which the expert is aware.

5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

Yes. Employees must have one year's continuous employment at the date of seeking to take leave: MAPLE Regulations, Regulation 13 (in NI, MAPLE NI Regulations, Regulation 13) . Continuous employment may be accrued under successive fixed-term contracts.

5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

Yes. The employer may postpone the taking of leave on the grounds of undue disruption of its business, provided that the leave is rescheduled (after consulting the employee) to a date not later than six months after the proposed date (and not later than the child's 18th birthday): MAPLE Regulations, Schedule 2, Paragraph 6 (in NI, MAPLE NI Regulations Schedule 2, Paragraph 6). The employer may not impose a postponement when the employee gives notice to take parental leave immediately after a child is born or is placed with the family for adoption.

5.4.11 Are there special arrangements for small firms?

No.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

No. Prior to April 2015 parents of disabled children could use the entitlement to parental leave during the child's first 18 years of life, parents of other children being entitled to leave only until the child was 5. The age for all children was increased to 18 by the Maternity and Parental Leave (Amendment) Regulations 2014 which amended the MAPLE Regulations. In NI the MAPLE NI Regulations are in materially identical terms.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. An employee is entitled not to be subjected to any detriment by his or her employer by reason of taking, or seeking to take parental leave: MAPLE Regulations, Regulation 19 (in NI, MAPLE NI Regulations, Regulation 19).

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Employees have the right to return to the same job if returning from a period of no more than four weeks' leave: MAPLE Regulations, Regulation 18 (in NI, MAPLE NI Regulations, Regulation 18). If the employee takes a longer period of parental leave, or takes such leave immediately following a period of maternity leave, the right to return to the same job is qualified: if return to the same job is not reasonably practicable, the right is to return

to another job which is suitable for the worker and appropriate for him or her to do in the circumstances, and which is on terms and conditions not less favourable than those which would have applied had he or she not been absent: Regulation 18(2), 18A.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

By MAPLE Regulation 18A the right to return is a right to return with seniority, pension rights and similar rights as they would have been if the worker had not been absent, and on terms and conditions not less favourable than those which would have applied if he or she had not been absent (in NI, the MAPLE NI Regulations make equivalent provision). In other words, these rights continue to accrue (as distinct from being frozen) during leave.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

The contract is suspended.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

Not as of right. Some employers may remunerate parental leave but there is no industry or sector practice to this effect.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

In the expert's view it does not.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. A father (which includes all those employees, of either sex, otherwise eligible) is entitled by reason of PAL Regulation 4 to up to two weeks' leave for the purpose of caring for a child or supporting the child's mother. The right, which is available to fathers or to spouses or partners or civil partners of the child's mother who have or expect to have responsibility for the upbringing of the child, is conditional on the employee having at least 26 weeks' employment at the end of the week immediately preceding the 14th week before the expected week of the child's birth. The leave is paid at the same level as statutory maternity pay: currently EUR 187 (£139.58) from April 2015. The provision in NI is materially identical (PAL Regulations (NI)).

- 5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Yes. An employee who takes, or seeks to take, paternity leave is entitled not to be subjected to any detriment, or dismissed, for doing so or having done so: PAL Regulations 28, 29 (in NI PAL Regulations (NI), Regulations 28, 29).

5.6 Time off/care leave

- 5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes. ERA 1996 Section 57A(1) provides that all employees are entitled to be permitted to take such time off as is 'reasonable' in order to take action that is 'necessary' to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted; to make arrangements for the provision of care for a dependant who is ill or injured; in consequence of the death of a dependant; because of the unexpected disruption or termination of arrangements for the care of a dependant; or to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him. There is no cap on entitlement as such but it is clear from the case law that the right relates to unexpected emergencies. (In NI the ER(NI) Order 1996 is in materially identical terms.)

5.7 Leave in relation to surrogacy

- 5.7.1 Is parental leave available in case of surrogacy?

Yes, in the sense that the birth mother will be regarded as the mother unless and until parenthood is transferred by parental order or adoption. The child's legal father or 'second parent' will be the surrogate's husband or partner unless legal rights are given to someone else through a parental order or adoption. If the child is adopted then parental leave rights will be enjoyed by the adopters: MAPLE Regulations Regulation 13; MAPLE (NI) Regulations, Regulation 13. Since April 2015, a commissioning parent in surrogacy situations can also qualify for adoption leave/pay.

5.8 Leave sharing arrangements

- 5.8.1 Does national law provide a legal right to share (part of) maternity leave?

Yes. The main statutory provisions in GB are the Work and Families Act 2015; the Shared Parental Leave Regulations 2014; the Statutory Shared Parental Pay (General) Regulations 2014; the Maternity and Adoption Leave (Curtailment of Statutory Rights To Leave) Regulations 2014; the Maternity Allowance (Curtailment) Regulations 2014 and the Statutory Maternity Pay and Statutory Adoption Pay (Curtailment) Regulations 2014. In NI there are materially identical provisions.³¹

Simply put, prospective mothers who are entitled to maternity leave may choose to limit their right to maternity leave (except for the two-week compulsory period of leave, and any period of leave before it), in favour of Shared Parental Leave. This then allows another person, nominated by her (the child's father or her spouse, civil partner or partner, as long as the other person has sufficient continuous employment³²), to share the remaining leave

³¹ Work and Families Act (Northern Ireland) 2015.

³² The Government has also announced plans to extend SPL (in 2018) so that it can be taken up by working grandparents (see <https://www.gov.uk/government/news/chancellor-announces-major-new-extension-of-shared-parental-leave-and-pay-to-working-grandparents> - last accessed 19/03/17).

entitlement. The leave taken is then called 'Shared Parental Leave'. Shared Parental Leave can be taken together or separately in blocks of time – providing more flexibility in how it is carved up. Mothers who are not entitled to maternity leave, for example self-employed mothers, may provide a right to Shared Parental Leave to the child's father or the mother's spouse or partner, by limiting their (the self-employed mother's) right to statutory maternity pay or Maternity Allowance.

Leave can only be taken on a full-time basis.

Employers and/or collective agreements can provide enhanced rights but cannot provide a right to take maternity leave (or Shared Parental Leave) other than on a full-time basis.

The size of the employer is irrelevant and Shared Parental Leave is an additional entitlement to the right to paternity leave.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No. See above in relation to SPL.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

No. However, there is a right to 'request' flexible working (Employment Rights Act 1996 s.80f).

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No. However, there is a right to 'request' flexible working (Employment Rights Act 1996 s.80f).

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No. However, there is a right to 'request' flexible working (Employment Rights Act 1996 s.80f).

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future?

No. However, there is a right to 'request' flexible working (Employment Rights Act 1996 s.80f).

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes, in respect of pension contributions made after 1990. In GB by the EqA Sections 29, 39 & 67. In NI by Articles 8 and 30 SD(NI)O and EqP(NI)A 1970.

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

It is the same, except that there is some room for concern as to the extent of application of the EqA and the equivalent provisions in NI law to the self-employed: in *Jivraj v. Hashwani* the Supreme Court indicated that autonomous workers were not within the concept of 'worker' for the purposes of UK discrimination law provisions.³³ That case concerned an arbitrator and it was perhaps not surprising that the Court took the view that such a person, though appointed by parties to a dispute, is not in a relationship of employment to them. The decision, however, is of broader impact and it is unclear as yet to what extent the EqA and, in NI, the SD(NI)O apply to protect the self-employed.

6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

There is no reason to think that it is not the same. The EqA and the NI equivalents prohibit sex discrimination in all matters relating to employment which would include those matters referred to in Article 7.

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

Not since 2012 in the case of Article 8(1). While occupational social security schemes such as those referred to in Article 8(1) would not fall within the employment-related provisions of the EqA or the SD(NI)O, they would fall to be considered within the provisions dealing with goods, facilities and services (Section 29EqA, Article 30 SD(NI)O). The EqA prohibits all sex discrimination in such contracts which are entered into, reviewed or renewed after December 2012. Similar provision is made in NI by the SD(NI)O Articles 30 and 46 as amended by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012.

Discrimination falling within Article 8(2) is permitted by reason of EqA Schedule 7 Paragraph 4, and in NI by the Pensions (NI) Order 1995 Article 64.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

Not of which the expert is aware.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

Yes. Schedule 7 Paragraph 5 EqA and the Pensions (NI) Order 1995 Article 64 allow discrimination in the form of actuarial factors which differ for men and women to the calculation of contributions to a scheme by employers. The author is not aware of any examples in case law.

³³ [2011] UKSC 40.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Not of which the author is aware.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. It is not possible to list all the relevant legislation here because there are very many pieces both of primary and of secondary legislation. The principle of equal treatment for men and women is generally respected (though it is possible that some rules may disparately impact on women or men). In addition Section 29 EqA (which has no direct equivalent in NI) prohibits sex discrimination by public authorities absent express provision to the contrary in primary legislation.³⁴ To the extent that social security is recognised as pertaining to 'goods, facilities or services' the SD(NI)O (Article 30) will also regulate sex discrimination, though it will not trump primary legislative provisions to the contrary. In *Amin v. Entry Clearance Officer, Baghdad*³⁵ (which concerned the materially identical provision of the SDA then in force) the House of Lords ruled that the 'services' in respect of which sex discrimination was prohibited were those which were of like nature to those provided by private sector bodies. In that case it meant that immigration-related decision making fell outside the SDA.

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

This question is not understood. Section 29 EqA, which regulates discrimination by public authorities, would apply to all the workers referred to in that Article. The same is true of Article 30 SD(NI)O, subject to the caveats expressed in 3.1.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

This question is not understood. Section 29 EqA, which regulates discrimination by public authorities, would apply to all the schemes referred to in that Article. The same is true of Article 30 SD(NI)O, subject to the caveats expressed in 3.1.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

³⁴ Section 29 provides, so far as relevant, that:

- (1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
- (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
 - (a) as to the terms on which A provides the service to B;
 - (b) by terminating the provision of the service to B;
 - (c) by subjecting B to any other detriment.
- (3) A service-provider must not, in relation to the provision of the service, harass—
 - (a) a person requiring the service, or
 - (b) a person to whom the service-provider provides the service.
- (4) A service-provider must not victimise a person requiring the service by not providing the person with the service.
- (5) A service-provider (A) must not, in providing the service, victimise a person (B)—
 - (a) as to the terms on which A provides the service to B;
 - (b) by terminating the provision of the service to B;
 - (c) by subjecting B to any other detriment.
- (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

³⁵ [1983] 2 AC 81.

Yes, but sex discrimination in statutory pensionable age, which results in discrimination in relation to other statutory benefits, is being phased out and will cease to exist from 5 December 2018 (at which time men and women will be eligible for state pension payments at 65). The age for both men and women will then continue to rise and is expected to hit 69 in the late 2040s.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

Not as far as the author is aware.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Not of which the author is aware.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

In small part. In the view of the UK governments, no new measures were required to implement the provisions of the Directive, save in the case of Article 8. The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014 and the materially identical Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations (Northern Ireland) 2014 came into effect on 1 April 2014. The Regulations make provision for the payment of a maternity allowance in line with the minimum requirements imposed by the Directive to the partners of self-employed workers who participate in their partners' self-employed business but who do not receive payment in respect of such participation. Whereas assisting spouses/partners who were paid for their efforts would have been entitled to maternity allowance prior to the implementation of the Regulations, those who were not paid for their assistance were not. Otherwise the assumption appears to be that self-employed workers are protected from sex discrimination by the EqA and, in NI, the SD(NI)O.

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

The Social Security Contributions and Benefits Act 1992, which establishes the general social security scheme in GB, defines 'self-employed earner' as persons who are 'gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not [they are] also employed in such employment)'. Similar provision is made in NI by the Social Security Contributions and Benefits (Northern Ireland) Act 1992. As far as employment-related protection is concerned there is no definition of self-employment or the self-employed; the relevant question concerns the extent to which such workers are recognised as falling within the broad concept of employment utilized in the EqA and, in NI, by the SD(NI)O: 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'. As mentioned above, the decision of the Supreme Court in *Jivraj v. Hashwani*³⁶ would appear to deny the protection of the EqA and SD(NI)O to anyone who would not be regarded as a (subordinated) 'worker' for the purposes of EU law, unless (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such persons are expressly covered by the legislation. There is, accordingly, a risk that 'small entrepreneurs' or 'business persons' will not be covered; if, for example, a woman contractor finds that her services are dispensed with when she becomes pregnant she will be unable to bring her claim within any provision of the EqA or the SD(NI)O if her contractual engagement does not impose on her a duty to provide her services personally (as distinct from a duty to ensure that the relevant service is provided).

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

There are no legislative distinctions between different types of self-employed workers (though see what is said at 4.2 above). The agricultural sector is treated the same as other sectors by the implementing Regulations (as by the EqA and SD(NI)O) and, as their title suggests, the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014 and the materially identical Social Security

³⁶ [2012] 1 All ER 629.

(Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 cover life partners only where they are married or civilly partnered (the latter in the case of same-sex couples).

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted or broader than specified in Article 4 Directive 2010/41/EU?

The implementation of Article 4 of Directive 2010/41 has not been modified since that of Article 4 of Directive 86/613/EEC, the UK governments taking the view in each case that no implementing measures were required.

The EqA and SD(NI)O prohibit sex discrimination in access to employment, vocational training and promotion and in working conditions; also in access to and the provision of goods, facilities and services; in the disposal and management of premises; in education; in the exercise of public functions and by associations such as private clubs. The combined material scope of the prohibitions on sex discrimination is likely to capture most sex discrimination against the self-employed but it is possible that lacunae exist in view of the non-application of the employment-related provisions to self-employed workers *not* working under a contract 'personally to execute any work or labour'. It is possible, for example, that a 'freelance' taxi driver will not be regarded as a relevant worker for the purposes of the employment-related provisions of the EqA. If that taxi driver wished to complain of his or her 'termination' by a taxi firm s/he would have to argue that the taxi firm had refused to provide a 'service' or 'facilities' to the taxi driver, or that it amounted to an association from which s/he had been excluded. Such an argument might work in the particular case but it will turn on the facts of the individual case and it may be that some self-employed workers will fall through a gap, which would indicate inadequate transposition.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

No measures have been taken with respect to positive action in the transposition of the Directive. The EqA already makes relatively generous provision in relation to positive action, though it *permits* rather than *requires* such except (in the form of the Public Sector Equality Duty) in the public sector. The scope for positive action in Northern Ireland is more limited (Article 5 of SD(NI)O) and the PSED also differs.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

There is no specific system of social protection applicable in the UK to self-employed workers. Entitlement to social protection depends, in the case of some benefits, on mandatory contributions made through National Insurance (paid by employees and the self-employed); other benefits are paid irrespective of contributions in which case the self-employed, together with employed persons and the economically inactive, are entitled by reason of need or other eligibility criteria.

Dealing first with contributory benefits, self-employed workers make National Insurance contributions if they earn in excess of EUR 11 200/ GBP 8 060 per year. If they make sufficient contributions they will be eligible for the basic (but not additional) state pension; contribution-based Employment and Support Allowance (payable to those unable to work by reason of disability); maternity and bereavement allowances. Except in the case of share fishermen and volunteer development workers employed abroad they will not be entitled to contribution-based Job Seeker's Allowance.

State benefits which are payable irrespective of contributions include Child Benefit, 'income-based' (means tested) Jobseeker's Allowance, 'income-based' Employment and Support Allowance, Working Tax Credit and Child Tax Credit, Attendance Allowance and Disability Living Allowance, Carer's Allowance, Severe Disablement Allowance, Industrial Injuries Disablement Benefit, War Widow's or Widower's Pension, Pension Credit and Universal Credit. The self-employed are entitled to means-tested state benefits and are also eligible for treatment under the National Health Service which is dependent on residence rather than contribution.

Except in relation to maternity allowance for spouses/civil partners of the self-employed, no amendments have been made to the system in the transposition of Directive 2010/41. The Explanatory Memorandum to the NI Regulations states that '[s]pouses and life partners referred to in Article 2(b) can access non-contributory means-tested social protection in their own right, on the same basis as other persons who do not pay contributions, depending on their circumstances and in accordance with UK law'.³⁷

There are no schemes in the UK which require participation in the form of payment or otherwise by the spouse or life partner of the self-employed, whereas the payment of National Insurance contributions is compulsory for the self-employed.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Yes. The British and NI Regulations both provide for payment of a Maternity Allowance based on the National Insurance contributions of women's spouses or partners, where the woman is not otherwise eligible for maternity allowance or statutory maternity pay, and where she has participated in the self-employed activities engaged in by her spouse or partner 'performing the same tasks or ancillary tasks, without being employed by S or being in partnership with S'. Maternity Allowance in such cases is a flat rate of EUR 37.50 (GBP 27) for 14 weeks. This contrasts with the level of Maternity Allowance for those women who qualify in their own right, who are entitled to the lower of EUR 194 (GBP 139.58) a week or 90 % of their average weekly earnings for 39 weeks.

The Explanatory Memorandum to the NI Regulations is silent as to whether Article 8(3)(a), (b) or (c) is relied upon but the EUR 37.50 level of payment is the same as that at which Maternity Allowance will be paid to a woman who relies on her own contributions, holds a small earnings exception for at least 13 weeks in the relevant period and has no other earnings. It must be questionable whether this can be said to amount to 'a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks' as required in Article 8(1).

The Maternity Allowance is mandatory in the sense that the woman is *entitled* to it as a matter of law, though she is not obliged to apply for it. It is paid by the State rather than by the woman's partner and is parasitic on his or her contributions.

The Explanatory Memorandum is silent as to how it is said that the NI (or materially identical GB) Regulations implement Article 8(4). It is to be presumed that the expectation is that self-employed spouses and partners, like everyone else, may avail themselves (if they can afford so to do) of temporary/agency workers if necessary. Such would not be alternative to or part of the allowance.

³⁷ Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 (in England and Wales the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations 2014.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

No. The view has been taken that no implementation was required.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

No. The view was taken that these were not applicable (because no transposition was required).

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes, subject to the provisos expressed above about the requirement in the 'employment' related provisions of the EqA and SD(NI)O for 'personal service'.

In NI, the SD(NI)O covers discrimination in relation to this (broad) definition of employment (Article 8), in relation to contract workers (Article 12), by agencies (Article 18), in relation to partners (Article 14), the conferring of qualifications (Article 16) and office holders (Article 13B). These provisions are relied on by the NI Government in its assessment that no transposing measures were required.³⁸ The EqA contains similar provisions (Sections 39, 41, 55, 44-45, 53 & 49-50).

³⁸ <https://www.ofmdfmi.gov.uk/publications/transposition-table-recast-directive>.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. In GB by reason of Section 29 EqA. In NI by Article 30 SD(NI)O.

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

Wider. The EqA and in NI the SD(NI)O cover 'facilities' as well as goods and services and do not require that services are of a nature which would generally be paid for. The application of the prohibition on discrimination in relation to services covers transport without restriction.

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?

No.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

Yes. In GB the EqA provides (Schedule 3 Part 7) exceptions from the prohibition on sex discrimination in relation to separate services for the sexes and single-sex services subject to considerations of proportionality. In NI the SD(NI)O provides limited exceptions for small dwellings (Article 33), and in relation to political parties (Article 34), voluntary bodies (Article 35), the purpose of Articles 34 and 35 being largely to permit positive action. Article 36 also allows exceptions designed to protect privacy and decency in circumstances where personal and/or healthcare is being provided or service users will be in a state of undress, as well as exceptions designed to protect religious freedom.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

In GB Schedule 3 Paragraph 23 EqA allows sex discrimination resulting from actuarial factors in relation (only) to insurance contracts entered into prior to (and not renewed or reviewed since) December 2012.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

See the answer to 9.5. The EqA has been amended from December 2012 to remove the actuarial exception which applied in relation to sex discrimination prior to that date. This amendment was a response to the ruling in *Test-Achats*. In NI similar amendments were made by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

Not in NI, though in GB the positive action provision (Section 148 EqA) is of general application and so could allow positive action in relation to access to goods and services where there was particular need, under-representation etc.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

Not of which the national expert is aware.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

No. The government has [said](#) that it is committed to ratification but that amendments to domestic law - to take extra-territorial jurisdiction over a range of offences - are necessary before this can be done. In June 2017, the government announced new measures (A Domestic Abuse Bill) to allow ratification.³⁹

The Bill will be introduced to Parliament sometime before 2019, following in-depth consultation and potential legal changes in Scotland and NI. In November 2017 a government report set out progress made to date and what yet needs to be done.⁴⁰

Prior to this latest development there had been parliamentary questions (see e.g. 18 March 2015 Commons 226663,⁴¹ 8 December 2014 Lords HL 3233)⁴² and the Joint Committee on Human Rights warned that failure to ratify the Convention could harm the UK's international reputation.⁴³ The failure to ratify has been / remains controversial.

³⁹ See <https://www.gov.uk/government/news/new-measures-to-allow-ratification-of-istanbul-convention>.

⁴⁰ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656561/CCS207_CCS1017_309396-1_HO_Istanbul_Convention_report_WEB_ACCESSIBLE.PDF.

⁴¹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-03-09/226663/>.

⁴² <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141208w0001.htm>.

⁴³ JCHR Report of 19 February 2015 on Violence against Women and Girls, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/publication-of-6th-report-190215/>.

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. In GB by Section 27 EqA. In NI by Article 6 SD(NI)O. Section 27 prohibits the subjection of a person to detriment because that person has (broadly) complained of, or been involved in litigation in relation to, an act of discrimination (or because it is thought that they have or might complain or be so involved). In NI, Article 6 of the SD(NI)O prohibits less favourable treatment on the same grounds. In the national expert's view the GB provision complies with the Directive whereas the requirement in NI for less favourable treatment may not be compliant.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. In GB by Section 136 EqA, in NI by Articles 63A and 66A SD(NI)O. In both GB and NI the legislation provides that, once the claimant has (on the balance of probabilities) established facts from which a court or tribunal could, in the absence of any other explanation, conclude that unlawful discrimination occurred, the court or tribunal must conclude that the discrimination did occur unless the person alleged to have discriminated shows that he or she did not. In the expert's view UK law does not necessarily comply with EU as established in C-415/10 *Kelly and Meister* because a potential claimant may be unable to obtain the necessary information to establish the facts such that the burden of proof may shift.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Under EqA Section 124 an employment tribunal may, if it finds that unlawful discrimination has occurred, make a declaration as to the rights of the claimant and the respondent in relation to the matters to which the proceedings relate. It may also order the respondent to pay compensation to the complainant and/or may make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the claimant of the discrimination which has been established. Similar provision is made in NI by Article 64 of the SD(NI)O. Outside the employment sphere a court may award compensation and may require or prohibit action on the part of the discriminator (Section 119 EqA, Article 66 SD(NI)O).

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

Yes, in that compensation is not capped. The difficulty lies in access to courts.

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers

victims of sex discrimination have encountered. Refer to relevant legislation and case law.

No. The legal rights are strong in theory but they are exceptionally difficult for most people to enforce in practice. There are statutory time limits for the initiating of complaints of discrimination (3 months for employment-related cases and 6 months in the county/sheriff court, though the court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so). Claimants in employment tribunals had been required to pay fees of EUR 335 (GBP 250) to file discrimination cases and a further EUR 1271 (GBP 950) in advance of hearing and employment claims reduced dramatically following the introduction of these fees.⁴⁴ (Fees have always been payable in the ordinary courts.).

However, these fees have been abolished in 2017 following a successful legal challenge which was brought by UNISON (a trade union). UNISON argued that the making of the Fees Order was not a lawful exercise of the Lord Chancellor's statutory powers, because the prescribed fees interfere unjustifiably with the right of access to justice, and discriminate unlawfully against women and other protected groups. The Court of Appeal rejected the claim on the basis that the imposition of fees did not breach the principle of effectiveness and did not amount to unlawful discrimination. The Supreme Court overruled the Court of Appeal.⁴⁵ The Fees Order was found to be unlawful under both domestic and EU law because it had the effect of preventing access to justice. The Fees Order was also unlawful because it contravenes the EU law guarantee of an effective remedy before a tribunal and imposes disproportionate limitations on the enforcement of EU employment rights. It was also found to be indirectly discriminatory under the Equality Act 2010 because the higher fees charged for more complex (type B) claims put women at a particular disadvantage, because a higher proportion of women bring type B than bring type A claims, and the differential fees could not be justified as a proportionate means of achieving a legitimate aim. The Supreme Court held that the fees bear no direct relation to the value of the claims made, and can therefore act as a deterrent to claims for modest amounts or non-monetary remedies. The question of whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Where low to middle income households can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable. The Fees Order is indirectly discriminatory under the Equality Act 2010 because the higher fees for type B claims put women at a particular disadvantage, because a higher proportion of women bring type B than bring type A claims. The charging of higher fees was not a proportionate means of achieving the stated aims of the Fees Order. The aims of the order were to transfer the cost of the tribunal service from taxpayers to users and to encourage cases to settle. The higher fee for type B cases was not an effective means of transferring costs from the tax payer. Moreover, both meritorious and unmeritorious claims could be deterred by the higher price, and there was no correlation between the higher fee and the merits of the case or incentives to settle. As a result, the charging of higher fees in type B cases could not be justified, and the Fees Order was indirectly discriminatory.

Employment tribunals do not normally order the unsuccessful party to pay the costs of the winner, though a tribunal may order costs against a party who has acted 'vexatiously, abusively, disruptively or otherwise unreasonably', or whose bringing or conduct of the proceedings is 'misconceived', i.e. has no reasonable prospect of success. The maximum amount of such costs was raised from EUR 11 800 (GBP 10 000) to EUR 23 600 (GBP 20 000) in 2012. It may be difficult for unrepresented claimants to know if their case is 'misconceived'. In the county/sheriff court, with few exceptions, an unsuccessful applicant

⁴⁴ This according to the official statistics of October to December 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506487/tribunals-gender-recognition-stats-oct-dec-2015.pdf, accessed 6 June 2016.

⁴⁵ [2015] EWCA Civ 935, <http://www.bailii.org/ew/cases/EWCA/Civ/2015/935.html> accessed 26 July 2017.

will be ordered to meet the costs of the respondent. It is difficult to over-state how much of a barrier this places in practice to litigation.

Although the abolition of fees is to be commended, it is important to note that access to justice in this context was an issue before the fees were introduced and research has consistently revealed that the majority of people who consider they have been victims of unlawful discrimination or harassment are very slow to seek legal redress. The main reasons are generally lack of confidence that they will be believed or fear that they will face some form of retaliation or victimisation.⁴⁶

A final barrier for discrimination claimants is the lack of skilled, experienced advice and assistance. Discrimination law is increasingly complex. Not only is most of the evidence in the hands of the respondent, but, in most cases, the respondent will have access to legal or other professional advice and representation; without comparable access to skilled case preparation and representation complainants are far less likely to succeed.

Particularly noteworthy are the findings of a national inquiry on pregnancy-related discrimination in the UK (regarding the access to justice), which found that less than a third of those who experience pregnancy or maternity-related discrimination, 28% (54,000 women annually), discuss the issue with their employer and only 3% make a formal complaint.⁴⁷ A 2016 inquiry conducted by the House of Commons Women and Equalities Committee (W&Eq Com) recently discussed this 'enforcement gap', noting how the burden always rests with the individual complainants and concluded that the Government has a 'clear responsibility to ensure that pregnancy and maternity discrimination laws are better enforced.'⁴⁸ Similar findings are reported in NI.⁴⁹

In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

No. In the UK associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination. Associations may support and assist, but may not engage in litigation on behalf of, victims of discrimination and may not speak on the victim's behalf, much less stand in his or her shoes for the purposes of any claim. Further, as regards judicial review proceedings, any legal or natural person with 'sufficient interest' in a matter may bring a claim whether in NI, England and Wales or Scotland; the exact approaches to judicial review varies across these jurisdictions but the test for standing is materially similar.

11.4.2 What kind of legal aid is available for alleged victims of gender discrimination?

None in the employment tribunals.

In theory legal aid may be available in the county court and for judicial review applications in the high court but the limitations on cases in which such aid is available, the very low

⁴⁶ Aston, J., Hill, D., Tackey, N. (2006), *The Experience of Claimants in Race Discrimination Employment Tribunal Cases*, Department of Trade and Industry, Employment Relations Research Series, ERRS55.

⁴⁷ EHRC/BIS (2016) *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509501/BIS-16-146-pregnancy-and-maternity-related-discrimination-and-disadvantage-experiences-of-mothers.pdf, at p145 (accessed 19 March 2017).

⁴⁸ Women & Equalities Committee (2016) *Pregnancy and Maternity Discrimination: Final Report of Session 2016-17* available at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> at p44.

⁴⁹ See: http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Expecting_Equality-PregnancyInvestigation-FullReport.pdf.

income thresholds below which it is available and the restrictions on legal aid in public law challenges are such that it is of extremely limited assistance to prospective claimants.

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. In GB the Equality and Human Rights Commission covers discrimination related to sex, gender reassignment, pregnancy and maternity, married and civilly partnered status, also age, disability, race, religion/belief and sexual orientation.⁵⁰ The Commission has devolved authorities in Wales and in Scotland. In NI the Equality Commission for Northern Ireland (ECNI) is responsible for the same protected characteristics.⁵¹

Both Commissions have the competence (if not necessarily the resources) to provide independent assistance to victims, to conduct independent surveys and to publish independent reports. The Commissions have the power to issue non-discrimination notices on completion of formal investigations into discrimination. These competences are exercised in an independent manner, in practice, although constraints on funding in particular of the EHRC have resulted in increasing limitations on its functioning.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

None, other than the actions of trade unions in facilitating and supporting actions by members. There are no legislative provisions in this respect.

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

It does not. Collective agreements are not binding.

⁵⁰ <http://www.equalityhumanrights.com>.

⁵¹ <http://www.equalityni.org/Home>.

12. Overall assessment

The law is generally good, though in NI there are some improvements which could be made to bring the law more into line with that which applies in GB. (The differences in the jurisdictions are set out in the text above). The real problem across the UK is that enforcement is difficult and increasingly expensive to the extent that the legal rights are in danger of becoming paper entitlements only.

Annexes

Bibliography

Monaghan, K. QC, *Monaghan on Equality Law* (2nd ed., OUP, Oxford)

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