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# Country report

## Gender equality



United Kingdom  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **United Kingdom**

Rachel Horton

Reporting period 1 January 2019 – 31 December 2019

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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.<sup>1</sup> 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.

At the end of 2019, the UK was set to leave the EU on 31 January 2020 under the European Union (Withdrawal) Act 2018. Under the terms of this Act (to be amended by the European Union (Withdrawal Agreement) Bill, which, in December 2019, was in passage through the Parliament), EU law would continue to apply in the UK until the end of the transition period on 31 December 2020. The 2018 Act (as amended) will also provide that direct EU law will continue to have effect in the UK after the end of the transition period unless or until revoked by UK regulations made under the Act. The proposed amendments to the Act include the power for the Government to make regulations to give courts instructions about interpretation of retained EU law, which may potentially impact on the implementation of provisions relating to gender equality and discrimination.

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 the directives**

### **GB**

- The Equality Act 2010 (EqA).<sup>2</sup> This replaces earlier legislation which had implemented (view relevant statutory instruments) relevant EU directives

<sup>1</sup> For purposes of transposition of EU legislation, the UK also has responsibility for Gibraltar. To comply with 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.

<sup>2</sup> Equality Act 2010, 1 October 2010.  
[http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf).

- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).
- The Employment Rights Act 1996, as amended.<sup>3</sup>
- The Maternity and Parental Leave etc. Regulations 1999.<sup>4</sup> Implements Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

## NI

- The Sex Discrimination (Northern Ireland) Order 1976 (SD(NI)O)<sup>5</sup> as amended by various Regulations that implement
  - EU directives: Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;
  - Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
  - European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
- Equal Pay Act (NI) 1970.<sup>6</sup>
- The Employment Rights (Northern Ireland) Order 1996.<sup>7</sup>
- The Maternity and Parental Leave etc. (Northern Ireland) Regulations 1999.<sup>8</sup> Implements Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

## 1.3 Sources of law

The main sources of gender equality law in the UK are international treaties (Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), ILO Convention 100 on equal pay, ILO Convention 111 on discrimination in employment and occupation), EU law (in 2018 – but see above regarding: Brexit going forward), national legislation and case law.

There is a single Equality and Human Rights Commission (EHRC) in GB, which can support complainants in legal proceedings, has enforcement powers of its own, and has powers to promote and encourage respect for equality of opportunity through research, public comments and other methods. There is a separate Equality Commission for Northern Ireland, which has similar functions (and in places, greater powers relating to positive action) to those of the EHRC, while in Scotland there is also a Scottish Human Rights Commission, with which the EHRC shares its human rights remit.

<sup>3</sup> Employment Rights Act 1996, 1 August 1996. <https://www.legislation.gov.uk/ukpga/1996/18>.

<sup>4</sup> Maternity and Parental Leave etc. Regulations 1999, 15 December 1999. <http://www.legislation.gov.uk/ukSI/1999/3312/contents/made>.

<sup>5</sup> The Sex Discrimination (Northern Ireland) Order 1976. <https://www.legislation.gov.uk/nisi/1976/1042/introduction>.

<sup>6</sup> Equal Pay Act (NI) 1970, <https://www.legislation.gov.uk/apni/1970/32/contents>.

<sup>7</sup> The Employment Rights (Northern Ireland) Order 1996. <https://www.legislation.gov.uk/nisi/1996/1919/contents>.

<sup>8</sup> Maternity and Parental Leave etc. (Northern Ireland) Regulations 1999, 15 December 1999. <http://www.legislation.gov.uk/nisr/1999/471/contents/made>.



## **2 General legal framework**

### **2.1 Constitution**

#### **2.1.1 Constitutional ban on sex discrimination**

The UK constitution is unwritten and so by definition contains no articles dealing with non-discrimination.

#### **2.1.2 Other constitutional protection of equality between men and women**

The Human Rights Act 1998<sup>9</sup> 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.

### **2.2 Equal treatment legislation**

The EqA in Great Britain and the SD(NI)O in Northern Ireland prohibit sex discrimination. In GB and in NI the legislation (EqA in Great Britain and the SD(NI)O in Northern Ireland) also regulates discrimination on grounds of gender reassignment, pregnancy and maternity, married and civil partner status, age, disability, race, religion/belief and sexual orientation.

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<sup>9</sup> Human Rights Act 1998, 9 November 1998. <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

### 3 Implementation of central concepts

#### 3.1 General (legal) context

##### 3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

There are no surveys dealing specifically with these issues. However, the House of Commons Women and Equalities Committee investigation of transgender equality<sup>10</sup> recommended that the terminology regarding 'transsexuals' be changed: the Equality Act 2010 (EqA) prohibits discrimination against 'transsexuals' and protects against 'gender reassignment' discrimination – the definition was found to be outdated and misleading. The House of Commons Committee recommended that 'the protected characteristic in respect of trans people under the Equality Act should be amended to that of 'gender identity'. This would improve the law by bringing the language in the Act up to date, making it compliant with Council of Europe Resolution 2048; and make it significantly clearer that protection is afforded to anyone who might experience discrimination because of their gender identity'.<sup>11</sup> At the time of reporting, the Equality Act 2010 has not been modified.

See also, more broadly, The Fawcett Society's 2018 report *Invisible Women*,<sup>12</sup> which provides:

- 'A summary of how the lack of evidence on the inequality specific groups face frequently limits the public debate on women's inequality, and recommendations for additional data that allows for comparisons between different groups of women.
- ...Findings on why the Government must review policy and better consider the combined effects of multiple disadvantage, particularly related to gender pay gap reporting, apprenticeships, childcare, and the industrial strategy.
- Evidence about a lack of tailored support that is made available to people accessing public services, and recommendations, including greater efforts to involve beneficiaries in service design in order to make them more responsive to the needs and experiences of diverse groups.'<sup>13</sup>

##### 3.1.2 Other issues

There are no further issues.

##### 3.1.3 General overview of national acts

The main relevant national legislation is the Equality Act 2010 in GB and Sex Discrimination (NI) Order 1976 in Northern Ireland.

##### 3.1.4 Political and societal debate and pending legislative proposals

There is ongoing and lively debate around transgender equality. The Government Equalities Office, responsible across government for equalities strategy and legislation, produced a plan of action in 2011 which aimed to 'improve the lives of transgender people

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<sup>10</sup> House of Commons Women and Equalities Committee (2016), *Transgender Equality*, at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>.

<sup>11</sup> House of Commons Women and Equalities Committee (2016), *Transgender Equality*, at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, para 108.

<sup>12</sup> Fawcett Society and Young Women's Trust (2018), *Invisible Women*, APPG on Sex Equality, June 2018.

<sup>13</sup> See Fawcett Society website: <https://www.fawcettsociety.org.uk/invisible-women>.

and support businesses and public bodies so they have the right tools to support transgender people'.<sup>14</sup>

In 2015 the House of Commons Women and Equalities Committee undertook an investigation of equality of transgender persons in 2015 and proposed a number of changes to improve the gender recognition process.<sup>15</sup> In particular, regarding the conditions referred to above, the Committee recommended in relation to the Gender Recognition Act 2004<sup>16</sup> (GRA) that:

- 'The Government must look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this.' (Paragraph 31)
- 'Within the current Parliament, the Government must bring forward proposals to update the Gender Recognition Act, in line with the principles of gender self-declaration that have been developed in other jurisdictions. In place of the present medicalised, quasi-judicial application process, an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers.' (Paragraph 45)
- 'The Government must ensure that it is informed about the extent of [the effective 'spousal veto'] and ways of addressing the problem.' (Paragraph 63)
- '[P]rovision should be made to allow 16- and 17-year-olds, with appropriate support, to apply for gender recognition, on the basis of self-declaration.' (Paragraph 70)
- 'The Ministry of Justice must investigate why there have not been any prosecutions [regarding: abuse of confidential information about people's trans status, contrary to Section 22 of the Gender Recognition Act, which is intended to protect trans people against having their gender identity made public without their consent] and take action to address this. It must also work with the courts to tackle the issue of trans people being inappropriately "outed" in court proceedings.' (Paragraph 87)

In 2017 the Ministry of Justice<sup>17</sup> and the Scottish Government<sup>18</sup> announced plans to consult on reform of the GRA 2004, and consultation took place in 2018. The Government is currently considering the evidence, and the topic remains controversial.<sup>19</sup>

## 3.2 Sex/gender/transgender

### 3.2.1 Definition of 'gender' and 'sex'

No specific definition is provided in the legislation. In GB, however, 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 SD(NI)O does not define gender/sex, instead prohibiting discrimination against men, women etc.

<sup>14</sup> See Government Equalities Office (2011), *Advancing transgender equality: a plan for action* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf).

<sup>15</sup> See House of Commons Women and Equalities Committee (2016), *Transgender Equality*, at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>.

<sup>16</sup> Gender Recognition Act 2004, 1 July 2004.

<sup>17</sup> [http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga\\_20040007\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf).

<sup>18</sup> See <https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>.

<sup>19</sup> See The Guardian (2017), 'Legal recognition for non-binary people planned in Scotland', 9 November 2017, at <https://www.theguardian.com/society/2017/nov/09/legal-recognition-for-non-binary-people-planned-in-scotland>.

<sup>19</sup> See e.g. Oxford Human Rights Hub (2018), 'Gender Recognition Reform – The Current Debate is Misconceived', 4 October 2018, at <http://ohrh.law.ox.ac.uk/gender-recognition-reform-the-current-debate-is-misconceived/>.

### 3.2.2 Protection of transgender, intersex and non-binary persons

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'. It is also noteworthy that Section 16 (2)(a) of the Equality Act 2010 expressly provides that treating transsexual workers less favourably for being absent from work because of gender reassignment than they would be treated if they were absent because of illness or injury constitutes discrimination. It is also discrimination if they are treated less favourably than they would be if absent for some other reason where that treatment is unreasonable (Section 16 (2)(b)). In NI the SD(NI)O makes materially similar provisions (Articles 2 and 4A).

Cases at employment tribunals.

In *Souza v Primark Stores* (2017)<sup>20</sup> the claimant was subjected to harassment and direct discrimination related to gender reassignment. Incidents, over a period of time by various members of staff, that led to the finding include – outing the claimant; calling her 'Alexander/Alexandra' and laughing at her; spraying scent near the claimant and saying 'I can smell urine, like a men's toilet'; telling the electrician that he could come into the ladies staff toilets as 'there are no ladies in there', when she knew the claimant was in there; saying in front of customers, 'She is evil'; failing to properly investigate the matter and deal with it appropriately, in particular by the failure to give the claimant the outcome of her grievance or advise her of the right of appeal. The claimant was awarded over EUR 52 510 (GBP 47 000) (including EUR 27 930 (GBP 25 000) for injury to feelings). The tribunal recommended that the employer consult a specialist organisation regarding the formulation of a written policy on dealing with transgender staff, which should cover confidentiality of sensitive data, and that it amend its training materials, existing equality and harassment policies and grievance procedures to reflect that policy.

### 3.2.3 Specific requirements

There is no requirement for any physical intervention or gender reassignment surgery.

## 3.3 Direct sex discrimination

### 3.3.1 Explicit prohibition

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

#### **GB**

Section 13 EqA defines direct discrimination as less favourable treatment 'because of a protected characteristic'. 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).<sup>21</sup>

<sup>20</sup> Employment Tribunal, Case No: 2206063/2017, 22 December 2017. Available at [https://assets.publishing.service.gov.uk/media/5a7aed66ed915d670dd7f91e/Miss\\_A\\_de\\_Souza\\_E\\_Souza\\_v\\_Primark\\_Stores\\_Ltd\\_-\\_2206063-2017\\_-\\_Final.pdf](https://assets.publishing.service.gov.uk/media/5a7aed66ed915d670dd7f91e/Miss_A_de_Souza_E_Souza_v_Primark_Stores_Ltd_-_2206063-2017_-_Final.pdf).

<sup>21</sup> A hypothetical comparator is acceptable.

## 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 might not comply, since it requires that the discrimination is on grounds of the complainant's sex. Defining direct discrimination in this way is arguably problematic, since the ruling in *Coleman v Attridge Law*<sup>22</sup> made clear that the wording of the definition of direct sex discrimination under the Framework Directive encompasses associative discrimination. Under the NI definition, protection appears to be restricted to those holding the characteristic. This somewhat undermines the sense that the definition ought to be broad enough to cover situations where the less favourable treatment is due to the victim's association with someone who has that characteristic.

### 3.3.2 Prohibition of pregnancy and maternity discrimination

In GB discrimination because of pregnancy and maternity are explicitly regulated. They are free-standing grounds of discrimination: this removes the need to establish 'less favourable' treatment, which implicitly requires a comparator, rather than unfavourable treatment. In NI Article 5A SD(NI)O prohibits 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 by the requirement for 'less favourable' as opposed to unfavourable treatment.

### 3.3.3 Specific difficulties

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 Section 13 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), 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 pupils. At Paragraph 80 of its 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.'<sup>23</sup>

## 3.4 Indirect sex discrimination

### 3.4.1 Explicit prohibition

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

<sup>22</sup> CJEU (ECJ), C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2008.

<sup>23</sup> Court of Appeal England and Wales, EWCA Civ 1426, 13 October 2017, <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, 'Islamic school's gender segregation is unlawful, court of appeal rules', 13 October 2017, at <https://www.theguardian.com/education/2017/oct/13/islamic-school-gender-segregation-unlawful-court-of-appeal>.

claimant, and places or would place others with whom she or 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. The SD(NI)O Section 3A makes materially similar provisions.

### 3.4.2 Statistical evidence

In the UK, statistical evidence in order to establish indirect discrimination is used in practice (though indirect discrimination may be proved without such evidence: see *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*).<sup>24</sup> 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 is strong here, as is experience from the USA and Commonwealth countries. However, there may of course 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).<sup>25</sup>

### 3.4.3 Application of the objective justification test

The test is correctly applied by the higher courts; in *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*<sup>26</sup> 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*,<sup>27</sup> 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'.

### 3.4.4 Specific difficulties

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 Employment Appeal Tribunal (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 decided.<sup>28</sup> 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'.<sup>29</sup>

The EAT, in ruling that tribunals ought not to assume that more women than men will be

<sup>24</sup> Supreme Court, [2012] UKSC 15, 25 April 2012, available at: <https://www.supremecourt.uk/cases/docs/uksc-2010-0102-judgment.pdf>.

<sup>25</sup> Employment Appeal Tribunal, *London Underground Ltd v Edwards (No. 2)* [1995] IRLR 355 and England and Wales Court of Appeal, *London Underground Ltd v Edwards (No. 2)* [1998] IRLR 364, [1999] ICR 494. <https://www.bailii.org/ew/cases/EWCA/Civ/1998/876.html>.

Supreme Court, [2012] UKSC 15, 25 April 2012, available at: <https://www.supremecourt.uk/cases/docs/uksc-2010-0102-judgment.pdf>.

<sup>27</sup> England and Wales Court of Appeal (Civil Division), Case No: A2/2004/1847, 7 July 2005, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2005/846.html>.

<sup>28</sup> In that case the EAT had taken judicial notice of the fact that women were disproportionately responsible for childcare.

<sup>29</sup> Employment Appeal Tribunal, UKEATS/0054/09/BI, 27 May 2009. See para. 28.



disadvantaged by a neutral policy (here that all property managers, male and female, be refused flexible working requests), reflects a view that gendered stereotypical attitudes about who provides care are no longer valid. However, for many women this cultural shift has not yet become reality and so they are, in practice, disadvantaged by these policies.

There has been some general discussion 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 others v Home Office (UK Border Agency)*; *Naeem v Secretary of State 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.

### 3.5 Multiple discrimination and intersectional discrimination<sup>30</sup>

#### 3.5.1 Definition and explicit prohibition

In the UK prohibition of multiple discrimination requires judicial interpretation. Express provision was originally made 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'. However, this provision has not come into force, and there is no similar provision in the SD(NI)O.

#### 3.5.2 Case law and judicial recognition

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 seven days a week).<sup>31</sup> 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 (GBP 15 000) damages awarded to the claimant in *Ministry of Defence v Debique* in respect of injury to her feelings.<sup>32</sup>

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 another*<sup>33</sup> 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

<sup>30</sup> See for more information Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>31</sup> Employment Appeal Tribunal, *Ministry of Defence v Debique* [2010] IRLR 471.

<sup>32</sup> Employment Appeal Tribunal, *Debique v Ministry of Defence (No.2)*, UKEAT/0075/11/SM [http://www.bailii.org/uk/cases/UKEAT/2011/0075\\_11\\_1509.html](http://www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html).

<sup>33</sup> Employment Tribunal, *O'Reilly v British Broadcasting Corporation and another*, 11.1.11 (2200423/10) <https://www.employmentcasesupdate.co.uk/site.aspx?i=ed7575>.

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.<sup>34</sup>

### 3.6 Positive action

#### 3.6.1 Definition and explicit prohibition

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 where (but only where) the person appointed/promoted is as qualified as others over whom s/he is preferred. This, in the author's opinion, complies with relevant CJEU rulings.

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 author's view the legislation in UK and NI complies with EU law.

#### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

As far as the author is aware, these concepts are separate.

#### 3.6.3 Specific difficulties

There are no specific difficulties in the UK 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.

#### 3.6.4 Measures to improve the gender balance on 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 companies by 2020<sup>35</sup> is voluntary – a 'soft' target – as are the other recommendations of the Davies Report and the more recent Hampton-Alexander Review.<sup>36</sup>

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<sup>34</sup> Supreme Court, *Hewage v Grampian Health Board* UKSC 37, 25 July 2012, <https://www.supremecourt.uk/cases/docs/uksc-2011-0050-judgment.pdf>.

<sup>35</sup> Department for Business, Innovation and Skills (2015), *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review>.

<sup>36</sup> Department for Business, Innovation and Skills and Government Equalities Office (2016), 'Rallying call for female boost in business and the boardroom', press release, 7 July 2016, at <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom>.



The Scottish Government's 'Partnership for Change' initiative of 2015,<sup>37</sup> to encourage organisations (public, private and third sector) to commit to achieving parity (50/50) between men and women on boards by 2020, is also voluntary.

### 3.6.5 Positive action measures to improve the gender balance in other areas

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. In addition, the broad public-sector equality duty (Equality Act 2010 Section 149), in force since 2011, states that those subject to it must, in the exercise of their functions, have due regard to, among 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.

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

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.<sup>38</sup> Section 26 (4) 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.

### 3.7.2 Scope of the prohibition of harassment

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

### 3.7.3 Definition and explicit prohibition of sexual harassment

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.

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<sup>37</sup> See <http://onescotland.org/equality-themes/5050-by-2020/>.

<sup>38</sup> Equality Act 2010, 1 October 2010, Section 26, available at [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf).

### 3.7.4 Scope of the prohibition of sexual harassment

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

### 3.7.5 Understanding of (sexual) harassment as discrimination

It is not defined explicitly in these terms, but in general the treatment of harassment and sexual harassment and the enforcement of available remedies in the UK are the same as for sex discrimination.

### 3.7.6 Specific difficulties

The Women and Equalities Committee of the House of Commons conducted an inquiry into sexual harassment in the workplace in 2018.<sup>39</sup> This highlighted a number of difficulties in relation to sexual harassment in the workplace, including:

- A lack of incentive for employers and regulators to take robust action to tackle and prevent sexual harassment in the workplace: the absence of comprehensive action by employers and/or of a stringent regulatory regime is viewed as problematic.
- That the burden of holding harassers/employers to account rests heavily upon the individual: ‘...the burden of tackling sexual harassment at work rests with individual workers. An individual who has suffered sexual harassment at work has the option of raising a complaint or grievance with their employer, assuming that proper processes are in place. They may bring a claim for sexual harassment under the Equality Act against their employer and against individual perpetrators in the employment tribunal. None of these are ever easy options, and they can be extremely difficult or traumatic experiences’.<sup>40</sup>
- Some non-disclosure agreements (NDAs) are being used unfairly by some employers (and some members of the legal profession) to silence victims of sexual harassment. They can form part of employment contracts and settlement agreements. Examples include concerns about their broad use in the entertainment industry which prevented workers revealing unacceptable behaviour in a casting session or on set ‘creating a “culture of fear and intimidation”’.<sup>41</sup> The main concern raised was regarding the risks of unethical use of NDAs, which barristers who provided evidence for the inquiry summarised ‘as being that individuals will not report serious wrongdoing to the police; will feel compelled not to assist with relevant law enforcement investigations or prosecutions; and will feel unable to speak openly and in the public interest about serious wrongdoing, thus inhibiting public awareness and debate’.<sup>42</sup>

The Women and Equalities Committee also conducted an inquiry into sexual harassment in public spaces in 2018 and highlighted how sexual harassment pervades the lives of women and girls and is deeply ingrained in our culture.<sup>43</sup> The report focuses on sexual harassment in public places: on public transport; in bars and clubs; in online spaces; at university; in parks and on the street. It is a routine and sometimes relentless experience for women and girls, many of whom first experience it at a young age.

<sup>39</sup> House of Commons Women and Equalities Committee (2018), *Sexual harassment in the workplace*, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>. See also Equality and Human Rights Commission (2018), *Turning the Tables: Ending Sexual Harassment at Work* at <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

<sup>40</sup> House of Commons Women and Equalities Committee (2018), *Sexual harassment in the workplace*, page 13, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>.

<sup>41</sup> House of Commons Women and Equalities Committee (2018), *Sexual harassment in the workplace*, at page 37, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>.

<sup>42</sup> House of Commons Women and Equalities Committee (2018), *Sexual harassment in the workplace*, p. 38, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>.

<sup>43</sup> House of Commons Women and Equalities Committee (2018), *Sexual harassment of women and girls in public places*, at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/701/701.pdf>.

The Committee also reported in 2016 on sexual harassment and sexual violence in schools<sup>44</sup> and made recommendations to the Government that have been influential in changing government policy; these included making relationships and sex education compulsory in schools and publishing guidance for schools on how to tackle sexual violence.

### **3.8 Instruction to discriminate**

#### **3.8.1 Explicit prohibition**

In the UK instruction to discriminate is prohibited in national law. Instruction is 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 following example is given in the Explanatory Notes: 'A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if subjected to a detriment for not doing so. A potential patient would also have a claim against the GP if she discovered the instruction had been given and was put off applying to register. The receptionist's claim against the GP would be brought before the employment tribunal as it relates to employment, while the potential patient's claim would be brought in the county court as it relates to services.'<sup>45</sup> The SD(NI)O expressly prohibits instruction and pressure to discriminate (Articles 40 and 41).

#### **3.8.2 Specific difficulties**

There are no specific difficulties in this regard.

### **3.9 Other forms of discrimination**

Section 13 EqA, which defines direct discrimination in GB, 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.<sup>46</sup> The case, which was in line with the CJEU decision in *S. Coleman v Attridge Law and Steve Law*,<sup>47</sup> 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 the face of it, appear to extend to discrimination based on association with persons with particular characteristics; however, the Northern Irish courts are virtually certain to follow the approach of the EAT in *EBR Attridge Law LLP & Another v Coleman (No. 2)*<sup>48</sup> and interpret the relevant provision to cover discrimination by association and assumed discrimination.

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<sup>44</sup> House of Commons Women and Equalities Committee (2016), *Sexual harassment and sexual violence in schools*, at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf>.

<sup>45</sup> Equality Act 2010, Explanatory Notes, Para. 367. See <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/8/4>.

<sup>46</sup> Employment Appeal Tribunal, *UKEAT/0227/08*, 24 October 2008, ([2009] IRLR 74), [http://www.bailii.org/uk/cases/UKEAT/2008/0227\\_08\\_2410.html](http://www.bailii.org/uk/cases/UKEAT/2008/0227_08_2410.html). 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>.

<sup>47</sup> Court of Justice of the European Union (CJEU), C-303/06, *S. Coleman v Attridge Law and Steve Law*, 17 July 2008.

<sup>48</sup> Employment Appeal Tribunal, *UKEAT/0071/09*, 30 October 2009, ([2010] IRLR 10), [http://www.bailii.org/uk/cases/UKEAT/2009/0071\\_09\\_3010.html](http://www.bailii.org/uk/cases/UKEAT/2009/0071_09_3010.html).

### **3.10 Evaluation of implementation**

In the author's view the majority of the legislation complies with EU law. In relation to pregnancy discrimination provisions in Northern Ireland, it is unclear whether Article 5a SD(NI)O complies with Article 2(2)(c) of Directive 2006/54, because less favourable treatment, by its very nature, can only be established by making a comparison to someone in a similar situation and this has long been deemed unnecessary in relation to pregnancy-related discrimination.

### **3.11 Remaining issues**

There are no further remaining issues regarding the central concepts of gender equality law that have not been discussed above.

## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### **4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay**

Women and Equalities Committee (2016) *Gender Pay Gap*<sup>49</sup>

This report highlights the lack of effective policy in many of the areas that contribute to the gender pay gap. It finds that the key causes of pay differentials are: the part-time pay penalty; women's disproportionate responsibility for childcare and other forms of unpaid caring; and the concentration of women in highly feminised, low-paid sectors such as care, retail and cleaning.

Although the Government has committed to eliminating the pay gap within a generation, it has remained at around the same level for years. The report found that women aged over 40 are most affected by the gender pay gap. Evidence suggests that the barriers to well-paid work currently experienced by women over 40 will continue unless action is taken to address the root causes of the gender pay gap.

Equality and Human Rights Commission (2018), *Closing the Gender Pay Gap*<sup>50</sup>

This report looks at the number of employers who have published an explanation of their gender pay gap figures or an action plan to show what they are doing to reduce their gender pay gaps. Important findings include that only one in five employers sampled has produced an action plan to close the gender pay gap; only 11 % had set themselves targets that would enable them to measure progress of their plans year on year; and larger employers were more likely than smaller ones to set themselves targets, as employers with fewer than 499 staff were less likely to publish an action plan as part of their gender pay gap figures than larger ones. The EHRC argues that all employers should be required by law to publish this information, particularly action plans that are time-bound and include specific and measurable targets.

#### **4.1.2 Surveys on the difficulties of realising equal treatment at work**

Fawcett Society (2018), *Sex Discrimination Law Review Final Report*<sup>51</sup>

This report covers a wide range of topics relating to equal treatment at work – including women in the workplace, hate crime and misogyny, and access to justice issues.

#### **4.1.3 Other issues**

There are many difficulties in practice in relation to equal pay, 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

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<sup>49</sup> House of Commons Women and Equalities Committee (2016), *Gender Pay Gap*, available at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf>.

<sup>50</sup> Equality and Human Rights Commission (2018), *Closing the gender pay gap*, at [https://www.equalityhumanrights.com/sites/default/files/closing-the-gender-pay-gap\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/closing-the-gender-pay-gap_0.pdf).

<sup>51</sup> Fawcett Society (2018), *Sex Discrimination Law Review Final Report*, at <https://www.fawcettsociety.org.uk/sex-discrimination-law-review-final-report>.

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*,<sup>52</sup> 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 are examples of cases 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*<sup>53</sup> the Scottish Court of Session (equivalent to the English Court of Appeal) accepted that, on the facts of the 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 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'.

In *Asda Stores Ltd v Brierley*<sup>54</sup> the Court of Appeal held that common terms were observed between thousands of female supermarket staff and men working in a network of warehouses and distribution centres, the latter operating under a different management structure. The Supreme Court will consider an appeal in 2020.

#### 4.1.4 Political and societal debate and pending legislative proposals

The gender pay gap remains an important topic in the UK and one that gains much media attention, especially around the time of the gender pay gap reporting deadline (in April each year).

There has also been public outrage at the revelations regarding the gender pay gap experienced amongst top journalists and other celebrities, which has raised public awareness but more still needs to be done.<sup>55</sup>

## 4.2 Equal pay

### 4.2.1 Implementation in national law

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)<sup>56</sup> makes materially similar provision (Section 1).

### 4.2.2 Definition in national law

The concept of pay is not defined in national legislation.

<sup>52</sup> CJEU, C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd*, 17 September 2002.

<sup>53</sup> Court of Session, [2017] CSIH 34, 30 May 2017, at <https://www.scotcourts.gov.uk/search-judgments/judgment?id=669034a7-8980-69d2-b500-ff0000d74aa7>.

<sup>54</sup> Court of Appeal (Civil Division), [2019] EWCA Civ 44, 10-12 October 2018. <https://www.bailii.org/ew/cases/EWCA/Civ/2019/44.html>.

<sup>55</sup> For a useful comment see The Guardian (2018), 'A year on, the BBC has still not done enough to close the gender pay gap', 11 July 2018, at <https://www.theguardian.com/commentisfree/2018/jul/11/bbc-not-close-gender-pay-gap-men>.

<sup>56</sup> Equal Pay (Northern Ireland) Act 1970. (EqP(NI)A) <https://www.legislation.gov.uk/apni/1970/32/contents>.

#### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

National legislation does not explicitly implement Article 4. 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, or work of equal value) can challenge pay discrimination). In GB the EqA provides, in addition, that women can challenge direct pay discrimination even in the absence of a real male comparator doing equal work (Section 71 EqA).

#### 4.2.4 Related case law

No recent leading cases.

#### 4.2.5 Permissibility of pay differences

A right to equal pay for equal work is 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. As Lord Nicholls in *Glasgow City Council and others v Marshall*<sup>57</sup> made clear – if the genuine material factor (GMF) is directly or indirectly discriminatory on the grounds of sex, then the employer must provide an objective justification for relying on it.

#### 4.2.6 Requirement for comparators

In NI a real comparator is required. In GB a hypothetical comparator may be relied upon but only where direct discrimination is concerned (Section 71 EqA).

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

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'.<sup>58</sup> In NI Section 1(3) EqP(NI)A is in materially similar terms.

#### 4.2.8 Other relevant rules or policies

There are no further relevant rules or policies relating to the parameters for establishing the equal value of the work performed.

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<sup>57</sup> House of Lords, *Glasgow City Council and others v Marshall*, 3 February 2000.  
<https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000203/glasgo.htm>.

<sup>58</sup> This is not an exhaustive list, but the legislation does not list any others.



#### 4.2.9 Job evaluation and classification systems

The EHRC and ACAS both provide guidance on the use of job evaluation schemes and outline the benefits of carrying out such evaluations.<sup>59</sup>

#### 4.2.10 Wage transparency

In GB Section 78 EqA allows the adoption of regulations requiring large employers (250+) to carry out and publish equal pay audits. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017<sup>60</sup> came into force in the UK on 6 April 2017. It applies to employers in the private and voluntary sector with 250 or more employees on the 'snapshot' date of 5 April. 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 5 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<sup>61</sup> SI 2017/353, which came into force on 31 March 2017.

The legislation is supported by guidance from the Advisory, Conciliation and Arbitration Service (ACAS).<sup>62</sup>

No civil penalties for non-compliance are currently proposed, although this is to remain under review,<sup>63</sup> but failure to report is 'an unlawful act' and the Equality and Human Rights Commission (EHRC) can take enforcement action (Section 34 of the Equality Act 2006). It may open an investigation if it suspects a considerable pay gap is being hidden by employers. Reputational risks are also a consideration if employers fail to comply with the regulations: information is publicly available online<sup>64</sup> and often attracts media attention.

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. Under Section 77 any term of a contract which prohibits or restricts a person from making a 'relevant pay disclosure' to anyone is unenforceable.

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<sup>59</sup> EHRC (2014) *Gender Neutral Job Evaluation Schemes: an introductory guide*, available at [https://www.equalityhumanrights.com/sites/default/files/gd.13.101-1\\_gender\\_neutral\\_jes-ig\\_18-03-14\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/gd.13.101-1_gender_neutral_jes-ig_18-03-14_final.pdf).

ACAS (2014) *Job evaluation: considerations and risks*, available at <http://www.acas.org.uk/media/pdf/3/d/Job-evaluation-considerations-and-risks-advisory-booklet.pdf>.

<sup>60</sup> Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 6 April 2017. <https://www.legislation.gov.uk/ukSI/2017/172/contents/made>.

<sup>61</sup> Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 SI 2017/353, 31 March 2017. <http://www.legislation.gov.uk/ukSI/2017/353/contents/made>.

<sup>62</sup> See <http://www.acas.org.uk/index.aspx?articleid=5768>.

<sup>63</sup> Government Equalities Office (2016), *Mandatory Gender Pay Gap Reporting: Government Consultation on Draft Regulations*, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504398/GPG\\_consultation\\_v8.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf).

<sup>64</sup> See <https://gender-pay-gap.service.gov.uk/Viewing/search-results>.



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<sup>65</sup> 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.

#### 4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

In the UK, the provisions referred to above go beyond the requirements of this legislation.

#### 4.2.12 Other measures, tools or procedures

No other measures have been developed.

### 4.3 Access to work, working conditions and dismissal

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

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 provisions<sup>66</sup> 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 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.<sup>67</sup>

The relevant provisions in GB are Sections 39-83 EqA and in NI Articles 6-23 SD(NI)O.

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

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:

<sup>65</sup> Equality Act 2010 (Equal Pay Audits) Regulations 2014, 1 October 2014.

<https://www.legislation.gov.uk/ukdsi/2014/9780111116753>.

<sup>66</sup> Supreme Court, [2011] UKSC 40, 27 July 2011, available at <https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf>.

<sup>67</sup> Supreme Court, [2012] UKSC 59, 12 December 2012, available at <https://www.supremecourt.uk/cases/docs/uksc-2011-0112-judgment.pdf>.  
<http://www.bailii.org/uk/cases/UKSC/2012/59.html>.

- 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. The scope is the same as the scope of Article 14(1) of Recast Directive 2006/54.

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

In GB the EqA provides (Schedule 9) for a genuine occupational qualification (GOQ) in relation to sex and gender reassignment (also married and civil partner 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) for 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
- (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.'

Under 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 10A 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).

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

The Equality Act 2010 Section 18 protects against unfavourable treatment of a woman because of her pregnancy or because she is exercising, has exercised, or has sought to exercise the right to maternity leave (see also SD(NI)O Article 5A), which would cover non-hiring, non-renewal of a contract and / or dismissal. The Employment Rights Act 1996 Section 99 also provides employees with a claim for (automatically) unfair dismissal if dismissed (as defined under Section 95, which includes non-hiring, non-renewal of a contract) for a reason connected to pregnancy or childbirth.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (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.

#### 4.3.6 Particular difficulties

There are no particular difficulties of which the author is aware.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

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 where (but only where) the person appointed/promoted is as qualified as others over whom she or he is preferred.

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

Although there is still very little research on this issue (as noted by McColgan for the previous report in 2005!), the provisions do not seem to be having any impact on tackling gender inequality in employment.<sup>68</sup> Moreover, the implications – long term – of the UK leaving the EU are a concern: the issue was raised in a recent EHRC Report:

‘While the positive action provisions are now fairly well embedded into domestic legislation, it may be that the UK (when no longer strictly bound by the framework provided by EU law) could adopt a more robust or ‘radical’ approach towards positive action that embraces ‘equality of outcome’ through the use of preferential treatment (see Manfredi, 2017). However, the UK could choose to maintain the current legislative framework or, in light of employer reticence towards use of the ‘tie-break’ (see section 3.4), the current government may consider that section 159 should be re-evaluated in light of its commitment towards breaking down unnecessary legislation in relation to employment’.<sup>69</sup>

#### **4.4 Evaluation of implementation**

In the author’s view the legislation complies with EU law. Of particular note, in terms of good practice, are the gender pay gap reporting provisions. They provide an opportunity to annually (and publicly) identify and measure any pay gaps/disparities at source.

#### **4.5 Remaining issues**

There are no further issues regarding equal pay and equal treatment at work that have not been discussed above.

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<sup>68</sup> Two small-scale studies explore its use in recruitment – see Davies, C. and Robison M. (2016), ‘Bridging the gap: an exploration of the use and impact of positive action in the United Kingdom’, *International Journal of Discrimination and the Law*, Vol. 16(2-3) 83-101 and Manfredi, S., Vickers, L. and Cousens, E. (2017), *Increasing the Diversity of Senior Leaders in Higher Education: The Role of Executive Search Firms* London.

<sup>69</sup> Davies, C. (2019), *Exploring Positive Action as a Tool to Address Under-representation in Apprenticeships*, EHRC, London, p. 30, available at <https://www.equalityhumanrights.com/sites/default/files/research-report-123-positive-action-apprenticeships.pdf>.

## **5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)<sup>70</sup>**

### **5.1 General (legal) context**

#### **5.1.1 Surveys and reports on the practical difficulties linked to work-life balance**

The Equality and Human Rights Commission / Department of Business, Innovation and Skills 'Pregnancy and Maternity Related Discrimination and Disadvantage' investigation of March 2016 (EHRC/BIS, 2016).<sup>71</sup>

The research examined the views and experiences of employers and mothers on a range of issues related to managing pregnancy, maternity leave and mothers returning to work. The report found that 'the majority of employers reported that it was in their interests to support pregnant women and those on maternity leave and they agreed that statutory rights relating to pregnancy and maternity are reasonable and easy to implement. However, the research found that:

- 'Around one in nine mothers (11 %) reported that they were either dismissed; made compulsorily redundant, where others in their workplace were not; or treated so poorly they felt they had to leave their job; if scaled up to the general population this could mean as many as 54 000 mothers a year.
- One in five mothers said they had experienced harassment or negative comments related to pregnancy or flexible working from their employer and /or colleagues; if scaled up to the general population this could mean as many as 100 000 mothers a year.
- 10 % of mothers said their employer discouraged them from attending antenatal appointments; if scaled up to the general population this could mean up to 53 000 mothers a year'.<sup>72</sup>

The Equality Commission in Northern Ireland conducted a similar investigation, *Expecting Equality* (2016), and the findings echoed the GB study.<sup>73</sup>

House of Commons Women and Equalities Committee *Pregnancy and Maternity Discrimination*' report (2016).<sup>74</sup>

Concerned by the findings of the EHRC/BIS research, the Women and Equalities Committee focussed on finding solutions to the problems it had raised. It received over 30 written evidence submissions, held 3 oral evidence sessions and visited a group of new/expectant mothers. Of particular note, the Women and Equalities Committee were concerned about and highlighted the following difficulties relating to enforcement:

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<sup>70</sup> See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>71</sup> Available at <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>.

<sup>72</sup> See website <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>.

<sup>73</sup> Equality Commission for Northern Ireland (2016), 'Investigation into pregnancy and maternity at work - new guidance', 29 November 2016, [https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Expecting\\_Equality-PregnancyInvestigation-FullReport.pdf?ext=.pdf](https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Expecting_Equality-PregnancyInvestigation-FullReport.pdf?ext=.pdf).

<sup>74</sup> See House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf>.

- New and expectant mothers who are casual, zero-hours or agency workers were 'less likely to feel confident about challenging discriminatory behaviour'.<sup>75</sup>
- The legal protection from redundancy for new and expectant mothers, suggesting that the Government 'implement a system similar to that used in Germany under which such women can be made redundant only in specified circumstances' and that 'this protection should apply throughout pregnancy and maternity leave and for six months afterwards'.<sup>76</sup>
- The lack of accessible one-to-one advice in the event of negative or discriminatory experiences – and the impact of this on women's ability to raise a complaint formally or informally.<sup>77</sup> The Committee recommended the Government conduct a review of the accessibility of employment advice services for pregnant women and new mothers who experience unfavourable/discriminatory treatment.<sup>78</sup>
- The 'line-manager' effect, where positive attitudes and legal knowledge and good practice does not necessarily 'filter down' to line managers – and suggested that action taken by the Government should include 'wider uptake of good quality training for line-managers'.<sup>79</sup>
- That, of those women who reported discriminatory experiences in the EHRC/BIS survey, very few pursued a claim – either formally or informally and the Committee recommended, in agreement with the EHRC/BIS, that the time limit for bringing a complaint to an employment tribunal be extended for new and expectant mothers.<sup>80</sup>
- That the burden of enforcement rests predominantly with individual women. The Minister for Business, Innovation and Skills asserted that the burden should remain with the women experiencing discrimination.<sup>81</sup>

House of Commons Women and Equalities Committee (2018), *Fathers and the Workplace* report<sup>82</sup> focussed on the reasons for the poor take-up of shared parental leave (SPL): the overly cumbersome/complex nature of the provision; the narrative of it being a 'maternal transfer' (i.e. taking of leave that belongs to the mother); lack of awareness of the right; and the low rate of pay.

Burgess, A. and Davies, J. (Dec 2017), *Cash or Carry? Fathers combining work and care in the UK*,<sup>83</sup> Fatherhood Institute, Marlborough, examines how contemporary British fathers manage work/care reconciliation and the cultural contexts framing their behaviours.

<sup>75</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 20, para. 56.

<sup>76</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 24, para. 70.

<sup>77</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 27-8, para. 83.

<sup>78</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 46, para. 155.

<sup>79</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 32, para. 99.

<sup>80</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 44, para. 143.

<sup>81</sup> House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, at <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> p. 48, para. 161.

<sup>82</sup> See House of Commons Women and Equalities Committee (2018), *Fathers and the Workplace* at <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/358/35802.htm>.

<sup>83</sup> See Burgess, A. and Davies, J. (2017), *Cash or Carry? Fathers combining work and care in the UK*, Fatherhood Institute, at <http://www.fatherhoodinstitute.org/wp-content/uploads/2017/12/Cash-and-carry-Full-Report-PDF.pdf>.

### 5.1.2 Other issues

Shared parental leave (SPL) was introduced in 2015 but take-up has been low – as little as 2 %.<sup>84</sup> The Government has (in 2018) introduced a ‘share the joy’ campaign to increase awareness of the right to SPL and encourage more take-up.<sup>85</sup>

### 5.1.3 Overview of national acts on work-life balance issues

The national legal provisions relating to work-life balance are located in numerous provisions: the Employment Rights Act 1996,<sup>86</sup> The Equality Act 2010,<sup>87</sup> Maternity and Parental Leave etc. Regulations (1999),<sup>88</sup> Management of Health and Safety at Work Regulations 1999<sup>89</sup> and, in NI, the Sex Discrimination (Northern Ireland) Order 1976,<sup>90</sup> The Employment Rights (Northern Ireland) Order 1996,<sup>91</sup> The Maternity and Parental Leave etc. (Northern Ireland) Regulations 1999,<sup>92</sup> Management of Health and Safety at Work (Northern Ireland) Regulations 2000.<sup>93</sup>

### 5.1.4 Political and societal debate and pending legislative proposals

The Government had planned to evaluate SPL in 2018, but no details have yet been released. Plans to extend SPL to grandparents have been shelved until after the review.

Redundancy protection for new mothers is currently under review. Currently, under Regulation 10 of the Maternity and Parental Leave etc. Regulations (1999),<sup>94</sup> before making an employee on maternity leave redundant, employers have an obligation to offer them a suitable alternative vacancy, where one is available with the employer (or an associated employer). This gives the woman priority over other employees who are also at risk of redundancy. An alternative vacancy must be both suitable and appropriate for the woman to take up in the circumstances, and the terms and conditions must not be ‘substantially less favourable’ than her previous role. This protection applies while the woman is on ordinary or additional maternity leave.

Evidence from reports undertaken by the Equality and Human Rights Commission and the Department of Business, Innovation and Skills (EHRC/BIS 2016) and later by the House of Commons Women and Equalities Select Committee (W&Eq 2016) demonstrates that new mothers are being forced out of work when they seek to return following leave.

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<sup>84</sup> See BBC (2018), ‘Shared parental leave take-up may be as low as 2%’, 12 February 2018, at <https://www.bbc.co.uk/news/business-43026312> and Eurofound (2017), ‘United Kingdom: Low take-up of Shared Parental Leave scheme’, 13 September 2017, at <https://www.eurofound.europa.eu/publications/article/2017/united-kingdom-low-take-up-of-shared-parental-leave-scheme>.

<sup>85</sup> See Department for Business, Energy and Industrial Strategy (2018), ‘New ‘Share the joy’ campaign promotes shared parental leave rights for parents’, press release, 12 February 2018, at <https://www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents>.

<sup>86</sup> Employment Rights Act 1996, 1 August 1996. <https://www.legislation.gov.uk/ukpga/1996/18>.

<sup>87</sup> Equality Act 2010, 1 October 2010. [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf).

<sup>88</sup> Maternity and Parental Leave etc. Regulations 1999, 15 December 1999. <http://www.legislation.gov.uk/uksi/1999/3312/contents/made>.

<sup>89</sup> Management of Health and Safety at Work Regulations 1999, 29 December 1999. <http://www.legislation.gov.uk/uksi/1999/3242/contents/made>.

<sup>90</sup> The Sex Discrimination (Northern Ireland) Order 1976. <https://www.legislation.gov.uk/nisi/1976/1042/introduction>.

<sup>91</sup> The Employment Rights (Northern Ireland) Order 1996, 23 July 1996. <https://www.legislation.gov.uk/nisi/1996/1919/contents>.

<sup>92</sup> Maternity and Parental Leave etc. (Northern Ireland) Regulations 1999, 15 December 1999. <http://www.legislation.gov.uk/nisr/1999/471/contents/made>.

<sup>93</sup> Management of Health and Safety at Work (Northern Ireland) Regulations 2000, 1 February 2001, <http://www.legislation.gov.uk/nisr/2000/388/made>.

<sup>94</sup> Maternity and Parental Leave etc. Regulations 1999, 15 December 1999. <http://www.legislation.gov.uk/uksi/1999/3312/contents/made>.



Following consultation the Government has now committed, among other measures, to extend the redundancy protection period for six months after a new mother returns to work on the basis that it is a long enough period to allow a new mother to re-establish herself in the workplace.<sup>95</sup> In terms of defining when in a pregnancy additional protection against redundancy should begin, the Government believes that this can best be defined as the point when a woman informs her employer in writing that she is pregnant.

The Government is also consulting on the impact of extending additional redundancy protection in the 'return to work' period for mothers to other groups who are taking extended periods of leave for purposes that are similar to maternity leave – e.g. adoptive leave, parental leave, shared parental leave.

The Government intends to form a technical task group to work through certain issues: extending protection into a 'return to work' period can create challenges in terms of the interactions of different forms of leave. For instance, when would the 'return to work' period start (i.e. when would the 6-month period of additional redundancy protection begin) where a period of maternity leave is followed immediately by a period of annual leave, special leave or a career break? There is also the question of how any extended redundancy protection would work with shared parental leave, where parents chose to take that in multiple blocks (i.e. a period of shared parental leave, followed by a period at work, followed by a further period of shared parental leave).

The Government is also seeking views regarding the promotion of awareness of legal rights and protections during pregnancy and maternity.

The consultation closed on 5 April 2019.

## **5.2 Pregnancy and maternity protection**

### **5.2.1 Definition in national law**

National law does not define a pregnant worker or a worker who is breastfeeding. However, a worker who has recently given birth is defined in the Management of Health and Safety at Work Regulations 1999<sup>96</sup> (the Management Regulations) Section 1 as having 'delivered a living child or, after 24 weeks of pregnancy, a stillborn child'.

### **5.2.2 Obligation to inform employer**

Employees must tell their employer about the pregnancy at least 15 weeks before the beginning of the week the baby is due. However, as employees cannot take time off for antenatal appointments until they have told the employer about the pregnancy, many will do so beforehand. It is also evident that legal protection against dismissal/discrimination is only enforceable if the employer was aware of the pregnancy at the time she or he decided to dismiss the employee: this was established in *Del Monte Foods v Mundon*.<sup>97</sup> See also the EAT decision in *Really Easy Car Credit Ltd v Thomson*,<sup>98</sup> in which the EAT confirmed that the correct test to determine was whether the claimant's pregnancy itself

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<sup>95</sup> Department for Business, Industry, Energy & Industrial Strategy Good Work Plan: Pregnancy and Maternity Discrimination Consultation - extending redundancy protection for women and new parents: Government Response (July 2019)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/819696/pregnancy-and-maternity-discrimination-consultation-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819696/pregnancy-and-maternity-discrimination-consultation-government-response.pdf).

<sup>96</sup> Management of Health and Safety at Work Regulations 1999, 29 December 1999.

<http://www.legislation.gov.uk/ukSI/1999/3242/contents/made>.

<sup>97</sup> Employment Appeal Tribunal, *Del Monte Foods v Mundon* [1980] IRLR 224 EAT.

<sup>98</sup> Employment Appeal Tribunal, *Really Easy Car Credit Ltd v Thomson* UKEAT/0197/17/DA, 3 January 2018. [https://assets.publishing.service.gov.uk/media/5a96b2a340f0b67aa5087bb9/Really\\_Easy\\_Car\\_Credit\\_Ltd\\_v\\_Miss\\_A\\_Thompson\\_UKEAT\\_0197\\_17\\_DA.pdf](https://assets.publishing.service.gov.uk/media/5a96b2a340f0b67aa5087bb9/Really_Easy_Car_Credit_Ltd_v_Miss_A_Thompson_UKEAT_0197_17_DA.pdf).



had been the reason or principal reason for her dismissal or whether the decision to dismiss had been because of her pregnancy.

#### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding.

To the author's knowledge there is no national case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding.

#### 5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

There are provisions 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 an adverse effect on an employee or a risk to their safety or health, 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.

#### 5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

In *Madarassy v Nomura International plc*,<sup>99</sup> the Court of Appeal ruled that an employer need only undertake a risk assessment where the work is 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 (or a new risk assessment) simply because an employee informs the employer that she is pregnant.

#### 5.2.6 Prohibition of night work

National law does not prohibit night work during pregnancy, but if a specific work risk has been identified – or her GP / midwife has provided a medical certificate stating she must not work nights – her employer must offer suitable alternative day work on the same terms and conditions. If that is not possible, the employer must suspend her from work on paid leave for as long as is necessary to protect her health and safety and/or that of her child.

#### 5.2.7 Case law on the prohibition of night work

There is no case law on the prohibition of night work.

#### 5.2.8 Prohibition of dismissal

Dismissal from the beginning of the pregnancy until the end of the maternity leave is not prohibited in national law, but if the dismissal is related to the pregnancy or maternity leave then it will automatically be deemed unfair (under the Employment Rights Act 1996 Section 99) and will be discriminatory under the Equality Act 2010.

#### 5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant when on maternity leave, she is still entitled to statutory maternity pay for the rest of the 39 weeks.

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<sup>99</sup> Court of Appeal, *Madarassy v Nomura International plc*, 26 January 2007.  
<https://www.bailii.org/ew/cases/EWCA/Civ/2007/33.html>.

#### 5.2.10 Employer's obligation to substantiate a dismissal

The employer's obligation to substantiate a dismissal is provided by Sections 92(4) and (4A) of the Employment Rights Act 1996 (ERA 1996) in GB, and in NI by Article 124A ER(NI)O.

#### 5.2.11 Case law on the protection against dismissal

*Serco Leisure Operating Ltd v Miss M Lau*<sup>100</sup> (UKEAT/0120/17)RN

This case involved a claimant who had notified her employer of her pregnancy shortly before a management restructure that put her position at risk of redundancy was announced. The manager responsible for the restructure had failed to notify the HR department of the claimant's pregnancy. The Employment Tribunal (ET) was satisfied the restructure was for entirely proper reasons, unrelated to the claimant's pregnancy. The claimant applied for one of the alternative positions in the new structure but was unsuccessful; this selection process, the ET accepted, had been fair but was based on performance on the day and the claimant had the poorest score. There were two other (lower-grade) supervisor positions, which the claimant also applied for but then left on pregnancy-related sick leave and was unable to attend for further interview. The respondent decided to use the scores for the previous selection process, which meant the claimant failed, as she had the lowest score. Having not succeeded in obtaining one of the remaining positions, she was selected for redundancy and duly dismissed.

On the claimant's claims of automatic unfair dismissal and pregnancy discrimination, the ET concluded that her pregnancy had not been the principal reason for her dismissal and thus she had not been automatically dismissed for the purposes of Section 99 Employment Rights Act 1996, but (applying the different test under Section 18 Equality Act 2010) she had suffered unfavourable treatment because of her pregnancy, as this had materially influenced the decision to use a method of selection for the supervisor positions, which had been an effective cause of her dismissal. The respondent appealed against the ET's decision on the Section 18 claim. The EAT allowed the appeal and found that the ET's finding that the burden of proof had shifted for the purposes of Section 136(2) Equality Act 2010 was inadequately explained. Further, it held that to the extent the ET had identified matters that might have suggested a motivation (whether conscious or subconscious) other than that relied on by the respondent, there was no obvious correlation with the claimant's pregnancy (a desire to retain the existing supervisors in post, for example, would still suggest a reason unrelated to the claimant's pregnancy, even if not a reason the respondent had been prepared to admit).

### 5.3 Maternity leave

#### 5.3.1 Length

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

#### 5.3.2 Obligatory maternity leave

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.

<sup>100</sup> Employment Appeal Tribunal, *Serco Leisure Operating Ltd v Miss M Lau*, 3 April 2018. [https://assets.publishing.service.gov.uk/media/5b1fade940f0b634c24e625c/Serco\\_Leisure\\_Operating\\_Ltd\\_v\\_Miss\\_M\\_Lau\\_UKEAT\\_0120\\_17\\_RN.pdf](https://assets.publishing.service.gov.uk/media/5b1fade940f0b634c24e625c/Serco_Leisure_Operating_Ltd_v_Miss_M_Lau_UKEAT_0120_17_RN.pdf).

### 5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

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

### 5.3.4 Legal protection of rights ensuing from the employment contract

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.

### 5.3.5 Level of pay or allowance

The level of pay 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<sup>101</sup> (in Northern Ireland by the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987<sup>102</sup> at 90 % of salary for 6 weeks, with an additional 33 weeks at EUR 166.13 (GBP 148.68) per week (or 90 % of salary if that is lower). There is no ceiling to the 90 %.

### 5.3.6 Additional statutory maternity benefits

Statutory maternity benefits are supplemented by some employers up to the normal remuneration. For example, many universities pay 100 % of salary for 18 weeks, followed by statutory maternity pay.

### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

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.

### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

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, 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.

### 5.3.9 Legal right to share maternity leave

There is no legal right as such to share the maternity leave, but shared parental leave was introduced in the UK in 2014: The Children and Families Act 2014;<sup>103</sup> the Shared Parental Leave Regulations 2014;<sup>104</sup> the Statutory Shared Parental Pay (General) Regulations

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<sup>101</sup> Statutory Maternity Pay (General) Regulations 1986, 24 November 1986.  
<http://www.legislation.gov.uk/ukksi/1986/1960/contents/made>.

<sup>102</sup> Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987, 15 March 1987.  
[https://www.legislation.gov.uk/nisr/1987/30/pdfs/nisr\\_19870030\\_en.pdf](https://www.legislation.gov.uk/nisr/1987/30/pdfs/nisr_19870030_en.pdf).

<sup>103</sup> The Children and Families Act 2014, 13 March 2014.  
<http://www.legislation.gov.uk/ukpga/2014/6/contents/enacted>.

<sup>104</sup> Shared Parental Leave Regulations 2014, 1 December 2014.  
<https://www.legislation.gov.uk/ukdsi/2014/9780111118856/contents>.

2014;<sup>105</sup> the Maternity and Adoption Leave (Curtailed of Statutory Rights to Leave) Regulations 2014;<sup>106</sup> the Maternity Allowance (Curtailed) Regulations 2014<sup>107</sup> and the Statutory Maternity Pay and Statutory Adoption Pay (Curtailed) Regulations 2014.<sup>108</sup> In NI there are materially identical provisions.<sup>109</sup>

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 employment),<sup>110</sup> to share the remaining leave entitlement. The maternity leave in effect comes to an end and 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. Protection against discrimination is the same as for maternity leave.

Leave can only be taken on a full-time basis. Employers and/or collective agreements can provide enhanced rights. The size of the employer is irrelevant and shared parental leave is an additional entitlement to the right to paternity leave/EU parental leave.

#### 5.3.10 Case law

##### *South West Yorkshire Partnership NHS Foundation Trust v Jackson & Others*<sup>111</sup>

The claimant was on maternity leave when she became one of several staff put at risk of redundancy. She was sent emails outlining the redeployment opportunities, but they were sent to her work email address, which she could not access. This caused a delay in her becoming aware of them, although this caused no substantial harm. Nonetheless, her claim for unfavourable treatment under Section 18 of the Equality Act succeeded at the Employment Tribunal, which felt that the claimant did not get the email 'because' she was on maternity leave. On appeal, the EAT ruled that the Employment Tribunal had erred in its application of the test for causation: although the unfavourable treatment would not have occurred 'but for' her being on maternity leave, the Employment Tribunal, it was held, ought to have considered the reasons why the email was sent to her work address, and there was no finding on this point. The 'reason why' test can be satisfied where a rule is applied which is inherently discriminatory, or where the protected characteristic has actually operated on the discriminator's mind. The case was remitted for further findings.

The main point of interest in this case is the discussion around causation and how it is to be applied in relation to Section 18 of the Equality Act. Here the ruling refers to *Indigo*

<sup>105</sup> Statutory Shared Parental Pay (General) Regulations 2014, 1 December 2014.  
<https://www.legislation.gov.uk/ukdsi/2014/9780111118832>.

<sup>106</sup> Adoption Leave (Curtailed of Statutory Rights to Leave) Regulations 2014, 1 December 2014.  
<https://www.legislation.gov.uk/ukdsi/2014/9780111118863/contents>.

<sup>107</sup> Maternity Allowance (Curtailed) Regulations 2014, 1 December 2014.  
<http://www.legislation.gov.uk/ukdsi/2014/3053/contents/made>.

<sup>108</sup> Statutory Maternity Pay and Statutory Adoption Pay (Curtailed) Regulations 2014, 1 December 2014.  
<http://www.legislation.gov.uk/ukdsi/2014/3054/contents/made>.

<sup>109</sup> Work and Families Act (Northern Ireland) 2015, 5 April 2015.  
<http://www.legislation.gov.uk/nia/2015/1/contents/enacted>.

<sup>110</sup> 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>).

<sup>111</sup> Employment Appeal Tribunal, *South West Yorkshire Partnership NHS Foundation Trust v Jackson & Others*, 22 November 2018.  
[https://assets.publishing.service.gov.uk/media/5c7d2268e5274a3b89a4ddaa/South\\_West\\_Yorkshire\\_Partnership\\_NHS\\_Foundation\\_Trust\\_v\\_Mr\\_C\\_Jackson\\_Others\\_UKEAT\\_0090\\_18\\_BA.pdf](https://assets.publishing.service.gov.uk/media/5c7d2268e5274a3b89a4ddaa/South_West_Yorkshire_Partnership_NHS_Foundation_Trust_v_Mr_C_Jackson_Others_UKEAT_0090_18_BA.pdf).

*design Build & Management Limited & Anor v Martinez*<sup>112</sup> and highlights the need for tribunals to ask the standard 'reasons why' question in relation to any unfavourable treatment and that simply applying a 'but for' test is not sufficient. The case of *Onu v Akwivu and Another*<sup>113</sup> is also referred to; this set out ways in which the 'reason why' test can be satisfied – namely where a rule is inherently discriminatory, or a protected characteristic has operated on the discriminator's mind.

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

The ERA Sections 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,<sup>114</sup> 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 (GBP 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.)

### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

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.

### 5.4.3 Case law

There are no cases of which the author is aware.

## 5.5 Parental leave

### 5.5.1 Implementation of Directive 2010/18

In GB the Parental Leave (EU Directive) Regulations 2013<sup>115</sup> amended provisions relating to parental leave in the ERA and the MAPLE Regulations, coming into force on 8 March 2013. Regulation 2 amended Section 80F 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); 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-year period after that. In NI the Parental

<sup>112</sup> Employment Appeal Tribunal, *Indigo design Build & Management Limited & Another v Martinez*, 22 November 2014.

<sup>113</sup> [https://assets.publishing.service.gov.uk/media/593570e1ed915d20fb000176/1\\_Indigo\\_Design\\_Build\\_and\\_Management\\_Ltd\\_2\\_Mr\\_B\\_Tank\\_v\\_Mrs\\_M\\_Martinez\\_UKEAT\\_0020\\_14\\_DM.pdf](https://assets.publishing.service.gov.uk/media/593570e1ed915d20fb000176/1_Indigo_Design_Build_and_Management_Ltd_2_Mr_B_Tank_v_Mrs_M_Martinez_UKEAT_0020_14_DM.pdf). See paras 29–36.

<sup>114</sup> Supreme Court, [2016] UKSC 31, *Onu v Akwivu and Another*, 22 June 2016.  
<https://www.supremecourt.uk/cases/uksc-2016-0024.html>.

<sup>115</sup> Paternity and Adoption Leave Regulations 2002, 8 December 2002.  
<http://www.legislation.gov.uk/uksi/2002/2788/contents/made>.

<sup>115</sup> Parental Leave (EU Directive) Regulations 2013, 13 March 2014.  
<http://www.legislation.gov.uk/ukpga/2014/6/contents/enacted>.

Leave (EU Directive) (Maternity and Parental Leave) Regulations (Northern Ireland) 2013<sup>116</sup> made materially identical amendments to the MAPLE(NI) Regulations and the Employment Rights (NI) Order 1996.

#### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The national legislation is applicable to public and private sectors, 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).

#### 5.5.3 Scope of the transposing legislation

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).

#### 5.5.4 Length of parental leave

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.<sup>117</sup>

#### 5.5.5 Age limits

Workers are entitled to take parental leave until the child is 18 years old.

#### 5.5.6 Individual nature of the right to parental leave

The (EU) parental leave entitlement is an individual right.

#### 5.5.7 Transferability of the right to parental leave

The (EU) parental leave entitlement is not transferable. The separate (UK) shared parental leave entitlement (which is dependent on the mother 'giving up' some of her maternity leave entitlement) can be shared between parents.

#### 5.5.8 Form of parental leave

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.<sup>118</sup> Paragraph 8 of Schedule 2 MAPLE provides that no more than four weeks' leave may be taken in any one year.

#### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

A person must be an employee (i.e. not self-employed or an agency/contract worker) to be able to claim parental leave. Employees must have been in continuous employment for 12 months (Section 13 MAPLE Regulations 1999 and MAPLE NI Regulations 1999).

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<sup>116</sup> Parental Leave (EU Directive) (Maternity and Parental Leave) Regulations (Northern Ireland) 2013, 16 April 2013. <http://www.legislation.gov.uk/nisr/2013/25/contents/made>.

<sup>117</sup> 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, as discussed at Section 5.2 above.

<sup>118</sup> Court of Appeal, [2005] EWCA Civ 443, *Rodway v South Central Trains Ltd*, 18 April 2005, [2005] EWCA Civ 443, [2005] IRLR 583.



#### 5.5.10 Notice period

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. 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.

#### 5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

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 of taking parental leave immediately after a child is born or is placed with the family for adoption.

#### 5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special arrangements for small firms.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

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 years old. The age for all children was increased to 18 by the Maternity and Parental Leave (Amendment) Regulations 2014,<sup>119</sup> which amended the MAPLE Regulations. In NI the MAPLE NI Regulations are in materially identical terms.

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

The author is not aware of any specific measures.

#### 5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

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

#### 5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

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.

<sup>119</sup> Maternity and Parental Leave (Amendment) Regulations 2014, 5 April 2015.  
<https://www.legislation.gov.uk/ukdsi/2014/9780111121559/contents>.

#### 5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

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.

#### 5.5.18 Status of the employment contract or relationship during parental leave

The contract is suspended.

#### 5.5.19 Continuity of entitlement to social security benefits

There is continuity of entitlements to social security cover under the different schemes during the period of parental leave

#### 5.5.20 Remuneration

Parental leave is unpaid. Some employers may remunerate parental leave, but there is no industry or sector practice to this effect.

#### 5.5.21 Social security allowance

The social security system does not provide for an allowance during parental leave

#### 5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

The national provisions do not allow for more favourable provisions.

#### 5.5.23 Case law

In *Ali v Capita Customer Management Limited and Chief Constable of Leicestershire v Hextall*<sup>120</sup> (joined appeals), the Court of Appeal held that it is not discriminatory to pay enhanced pay to those on maternity leave, but not to those on parental leave. It was not direct discrimination as men on parental leave and women on maternity leave are not in comparable positions because 'the predominant purpose of [maternity] leave is not childcare but other matters exclusive to the birth mother.' In any event the exception in the Equality Act 2010 precluding comparison in relation to 'special treatment afforded to a woman in connection with pregnancy or childbirth' applied. The Court of Appeal also held that a claim under the equality of terms (equal pay) provisions of the Equality Act 2010 was precluded by Schedule 7, Paragraph 2, which provides that a sex equality clause does not have effect 'in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.' Finally a claim of indirect discrimination could not be brought as the Equality Act precludes claims of indirect discrimination where the equality of terms (equal pay) provisions apply. Permission to appeal to the Supreme Court was refused.

In a different (unreported) employment tribunal case, *Snell v Network Rail*, a policy of giving mothers on shared parental leave full pay but paying only statutory minimum pay to partners on the same scheme was found to be indirectly discriminatory.

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<sup>120</sup> [2019] EWCA Civ 900.



*Rodway v South West Trains*<sup>121</sup>

An employee who took one day's parental leave to care for his son was charged with unauthorised absence from work. The Court of Appeal held that this was contrary to the legislation and stipulated the need to take the leave in blocks of one week at a time.

## **5.6 Paternity leave**

### **5.6.1 Existence of paternity leave in national law**

A father (which includes all those employees, of either sex, otherwise eligible) is entitled by reason of Paternity and Adoption Leave (PAL) Regulations 2002<sup>122</sup> 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. The provision in NI is materially identical (PAL Regulations (NI)).

### **5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)**

An employee who takes, or seeks to take, paternity leave is entitled not to be subjected to any detriment, nor to be dismissed, for doing so or having done so: PAL Regulations 28, 29 (in NI PAL Regulations (NI), Regulations 28, 29).

### **5.6.3 Case law**

*Atkins v Coyle Plc*<sup>123</sup>

The EAT held that in order to give rise to a claim for unfair dismissal relating to paternity leave the Paternity and Adoption Leave Regulations 2002 Regulation 29 required a causal connection between the dismissal and the taking of paternity leave rather than some vaguer, less stringent connection. It held that the employment tribunal had approached the matter correctly by stating that the relevant question was 'whether or not the reason or principal reason for [the] dismissal was connected with the fact that [X] took paternity leave'.

## **5.7 Time off for *force majeure***

### **5.7.1 Time off for *force majeure***

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.)

<sup>121</sup> Court of Appeal, [2005] EWCA Civ 443, *Rodway v South Central Trains Ltd*, 18 April 2005, [2005] EWCA Civ 443; [2005] IRLR 583 CA.

<sup>122</sup> Paternity and Adoption Leave (PAL) Regulations 2002, 8 December 2002.  
<http://www.legislation.gov.uk/ukxi/2002/2788/contents/made>.

<sup>123</sup> Employment Appeal Tribunal, UKEAT/0206/07, *Atkins v Coyle Plc*, 16 October 2007/8 February 2008. Available at [https://www.bailii.org/uk/cases/UKEAT/2008/0206\\_07\\_0802.html](https://www.bailii.org/uk/cases/UKEAT/2008/0206_07_0802.html).

### 5.7.2 Case law

#### *Qua v John Ford Morrison Solicitors*<sup>124</sup>

The EAT held that the right is simply to arrange alternative care as opposed to a right to care for the child or other dependant oneself.

#### *Royal Bank of Scotland v Harrison*<sup>125</sup>

The EAT held that entitlement because of the unexpected disruption or termination of care arrangements for dependants is not limited to last minute unavailability or emergencies. In this case Mrs Harrison wanted emergency time off when her childminder was unable to care for her children. What is interesting about the case is that she had two weeks' notice of her childminder's unavailability. The question for the tribunal was whether these circumstances fell within the statutory right to time off. Somewhat surprisingly, the EAT confirmed that she should have been allowed time off. The EAT first agreed with the tribunal that the amount of time actually taken off was *reasonable* – the only question was whether the disruption of the arrangements was *unexpected*. RBS argued that as she had advance warning of the problem it was not unexpected. The EAT disagreed and made it clear that the provision does not apply only to a situation such as a childminder not turning up on the day in question. The disruption to Mrs Harrison's arrangements was unexpected albeit that she had two weeks' notice of it.

#### *Ellis v Ratcliffe Palfinger Ltd*<sup>126</sup>

The EAT held that an employee had not been automatically unfairly dismissed for exercising the right to take time off to assist dependants. He did not contact his employer to inform them 'as soon as reasonably practicable' (as required by legislation) of the reason for his absence – taking a heavily pregnant partner to hospital to give birth – and was dismissed.

## 5.8 Care leave

### 5.8.1 Existence of care (or carers') leave in national law

There is no such leave in national law.

### 5.8.2 Case law

None.

## 5.9 Leave in relation to surrogacy

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.

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<sup>124</sup> Employment Appeal Tribunal, [2003] ICR 482 EAT.

<sup>125</sup> Employment Appeal Tribunal, [2008] UKEAT/0093/08/LA.

<sup>126</sup> Employment Appeal Tribunal, UKEAT/0438/13/BA, 17 September 2014, at [https://assets.publishing.service.gov.uk/media/5930152fe5274a5e51000132/Mr\\_G\\_Ellis\\_v\\_Ratcliff\\_Palfinger\\_Ltd\\_UKEAT\\_0438\\_13\\_BA.pdf](https://assets.publishing.service.gov.uk/media/5930152fe5274a5e51000132/Mr_G_Ellis_v_Ratcliff_Palfinger_Ltd_UKEAT_0438_13_BA.pdf).

## 5.10 Flexible working time arrangements

### 5.10.1 Right to reduce or extend working time

There is no right to reduce or extend working hours. However, employees have a right to 'request' a change to the hours they are required to work (Employment Rights Act 1996, Section 80f).

Successful requests result in a change to the terms and conditions of employment. It is not clear whether the right to request flexible working includes the right to request a temporary rather than permanent change in terms and conditions; it is also unclear whether it includes the right to request to increase, as well as decrease, hours of work. In relation to the opportunity to request an increase in hours, the Women and Equalities Committee, in its 2016 inquiry into the gender pay gap, noted that the uncertainty about the scope of the legislation may result in women working for fewer hours than they would choose should they have a statutory right to request an increase, or a right to return to a previously higher level. They therefore recommended that the legislation be amended to allow those working less than full-time hours to request the opportunity to work more.<sup>127</sup>

To be eligible a worker must be an *employee* with 26 weeks continuous employment (thus excluding many workers on agency, casual or other atypical contracts). The right was originally restricted to parents or carers but was extended to all employees in 2014. There is no restriction on the purposes for which the right can be exercised. The right does not depend on the size of the employer.

Only one statutory request can be made within a 12 month period. The request must be in writing and employees are required, among other details, to specify the change to their terms and conditions that they are seeking; what effect they anticipate the requested change would have on the employer/the running of the business; and how they anticipate the employer may be able to deal with any such effect.

Having received a request the employer is under an obligation to deal with the application in a reasonable manner and may only refuse a request for one of a number of business reasons specified in the legislation.<sup>128</sup> These include: an unacceptable burden of costs; an inability to reorganise work among existing staff or an inability to recruit more staff; if the employer considers the change would have a detrimental impact on quality or performance or on ability to meet customer demand; where there is insufficient work during the period the employee proposes to work; or if proposed structural changes to the business mean that the new proposed work patterns are unlikely to fit in with new arrangements. A statutory code of practice sets out the steps employers will normally be required to take in order to handle requests in a reasonable manner: employers should consider the benefits of the request for both employee and business and weigh these against any adverse impact on the business by reference to the reasons set out above; they should discuss the request with the employee (except in the event of straightforward acceptance of the request); and they should deal with requests promptly.<sup>129</sup> Employees who are dismissed or subject to a detriment as a result of having exercised their legal right to request flexible working are entitled to remedies under the legislation.

The author is not aware of any specific measures to encourage men to make use of this legal right.

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<sup>127</sup> House of Commons Women and Equalities Committee (2016) *Gender Pay Gap: Second Report of Session 2015-6* (HC584) at p.40.

<sup>128</sup> Employment Rights Act 1996, Section 80G.

<sup>129</sup> ACAS (2014) 'Code of practice on handling in a reasonable manner requests to work flexibly', available at: <https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests/html>.

#### 5.10.2 Right to adjust working time patterns

There is no right to adjust working time patterns. However, employees have a right to 'request' a change to the times when they are required to work (Employment Rights Act 1996, Section 80f). This right applies in the same way as the right to request a change in hours.

#### 5.10.3 Right to work from home or remotely

There is no right to work from home or remotely. However, an employee has a right to 'request' a change to 'where as between his home and a place of business of his employer, he is required to work' (Employment Rights Act 1996, Section 80f). This right applies in the same way as the right to request a change in hours.

#### 5.10.4 Other legal rights to flexible working arrangements

There are no other legal rights to flexible working arrangements. However, the Employment Rights Act 1996 gives power to the Secretary of State to make regulations to specify other forms of flexible working arrangement to which the right to request may apply (Employment Rights Act 1996, Section 80f).

#### 5.10.5 Case law

*Shaw v CCL Ltd*<sup>130</sup>

An employer was found to have directly and indirectly discriminated on the grounds of sex in turning down a request to be allowed to work flexibly on an employee's return from maternity leave. See also *Bathgate v Applied Satellite Technology Ltd*.<sup>131</sup> These cases show that where the request is made by a woman, in refusing that request the employer may be applying a provision, criterion or practice which puts women at a particular disadvantage. Thus, where a tribunal is not satisfied that the provision, criterion or practice is objectively justified and determines that the claimant resigned in response to its application, the refusal to grant flexible working would give rise to a discriminatory constructive dismissal.

### 5.11 Evaluation of implementation

The national law implementing the EU law relating to the relevant provisions is adequate.

### 5.12 Remaining issues

There is a gap between the protections / rights available and their practice / experience of working parents. Enforcement of the law in this area can be problematic. Encouraging fathers to take leave (paternity or parental) is also problematic.

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<sup>130</sup> Employment Appeal Tribunal, *Shaw v CCL Ltd*, 22 May 2007.  
[http://www.employmentappeals.gov.uk/Public/Upload/06\\_0512fhCNDM.doc](http://www.employmentappeals.gov.uk/Public/Upload/06_0512fhCNDM.doc).

<sup>131</sup> Employment Tribunal (ET), Case No.1501476/13, unreported.

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

### **6.1 General (legal) context**

#### **6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues**

The author is not aware of any specific recent reports / surveys in this area.

#### **6.1.2 Other issues related to gender equality and social security**

The author is not aware of any other issues.

#### **6.1.3 Political and societal debate and pending legislative proposals**

The author is not aware of any political / social debate or pending legislative issues.

### **6.2 Direct and indirect discrimination**

Direct and indirect discrimination is prohibited in respect of pension contributions made after 1990: in GB by the EqA Sections 29, 39 and 67; in NI by Articles 8 and 30 SD(NI)O and EqP(NI)A 1970.

### **6.3 Personal scope**

The personal scope of national law is the same as specified in Article 6 of Directive 2006/54, 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 the landmark case of *Jivraj v Hashwani* the Supreme Court ruled that arbitrators were not 'employed' for the purposes of the anti-discrimination provisions,<sup>132</sup> 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 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. However, other workers who are not employees but who have a contract personally to do work are covered by the Equality Act 2010, as confirmed by the Supreme Court in 2018 in *Pimlico Plumbers v Smith*.<sup>133</sup>

### **6.4 Material scope**

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 of the Directive.

### **6.5 Exclusions**

National law has not applied exclusions 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 be considered to fall under the provisions dealing with goods, facilities and services (Section 29 EqA, 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

<sup>132</sup> Supreme Court, [2011] UKSC 40, 27 July 2011, at <https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf>. <https://www.bailii.org/uk/cases/UKSC/2011/40.html>.

<sup>133</sup> Equality Act 2010, Section 83(2); Supreme Court, [2018] UKSC 29, *Pimlico Plumbers Ltd and another v Smith*, 13 June 2018, at: <https://www.bailii.org/uk/cases/UKSC/2018/29.html>.

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.

#### **6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54**

The author is not aware of any examples.

#### **6.7 Actuarial factors**

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 in the calculation of contributions to a scheme by employers. The author is not aware of any examples in case law.

#### **6.8 Difficulties**

None of which the author is aware.

#### **6.9 Evaluation of implementation**

No further comments

#### **6.10 Remaining issues**

No further comments

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

### 7.1 General (legal) context

#### 7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

The author is not aware of many specific recent reports/surveys in this area, but the work of the Women's Budget Group (WBG)<sup>134</sup> is worthy of reference, as it monitors and comments on the gender implications of reforms/cuts and freezes in statutory social security provisions: WBG (2018) *Universal Credit and Financial Abuse: Exploring the Links*,<sup>135</sup> which focuses on the universal credit single payment. The WBG, along with other organisations, has concerns about aspects of universal credit that have implications for women and for survivors of domestic abuse: e.g. the fact that universal credit requires couples to nominate a single bank account is of concern because it could result in financial abuse in less equal relationships and hence main carers (usually women) risk losing financial support that is clearly earmarked for children.

#### 7.1.2 Other relevant issues

The author is not aware of any other issues.

#### 7.1.3 Overview of national acts

It is not possible to list all the relevant social security schemes / legislation here because there are so very many pieces of both primary and secondary legislation (in GB and NI) containing provisions on statutory social security schemes.<sup>136</sup>

#### 7.1.4 Political and societal debate and pending legislative proposals

Universal credit has replaced six means-tested benefits and tax credits in the UK with a single monthly payment per claimant/jointly claiming couple. It will impact upon half of all families with children and around 7 million households in total. The move is controversial, not least because it is likely to have a huge impact on women – especially those with dependent children. The impact is thought to be on their financial independence and autonomy as well as their ability to enter and progress in the labour market.<sup>137</sup>

### 7.2 Implementation of the principle of equal treatment for men and women in matters of social security

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.<sup>138</sup> To the extent that social security is recognised as pertaining to 'goods,

<sup>134</sup> Available at <https://wbq.org.uk/>.

<sup>135</sup> Howard, M. (2018), *Universal Credit and Financial Abuse: Exploring the Links*, Women's Budget Group, available at <https://wbq.org.uk/wp-content/uploads/2018/09/FINAL-full-report-financial-abuse-and-uc.pdf>.

<sup>136</sup> See <https://www.gov.uk/browse/benefits> for list of the main benefits, which include universal credit, job seeker's allowance and low income benefits, tax credits and housing benefits. Or see list of relevant legislation at <https://www.legislation.gov.uk/ukxi/social%20security>.

<sup>137</sup> See e.g. Griffiths, R. (2018), 'Universal Credit, Women and Gender Equality: A Retrograde Step?', IPR blog, University of Bath, 19 September 2018, at <https://blogs.bath.ac.uk/iprblog/2018/09/19/universal-credit-women-and-gender-equality-a-retrograde-step/> and Bennett, F. (2018), 'Universal credit: the gender impact', available at [http://www.cpag.org.uk/sites/default/files/CPAG\\_Poverty140\\_UniversalCreditGender\\_0.pdf](http://www.cpag.org.uk/sites/default/files/CPAG_Poverty140_UniversalCreditGender_0.pdf).

<sup>138</sup> Equality Act 2010, 1 October 2010, 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.



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 *R v Entry Clearance Officer Bombay ex parte Amin*<sup>139</sup> (which concerned the materially identical provision of the Sex Discrimination Act<sup>140</sup> (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.

### 7.3 Personal scope

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.

### 7.4 Material scope

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.

### 7.5 Exclusions

National law has applied the exclusions from the material scope as specified in Article 7 of Directive 76/7, but sex discrimination in statutory pensionable age, which results in discrimination in relation to other statutory benefits, has been phased out and ceased to exist from 5 December 2018 (at which time men and women became 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.

### 7.6 Actuarial factors

Sex is not used as an actuarial factor in social security schemes: sex discrimination in statutory pensionable age, which results in discrimination in relation to other statutory benefits, has been phased out and ceased to exist from 5 December 2018 (at which time men and women became eligible for state pension payments at 65).

### 7.7 Difficulties

There are no difficulties of which the author is aware.

### 7.8 Evaluation of implementation

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, as explained above).

- 
- (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.  
<https://www.legislation.gov.uk/ukpga/2010/15/contents>.

<sup>139</sup> House of Lords, *R v Entry Clearance Officer Bombay, ex parte Amin* [1983] 2 AC 818 (HL).

<sup>140</sup> Sex Discrimination Act 1975, 1976. <https://www.legislation.gov.uk/ukpga/1975/65>.

## **7.9 Remaining issues**

There are no further issues that have not been discussed above.

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

### **8.1 General (legal) context**

#### **8.1.1 Surveys and reports on the specific difficulties of self-employed workers**

Tomlinson, D. and Corlett, A. (2017), *A Tough Gig? The Nature of Self-Employment in 21st Century Britain and Policy Implications*, Resolution Foundation,<sup>141</sup> focuses on: the sectoral make-up of the UK's 5 million self-employed workers; the drivers of this growth since the recession; how the self-employed are treated differently in terms of tax and employment rights; and what policy challenges this raises. Key findings: nearly 60 % of the growth in self-employment since 2009 has been in high-skilled, higher-paying 'privileged' sectors, despite them making up just 40 % of the self-employed. The fastest growing sectors have been advertising (100 % growth), public administration (90 %), and banking (60 %); the remaining 40 % of the growth has taken place in relatively precarious sectors, such as construction and cleaning. One of the key drivers of this growth has been the tax advantages enjoyed by the self-employed. For a worker costing a firm approximately EUR 111 690 (GBP 100 000), a self-employed worker enjoys a tax advantage of approximately EUR 7 820 (GBP 7 000) over a similarly expensive employee. The growth of self-employment raises important policy questions regarding the tax treatment of labour; employment rights and protection; and access to social security provision and private pension savings.

Office of National Statistics (2018), *Trends in self-employment in the UK – Analysing the characteristics, income and wealth of the self-employed*,<sup>142</sup> which highlights, amongst other things, a growth in numbers of self-employed workers from 3.3 million in 2001 to 4.8 million in 2017. It has become more prevalent amongst both men and women.

#### **8.1.2 Other issues**

The author is not aware of any other issues not already mentioned elsewhere here.

#### **8.1.3 Overview of national acts**

The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014<sup>143</sup> and Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations (Northern Ireland) 2014.<sup>144</sup>

#### **8.1.4 Political and societal debate and pending legislative proposals**

Growth in the number of self-employed workers has been noted (see ONS report above in 8.1.1). Concern has been raised about the impact of this growth, and the gig economy in general, on taxation / welfare state / pensions.

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<sup>141</sup> Tomlinson, D. and Corlett, A. (2017), *A Tough Gig? The Nature of Self-Employment in 21st Century Britain and Policy Implications*, Resolution Foundation, available at <https://www.resolutionfoundation.org/publications/a-tough-gig-the-nature-of-self-employment-in-21st-century-britain-and-policy-implications/>.

<sup>142</sup> Office of National Statistics (2018), *Trends in self-employment in the UK – Analysing the characteristics, income and wealth of the self-employed*, available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/article/trendsinselfemploymentintheuk/2018-02-07>.

<sup>143</sup> The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014, 1 April 2014. <https://www.legislation.gov.uk/uksi/2014/606/contents/made>.

<sup>144</sup> Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations (Northern Ireland) 2014, 1 April 2014. <https://www.legislation.gov.uk/nisr/2014/102/contents/made>.

## 8.2 Implementation of Directive 2010/41/EU

In the view of the UK Government, 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 in GB by the EqA and in NI by the SD(NI)O.

## 8.3 Personal scope

There is, accordingly, a risk that 'small entrepreneurs' or 'business persons' will not be covered. For example, if 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).

### 8.3.1 Scope

The Social Security Contributions and Benefits Act 1992,<sup>145</sup> 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.<sup>146</sup>

### 8.3.2 Definitions

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 utilised 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'.<sup>147</sup> The decision of the Supreme Court in *Jivraj v Hashwani*<sup>148</sup> 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.

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<sup>145</sup> Social Security Contributions and Benefits Act 1992, 13 February 1992.

<http://www.legislation.gov.uk/ukpga/1992/4/contents/enacted>.

<sup>146</sup> Social Security Contributions and Benefits (Northern Ireland) Act 1992, 13 February 1992.

<https://www.legislation.gov.uk/ukpga/1992/7/contents>.

<sup>147</sup> Equality Act 2010, 1 October 2010.

[http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf) S83(2)(a) and The Sex

Discrimination (Northern Ireland) Order 1976. <https://www.legislation.gov.uk/nisi/1976/1042/introduction>.

<sup>148</sup> Supreme Court, [2011] UKSC 40, 27 July 2011, available at

<https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf>.

### 8.3.3 Categorisation and coverage

There are no legislative distinctions between different types of self-employed workers. The agricultural sector is treated the same as other sectors by the implementing Regulations (as by the EqA and SD(NI)O)

### 8.3.4 Recognition of life partners

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 cover life partners only where they are married or in a civil partnership.

## 8.4 Material scope

### 8.4.1 Implementation of Article 4 of 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 Government taking the view in each case that no implementing measures were required.

### 8.4.2 Material scope

The EqA and SD(NI)O prohibit sex discrimination in access to employment, vocational training and promotion and in working conditions; 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 she or he had been excluded. Such an argument might work in a particular case but it would turn on the facts of the individual case and it may be that some self-employed workers would fall through a gap, which would indicate inadequate transposition.

## 8.5 Positive action

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 (PSED)) 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 Social protection

There is no specific system of social protection applicable in the UK to self-employed workers. In the case of some benefits, entitlement to social protection depends 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) and 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'.<sup>149</sup>

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 Maternity benefits

The GB 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'.<sup>150</sup> 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 (GBP 27) 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.

<sup>149</sup> Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 <http://www.legislation.gov.uk/nisr/2014/102/regulation/2/made> and in England and Wales the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations 2014 at <https://www.legislation.gov.uk/ukSI/2014/606/contents/made>.

<sup>150</sup> Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014. <http://www.legislation.gov.uk/nisr/2014/102/regulation/2/made> S2(5)(2)(a).

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. This would not as such be alternative to or part of the allowance.

## **8.8 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

The view has been taken in GB and NI that no implementation was required.

### **8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)**

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

## **8.9 Prohibition of discrimination**

Article 14(1)(a) of the recast Directive 2006/54 has been implemented in the UK, 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.<sup>151</sup> The EqA contains similar provisions (Sections 39, 41, 55, 44-45, 53 & 49-50).

## **8.10 Evaluation of implementation**

In the view of the author, the level of protection is in line with EU law, but not higher than that required by the Directive.

## **8.11 Remaining issues**

There are no further issues that have not been discussed above.

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<sup>151</sup> [https://www.communities-ni.gov.uk/sites/default/files/publications/ofmdfm\\_dev/transposition-table.pdf](https://www.communities-ni.gov.uk/sites/default/files/publications/ofmdfm_dev/transposition-table.pdf).



## **9 Goods and services (Directive 2004/113)<sup>152</sup>**

### **9.1 General (legal) context**

#### **9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services**

The author is currently not aware of any key surveys / reports in this area.

#### **9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy**

The author is currently not aware of any specific problems in this area.

#### **9.1.3 Political and societal debate**

The author is currently not aware of any significant political/societal debates in this area.

### **9.2 Prohibition of direct and indirect discrimination**

National law prohibits direct and indirect discrimination, in GB by reason of Section 29 EqA and in NI by Article 30 SD(NI)O.

### **9.3 Material scope**

The national provisions are broader than specified in Article 3 of Directive 2004/113. The EqA in GB and the SD(NI)O in NI 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.

### **9.4 Exceptions**

No exceptions as specified in Article 3(3) of Directive 2004/113 are applied in national law.

### **9.5 Justification of differences in treatment**

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.

### **9.6 Actuarial factors**

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.

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<sup>152</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

### **9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113**

The EqA has been amended from December 2012 to remove the actuarial exception which applied prior to that date in relation to sex discrimination. This amendment was a response to the ruling in *Test-Achats*.<sup>153</sup> In NI similar amendments were made by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012.

### **9.8 Positive action measures (Article 6 of Directive 2004/113)**

No positive action measures in relation to access to and the supply of goods and services have been adopted 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.

### **9.9 Specific problems related to pregnancy, maternity or parenthood**

The author is not aware of any specific problems of discrimination on the grounds of pregnancy, maternity and parenthood in relation to the access to and the supply of goods and services.

### **9.10 Evaluation of implementation**

In the author's view the legislation complies with EU law but does not exceed it.

### **9.11 Remaining issues**

There are no remaining issues that have not been discussed above.

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<sup>153</sup> CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, 1 March 2011. Available at <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&parties=test%20achats>.

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

### 10.1 General (legal) context

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

- There are a number of Women's Aid surveys / reports<sup>154</sup> e.g.

(2015) *The First Femicide Census Report*:<sup>155</sup> 'The Femicide Census Report is a database currently containing information on almost one thousand women killed by men in England and Wales since 2009. It is a ground-breaking project which aims to provide a clearer picture of men's fatal violence against women by allowing for detailed tracking and analysis.'

(2017) *The Femicide Census: 2016 Findings*:<sup>156</sup> An annual report from the Femicide Census, which monitors the number of women killed by men in England, Wales and Northern Ireland: 113 women were killed by men in 2016.

(2017) *Nowhere to Turn* report:<sup>157</sup> 'This report shows that there is a systemic failure by statutory agencies when it comes to responding to the needs of the most vulnerable survivors of domestic abuse. While chronic underfunding is increasing pressure on already overstretched refuge providers, leading to a crisis in refuge provision for the women who most desperately need support.'

(2018) Report from the second year of their *No Woman Turned Away* project<sup>158</sup> – this report shows 'repeated failings from statutory services to those in priority need who are vulnerable due to fleeing domestic abuse'.<sup>159</sup>

- *Creating a Truly Transformative Domestic Abuse Bill. Recommendations from the All-Party Parliamentary Group on Domestic Violence and Abuse, 2017-18* (2018)<sup>160</sup>

This report found sexual assault victims are waiting up to 14 months for counselling because specialist support services are finding it difficult to keep up with 'unprecedented demand'. It also found some centres had to close their waiting lists completely due to a shortfall of funding. It calls for a Domestic Abuse Bill to do six things:

1. 'A sustainable, long-term and secure funding model for specialist domestic abuse services, most urgently refuges, including those specific services for BME women, LGBT women and disabled women, and specialist support for children who have experienced domestic abuse.
2. A violence against women and girls (VAWG) commissioner, who has the power to effectively enforce a clear framework of national accountability for the resourcing, quality and provision of services.
3. Migrant survivors, including survivors on non-spousal visas and all those who have no recourse to public funds due to their immigration status, should have full and equal access to all the services and support they need.

<sup>154</sup> <https://www.womensaid.org.uk/research-and-publications/>.

<sup>155</sup> <https://www.womensaid.org.uk/what-we-do/campaigning-and-influencing/femicide-census/>.

<sup>156</sup> <https://www.womensaid.org.uk/what-we-do/campaigning-and-influencing/femicide-census/>.

<sup>157</sup> <https://www.womensaid.org.uk/research-and-publications/nowomanturnedaway/>.

<sup>158</sup> <https://www.womensaid.org.uk/tag/no-woman-turned-away-project/>.

<sup>159</sup> <https://www.womensaid.org.uk/research-and-publications/>.

<sup>160</sup> Francis-Cansfield, S. (2018), *Creating a Truly Transformative Domestic Abuse Bill. Recommendations from the All-Party Parliamentary Group on Domestic Violence and Abuse, 2017-18*, Women's Aid Federation of England, available at <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/APPG-Report-2018.pdf>.

4. "Priority need" status for housing extends to all survivors of domestic abuse, with clear guidance that local authorities should accept all survivors of domestic abuse who present themselves as homeless, regardless of their local connection, under the local connection criteria of the homelessness legislation.
5. Secure domestic abuse as a priority within the health and social care sector, first and foremost reflected through mandatory ongoing training for health care providers and professionals.
6. Ensure mandatory relationships and sex education has a clear and gendered focus on tackling domestic abuse and VAWG, tackles pervasive gender stereotypes, is delivered in partnership with the expertise of specialist domestic abuse services, has a "whole school approach" to prevention, and includes both online and offline abuse.<sup>161</sup>

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

In GB there is a combination of civil and criminal law provision, e.g.

The Family Law Act 1996<sup>162</sup> Part IV deals with non-molestation orders and occupation orders (for property), both of which can have power of arrest attached if they are breached. The Domestic Violence Crime and Victims Act 2004<sup>163</sup> broadened the availability of those protections to include same-sex and cohabiting couples (and made breach of a non-molestation order a criminal offence).

The Protection from Harassment Act 1997<sup>164</sup> gives both criminal and civil remedies. There are two criminal offences: pursuing a course of conduct amounting to harassment and a more serious offence where the conduct puts the victim in fear of violence. There are special provisions to cover harassment targeting two or more people to persuade (for example certain kinds of protest action against companies) and harassment of an individual carried out by two or more people. A civil court can impose civil injunctions in harassment cases as well as awarding damages to the victim for the harassment. Breach of such an injunction is a criminal offence. In 2012 the coalition Government added two specific criminal offences of stalking to the 1997 Act following widespread concern that the Act was not dealing adequately with this problem.

Scotland is covered by separate sections in the 1997 Act. Key differences are that they do not provide for a specific criminal offence of harassment (although the police could prosecute perpetrators using the common law offence of breach of the peace) and there are special rules for harassment amounting to domestic abuse, where conduct on just one occasion can count.

Crime and Security Act 2010,<sup>165</sup> Section 24: domestic violence protection notice (DVPN) – issued by police, for 48 hours; and under Section 28: domestic violence protection order (DVPO) – issued by magistrates for 28 days where actual harm and breach is an arrestable offence.

<sup>161</sup> Francis-Cansfield, S. (2018), *Creating a Truly Transformative Domestic Abuse Bill. Recommendations from the All-Party Parliamentary Group on Domestic Violence and Abuse, 2017-18*, Women's Aid Federation of England, available at <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/APPG-Report-2018.pdf>, at p. 6.

<sup>162</sup> The Family Law Act 1996, 4 July 1996. <https://www.legislation.gov.uk/ukpga/1996/27/contents>.

<sup>163</sup> The Domestic Violence Crime and Victims Act 2004, 15 November 2004. <https://www.legislation.gov.uk/ukpga/2004/28/section/5>.

<sup>164</sup> Protection from Harassment Act 1997, 21 March 1997. <https://www.legislation.gov.uk/ukpga/1997/40/contents>.

<sup>165</sup> Crime and Security Act 2010, 8 April 2010. <https://www.legislation.gov.uk/ukpga/2010/17/contents>.

Section 76 of the Serious Crime Act 2015<sup>166</sup> came into force in December 2015; it criminalises patterns of coercive or controlling behaviour where they are perpetrated against an intimate partner or family member. Several other criminal offences can apply to cases of domestic violence. These range from murder, rape and manslaughter through to assault and threatening behaviour.

The Domestic Violence Disclosure Scheme is a non-statutory scheme and was introduced in 2014.<sup>167</sup> The scheme is based on the common law power of the police to disclose information where this is necessary to prevent crime. It allows an individual, where they have concerns that their partner has a history of abusive behaviour, to make enquiries confidentially to police. This will enable them to make an informed choice about an existing personal relationship.

In NI<sup>168</sup> the legislation has progressed over the last few decades but does not include the coercive control offence<sup>169</sup> (in force in GB) and there are differences in the Protection from Harassment Act (see below). The following are the key pieces of legislation, again a mix of criminal and civil provision:

The Northern Ireland Housing Executive (1988) policy, gives survivors of domestic abuse priority for re-housing.

The Protection from Harassment (NI) Order 1997<sup>170</sup> Northern Ireland has very similar provisions to those sections of the Protection from Harassment Act which extend to England and Wales. Key differences are: The Order does not include the specific stalking offences and does not include the special provisions for harassment of two or more people, or for harassment of an individual by two or more people.

Other relevant acts are:

- The Family Homes and Domestic Violence (NI) Order 1998;<sup>171</sup>
- The Protection of Children and Vulnerable Adults (NI) Order 2003;<sup>172</sup>
- The Domestic Violence, Crime and Victims Act 2004;<sup>173</sup>
- Law Reform (Misc. Provision) NI Order 2005 (allows cohabitants to be protected);<sup>174</sup>
- The Forced Marriage (Civil Protection) Act 2007;<sup>175</sup>

<sup>166</sup> Serious Crime Act 2015, 3 March 2015. <http://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>.

<sup>167</sup> Government guidance is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf). For details of the scheme in Scotland see <https://www.scotland.police.uk/contact-us/disclosure-scheme-for-domestic-abuse-scotland/>.

<sup>168</sup> For discussion of the differences in approach – not outlined in detail here – see Doyle, J. and McWilliams, M. (2018), 'Transforming Responses to Domestic Violence in a Politically Contested Environment: The Case of Northern Ireland', in *feminists@law*, Vol 9, No 1 (2019) available at <https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/744/1459>.

<sup>169</sup> In February 2016 a consultation paper was launched by the NI Dept of Justice with a view to introducing these elements but it was stalled due the absence of a functioning assembly since January 2017. See Domestic Abuse Offence and Domestic Violence Disclosure Scheme at <https://www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme>, Department of Justice (NI) (2016), *Domestic Abuse Offence and Domestic Violence Disclosure Scheme – A Consultation*, at <https://www.justice-ni.gov.uk/sites/default/files/consultations/doj/consultation-domestic-violence.PDF>

<sup>170</sup> Protection from Harassment (NI) Order 1997, 8 April 1997. <http://www.legislation.gov.uk/nisi/1997/1180/contents>.

<sup>171</sup> Family Homes and Domestic Violence (NI) Order 1998, 22 April 1998. <https://www.legislation.gov.uk/nisi/1998/1071/contents/made>.

<sup>172</sup> Protection of Children and Vulnerable Adults (NI) Order 2003, 27 February 2003. <https://www.legislation.gov.uk/nisi/2003/417/contents>.

<sup>173</sup> Domestic Violence, Crime and Victims Act 2004, 15 November 2004. <https://www.legislation.gov.uk/ukpga/2004/28/contents>.

<sup>174</sup> Law Reform (Misc. Provision) NI Order 2005, 7 June 2005. <http://www.legislation.gov.uk/nisi/2005/1452/contents>.

<sup>175</sup> The Forced Marriage (Civil Protection) Act 2007, 26 July 2007. <https://www.legislation.gov.uk/ukpga/2007/20/contents>.

- Sexual Offences (NI) Order 2008;<sup>176</sup>
- Domestic Abuse (Scotland) Act 2018;<sup>177</sup>
- Domestic Violence and Abuse Disclosure Scheme (similar to that available in GB) was introduced in 2018.<sup>178</sup>

### 10.1.3 National provisions on online violence and online harassment

There are no specific provisions relating to online violence or online harassment in the UK but a number of existing laws can be applied (depending on the circumstances of the claim) – e.g. Protection from Harassment Act 1997;<sup>179</sup> Criminal Justice and Public Order Act 1994;<sup>180</sup> Malicious Communications Act 1988;<sup>181</sup> Communications Act 2003;<sup>182</sup> Criminal Justice and Licensing Scotland Act 2010;<sup>183</sup> and the Defamation Act 2013.<sup>184</sup> The Crown Prosecution Service has published guidance on prosecuting cases involving communications sent via social media.<sup>185</sup> The Law Commission has recently (2018) called for reforms to the law relating to online and social media-based abuse. It raises concerns about the lack of coherence in the current criminal law and the problems this causes for victims, police and prosecutors and is critical of the current law's ability to protect people harmed by a range of behaviour online, including receiving abusive and offensive communications, 'pile on' harassment, often on social media and misuse of private images and information.<sup>186</sup>

### 10.1.4 Political and societal debate

On 8 March 2016, the Home Office published its 2016-20 strategy for ending violence against women and girls (VAWG).<sup>187</sup>

In March 2018, the Government launched a consultation 'seeking views on both legislative proposals for a landmark draft Domestic Abuse Bill and a package of practical action.' Proposals include: the introduction of a statutory definition of domestic abuse; the creation of a new domestic abuse protection notice (DAPN), to be made by the police and a new domestic abuse protection order (DAPO) to be available to the courts in a wide range of circumstances; a Domestic Abuse Commissioner; putting the Domestic Violence Disclosure Scheme into law. The resulting Domestic Abuse Bill 2020 had its second reading in Parliament in April 2020 and is expected to become law later this year.

<sup>176</sup> Sexual Offences (NI) Order 2008, 9 July 2008. <https://www.legislation.gov.uk/nisi/2008/1769/contents>.

<sup>177</sup> Domestic Abuse (Scotland) Act 2018, 9 March 2018. <https://www.legislation.gov.uk/asp/2018/5>.

<sup>178</sup> See Department of Justice (2018), *Domestic Violence and Abuse Disclosure Scheme Northern Ireland (DVADS NI) guidance* at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Domestic-violence-and-abuse-disclose-scheme.pdf>.

<sup>179</sup> Protection from Harassment Act 1997, 21 March 1997.

<https://www.legislation.gov.uk/ukpga/1997/40/contents>.

<sup>180</sup> Criminal Justice and Public Order Act 1994, 3 November 1994.

<https://www.legislation.gov.uk/ukpga/1994/33/contents>.

<sup>181</sup> Malicious Communications Act 1988, 29 July 1988.

<https://www.legislation.gov.uk/ukpga/1988/27/contents>.

<sup>182</sup> Communications Act 2003, 17 July 2003. <http://www.legislation.gov.uk/ukpga/2003/21/contents>

<sup>183</sup> Criminal Justice and Licensing Scotland Act, 6 August 2010.

<https://www.legislation.gov.uk/asp/2010/13/contents>.

<sup>184</sup> The Defamation Act 2013, 26 April 2013.

<http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>.

<sup>185</sup> See Crown Prosecution Service (2018), *Social Media - Guidelines on prosecuting cases involving communications sent via social media*, at <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>.

<sup>186</sup> See Law Commission (2018), 'Reform of the criminal law needed to protect victims from online abuse says Law Commission', 1 November 2018, at <https://www.lawcom.gov.uk/reform-of-the-criminal-law-needed-to-protect-victims-from-online-abuse-says-law-commission/>.

<sup>187</sup> HM Government (2016), *Ending Violence against Women and Girls. Strategy 2016 – 2020*, March 2016, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522166/VAWG\\_Strategy\\_FINAL\\_PUBLICATION\\_MASTER\\_vRB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF).

In NI a consultation was launched in 2018 on Domestic Violence Homicide Reviews and a preliminary report into the law and procedure in serious sexual offences in Northern Ireland was published for consultation.

Many, many, issues remain topical in the UK – e.g. female genital mutilation (FGM), revenge porn, forced marriage and 'honour killings', preventing exploitation of girls by gangs, and human trafficking.

## **10.2 Ratification of the Istanbul Convention**

Although the UK signed the Convention on 8 June 2012, the Convention has not been ratified. 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.<sup>188</sup> The Domestic Abuse Bill, which contained the necessary measures, was not passed in 2019 as intended because of the general election in December 2019.

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<sup>188</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-10-31/HCWS58/#:~:text=The%20UK%20signed%20the%20Istanbul,remains%20committed%20to%20ratifying%20it.&text=In%20most%20respects%2C%20the%20UK,further%20than%20the%20Convention%20requires.>



## 11 Compliance and enforcement aspects (horizontal provisions of all directives)

### 11.1 General (legal) context

#### 11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

- Organ, J. and Sigafoos, J. (2018) *The impact of LASPO on routes to justice*, Equality and Human Rights Commission (EHRC).<sup>189</sup>

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012<sup>190</sup> introduced funding cuts to legal aid and resulted in fewer people being able to access legal advice and representation. Using case studies, this report looked at how LASPO has negatively affected people's lives and access to justice in three areas of law – focussing on employment law (as well as family law and welfare benefits law). It found that '[m]any individuals could not afford to get the help they needed, and across all three areas of law participants reported significant difficulties in accessing formal advice from solicitors or from charities and voluntary organisations. Participants repeatedly cited cost as the barrier to using a solicitor'.<sup>191</sup> It concluded that '[i]n all areas of law, participants reported financial, social, emotional, physical and mental health impacts. There were numerous reports of relationship difficulties due to the strains of struggling to resolve legal issues. The process of trying to pursue justice without legal aid added extra physical and mental strain, which may exacerbate existing physical and mental health issues or cause new ones. This was particularly noticeable for disabled participants, who found the stress of trying to resolve a welfare issue with inadequate advice made their health condition worse. Financial, housing and employment instability exacerbated the impact of unresolved legal issues. At least one participant accepted unlawful changes to her work conditions owing to the fear of losing her job altogether'.<sup>192</sup>

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

Changes to the provision of legal aid are discussed above. Wider reforms to the justice system include changes to judicial review,<sup>193</sup> increases in court fees,<sup>194</sup> the now reversed regime of fees in employment tribunals,<sup>195</sup> and the closure of more than 230 crown, county

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<sup>189</sup> Organ, J. and Sigafoos, J. (2018) *The impact of LASPO on routes to justice*, Equality and Human Rights Commission, available at <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>.

<sup>190</sup> Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, 1 May 2012. <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>.

<sup>191</sup> Organ, J. and Sigafoos, J. (2018) *The impact of LASPO on routes to justice*, Equality and Human Rights Commission, p. 52, available at <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>.

<sup>192</sup> Organ, J. and Sigafoos, J. (2018) *The impact of LASPO on routes to justice*, Equality and Human Rights Commission, p. 53, available at <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>.

<sup>193</sup> Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project (2015), *Judicial review and the rule of law: an introduction to the Criminal Justice and Courts Act 2015, Part 4*, available at: <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/10/Judicial-Review-and-the-Rule-of-Law-FINAL-FOR-WEB-19-Oct-2015.pdf>.

<sup>194</sup> See Ministry of Justice (2015), *Court and tribunal fees: the Government response to consultation on further fees proposals*, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/515460/further-fees-proposals-gov-response-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/515460/further-fees-proposals-gov-response-consultation.pdf).

<sup>195</sup> See Ministry of Justice and HM Courts and Tribunals Service (2017), 'Opening stage of employment tribunal fee refund scheme launched', 20 October 2017, available at: <https://www.gov.uk/government/news/opening-stage-of-employment-tribunal-fee-refund-scheme-launched>.

and magistrates courts<sup>196</sup> are part of an ongoing programme of reform that would see attendance at court largely replaced by digital alternatives such as online courts and virtual hearings.<sup>197</sup> These changes, as the EHRC suggests, 'have a cumulative effect on people's ability to access justice'.<sup>198</sup>

### 11.1.3 Political and societal debate and pending legislative proposals

The Ministry of Justice has published an evidence-based review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).<sup>199</sup>

The accessibility and effectiveness of legal aid for discrimination cases is the subject of an on-going inquiry by the EHRC examining the extent to which victims of discrimination are able to obtain access to justice through the provision of legal aid.<sup>200</sup> It will examine:

- how discrimination cases are funded by legal aid;
- how many individuals receive legal aid funding for discrimination claims, including representation or assistance with bringing a case in a court or tribunal, and how this compares with evidence of the number of individuals who seek advice about discrimination;
- whether there are barriers to effective access to legal aid; whether some individuals experience specific difficulties in accessing legal aid, for example due to language or literacy difficulties, or because of a protected characteristic;
- the operation of the mandatory telephone gateway as the access point for most discrimination advice;
- in light of the above, whether legal aid provides effective access to justice for individuals who complain of discrimination, and whether improvements could be made to reduce barriers and improve access to justice.

The EHRC is also undertaking a new inquiry to determine whether discrimination victims on lower incomes are being denied justice.<sup>201</sup>

The Women and Equalities Committee held an inquiry in June 2019 into the use of non-disclosure agreements (NDAs) in discrimination claims and found evidence that these can be used to cover up unlawful discrimination and harassment. The Government has committed to introducing reforms that would prevent employers misusing NDAs but no details are currently available.<sup>202</sup>

<sup>196</sup> Response to Parliamentary Question 136450, available at:

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-18/136450>.

<sup>197</sup> See Ministry of Justice and HM Courts and Tribunals Services (2018), *Fit for the future: transforming the Court and Tribunal estate*, available at: [https://consult.justice.gov.uk/digital-communications/transforming-court-tribunal-estate/supporting\\_documents/hmctsstrategyapproachconsultation.pdf](https://consult.justice.gov.uk/digital-communications/transforming-court-tribunal-estate/supporting_documents/hmctsstrategyapproachconsultation.pdf). For the Commission's response to the consultation on these proposals see Equality and Human Rights Commission (2018), *Response to the consultation on transforming the court and tribunal estate*, available at: [https://www.equalityhumanrights.com/sites/default/files/reponse\\_to\\_the\\_consultation\\_on\\_the\\_strategy\\_to\\_transform\\_the\\_courts\\_and\\_tribunal\\_estate.pdf](https://www.equalityhumanrights.com/sites/default/files/reponse_to_the_consultation_on_the_strategy_to_transform_the_courts_and_tribunal_estate.pdf).

<sup>198</sup> See EHRC Response to the LASPO post-implementation Review (2018), link at

<https://www.equalityhumanrights.com/en/publication-download/impact-laspo-routes-justice>.

<sup>199</sup> <https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>, Ministry of Justice (2019), *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, February 2019, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)

<sup>200</sup> See: <https://www.equalityhumanrights.com/en/our-legal-action/inquiries-and-investigations/legal-aid-victims-discrimination-our-inquiry>.

<sup>201</sup> See <https://www.equalityhumanrights.com/en/our-work/news/new-inquiry-determine-whether-discrimination-victims-lower-incomes-are-being-denied>.

<sup>202</sup> House of Commons, Women and Equalities Committee (2019) *The Use of Non-Disclosure Agreements in Discrimination Cases, Ninth Report of Session 2017-9* available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/nda-inquiry-17-19/>.

## 11.2 Victimisation

Provisions on victimisation are implemented in national legislation: in GB by Section 27 EqA and in NI by Article 6 SD(NI)O. Section 27 EqA 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 author's view the GB provision complies with the Directive, whereas the requirement in NI for less favourable treatment may not be compliant.

## 11.3 Access to courts

### 11.3.1 Difficulties and barriers related to access to courts

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 initiating complaints of discrimination (three months for employment-related cases and six 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 in advance of hearing, and employment claims reduced dramatically following the introduction of these fees.<sup>203</sup> However, these fees were abolished in 2017 following a successful legal challenge 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 interfered unjustifiably with the right of access to justice and discriminated 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.<sup>204</sup> 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 contravened the EU law guarantee of an effective remedy before a tribunal and imposed 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 bore no direct relation to the value of the claims made, and could 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 was indirectly discriminatory under the Equality Act 2010 because the higher fees for type B claims put women at a particular disadvantage, as 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 taxpayer. 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

<sup>203</sup> 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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506487/tribunals-gender-recognition-stats-oct-dec-2015.pdf).

<sup>204</sup> Supreme Court, [2017] UKSC 51, 26 July 2017. See <https://www.supremecourt.uk/cases/uksc-2015-0233.html>.

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',<sup>205</sup> or whose bringing or conduct of the proceedings is 'misconceived', i.e. has no reasonable prospect of success. 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 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.<sup>206</sup>

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 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.<sup>207</sup> A 2016 inquiry conducted by the House of Commons Women and Equalities Committee 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.'<sup>208</sup> Similar findings are reported in NI.<sup>209</sup>

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 vary across these jurisdictions but the test for standing is materially similar.

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<sup>205</sup> Employment Tribunal Rules of Procedure 2013, Schedule 1 S.76(1)(a).  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/429633/employment-tribunal-procedure-rules.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/429633/employment-tribunal-procedure-rules.pdf).

<sup>206</sup> 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.

<sup>207</sup> Equality and Human Rights Commission and Department of Business, Innovation and Skills (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](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 p. 145.

<sup>208</sup> House of Commons Women and 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 p. 44.

<sup>209</sup> See Equality Commission for Northern Ireland, *Expecting Equality*, at [http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Expecting\\_Equality-PregnancyInvestigation-FullReport.pdf](http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Expecting_Equality-PregnancyInvestigation-FullReport.pdf).

### 11.3.2 Availability of legal aid

No legal aid is available in employment tribunals.

In theory legal aid may be available in the county courts, sheriff courts and Courts of Session (in Scotland) and for judicial review applications in the High Court, but the limitations on cases in which such aid is available, the very low 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.

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

The question of horizontal direct effect does not pose any particular problems as far as the author is aware.

### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*<sup>210</sup>

The impact of *Bauer* in the UK is currently unknown.

## 11.5 Burden of proof

A shift of the burden of proof is provided for, in GB by Section 136 EqA and 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.

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

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).

### 11.6.2 Effectiveness, proportionality and dissuasiveness

Remedies meet EU standards in that compensation is not capped. The difficulty lies in access to courts (see above).

## 11.7 Equality body

In GB the Equality and Human Rights Commission covers discrimination related to sex, gender reassignment, pregnancy and maternity, married and civil partner status, also age, disability, race, religion/belief and sexual orientation.<sup>211</sup> The Commission has devolved

<sup>210</sup> Court of Justice of the European Union (CJEU), Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] EU:C:2018:871, 6 November 2018.

<sup>211</sup> <http://www.equalityhumanrights.com>.

authorities in Wales and in Scotland. In NI the Equality Commission for Northern Ireland (ECNI) is responsible for the same protected characteristics.<sup>212</sup>

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. In practice, these competences are exercised in an independent manner, although constraints on funding in particular have resulted in increasing limitations on the functioning of the EHRC.

In July 2019 the Women and Equalities Committee published a report, *Enforcing the Equality Act: the law and role of the Equality and Human Rights Commission*.<sup>213</sup> In calling for a fundamental shift in the burden of enforcement away from the individual, it concludes that the EHRC needs to refocus its work, 'overcome its timidity and be bolder in using the existing powers that only it has; increasing its own enforcement activity; and doing so in a strategic way that acts as a multiplier across entire sectors in the longer term.'

### **11.8 Social partners**

Social partners do not play a role in setting equality standards, other than the actions of trade unions in facilitating and supporting actions by members. There are no legislative provisions in this respect.

### **11.9 Other relevant bodies**

There are no other relevant bodies in the UK involved directly in the enforcement of gender equality laws, although there are active charities (e.g. Working Families, Maternity Action, Fawcett Society) that offer support / advice and occasionally intervene in litigation (see *Capita Customer Management Ltd v Ali*).<sup>214</sup> The charity explained its intervention as follows – 'We intervened in this case because the particular workplace disadvantage women face having experienced pregnancy and childbirth must continue to be recognised in law. Only women can experience childbirth, and maternity leave is to protect women's health and wellbeing – it cannot simply be equated with "childcare"'.<sup>215</sup>

### **11.10 Evaluation of implementation**

In the author's view the legislation complies with EU law. However, the key issues here relate to access to justice, which is increasingly restricted by budget cuts and reforms that are ill thought out. Overall, the fact that enforcement of rights remains an individual endeavour in the UK is hugely problematic.

### **11.11 Remaining issues**

There are no further issues that have not been discussed above.

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<sup>212</sup> <http://www.equalityni.org/Home>.

<sup>213</sup> House of Commons, Women and Equalities Committee (2019) *Enforcing the Equality Act: law and the role of the Equality and Human Rights Commission, Tenth Report of Session 2017-2019* available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2017/equality-act-role-of-ehrc-report-published-17-19/>.

<sup>214</sup> Court of Appeal, [2019] EWCA Civ 900, *Capita Customer Management Ltd v Ali*, 24 May 2019 <https://www.bailii.org/ew/cases/EWCA/Civ/2019/900.html>. See also EAT decision at [https://assets.publishing.service.gov.uk/media/5acdf65b40f0b617df3357d4/Capita\\_Customer\\_Management\\_Ltd\\_v\\_1\\_Mr\\_M\\_Ali\\_2\\_Working\\_Families\\_Intervenor\\_UKEAT\\_0161\\_17\\_BA.pdf](https://assets.publishing.service.gov.uk/media/5acdf65b40f0b617df3357d4/Capita_Customer_Management_Ltd_v_1_Mr_M_Ali_2_Working_Families_Intervenor_UKEAT_0161_17_BA.pdf).

<sup>215</sup> See Working Families (2018), 'Working Families' response to Ali vs Capita Customer Management EAT decision', 11 April 2018, at <https://www.workingfamilies.org.uk/news/working-families-response-to-ali-vs-capita-customer-management-eat-decision/>.



## 12 Overall assessment

The following transposition problems were mentioned in this report:

1. The Istanbul Convention has not yet been ratified.
2. Enforcement of anti-discrimination law remains problematic for various reasons including: lack of legal aid; delays in tribunal hearings; reliance on individual enforcement; and limited funding for the Equality and Human Rights Commission.

Overall, across the UK, there is concern about the potential impact of Brexit upon gender equality.<sup>216</sup> Of course, the UK has in many ways gone beyond what is necessary under EU law and may, following Brexit, go beyond what is permitted by EU laws (e.g. permitting further positive action). Equally, Brexit will not impact the ratification of the Istanbul convention and this may help safeguard rights. However, there is a general awareness that gender equality in the UK has improved as a result of its membership of the EU: as stated by the Fawcett Society in a recent review 'The EU has acted as a protective "backstop" on equality and human rights law in the UK... The European Union (Withdrawal) Bill has been introduced to Parliament with the stated aim of incorporating EU law into UK law so that our statute book continues to function.' There are, however, concerns regarding: equality law going forward. For example, we could see curtailment of rights protected in the Working Time Directive, the Parental Leave Directive, and part-time and agency workers' rights. 'Leaving the EU will [also] impact legislation and policy on domestic abuse and violence against women and girls (VAWG). The Lisbon Treaty has harmonised police co-operation on issues like trafficking and EU membership has strengthened victims' rights. EU funding supports VAWG services and research in the UK. These must be safeguarded, through unilaterally recognising European Protection Orders and prioritising cross-border VAWG protection, co-operation and funding throughout negotiations.'<sup>217</sup>

Concerns have also been raised regarding the impact of Brexit in Northern Ireland. The Fawcett Society commented upon this as follows: 'Sex equality law which is a devolved matter, is significantly behind the rest of the UK – the Northern Ireland Assembly has not introduced parallel provisions to the Equality Act 2010. There is no reason in principle why women in Northern Ireland should enjoy different protection from discrimination depending on which part of the UK they find themselves in. ... Because Northern Ireland's equality law lags behind the Equality Act 2010, it is more reliant on EU equality law than the rest of the UK, and therefore potentially at even greater risk due to Brexit. Yet women's rights in Northern Ireland are often marginalised because of the legacy of the sectarian divide – it is vital that they are made a political priority.'<sup>218</sup>

The detailed implications of Brexit for gender equality in the UK are uncertain and only time will tell what rights and protections are affected. Women's concerns have been excluded from the Brexit debates and, as one journalist recently wrote about the implications of a no-deal Brexit: '[The EU] has a long history of dragging the UK kicking and screaming towards gender equality. A no-deal Brexit would leave these hard-earned

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<sup>216</sup> See also McCrudden, C. (2018), 'EU equality law in the age of Brexit', *European Equality Law Review* 1, pp 30-38.

<sup>217</sup> The Fawcett Society (2018), *Sex Discrimination Law Review, Executive Summary, January 2018*, at <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=1f3c13a4-2112-48db-9569-eadc6741f317>, pp. 6-7.

<sup>218</sup> The Fawcett Society (2018), *Sex Discrimination Law Review, Executive Summary, January 2018*, at <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=1f3c13a4-2112-48db-9569-eadc6741f317>, p. 14. For an assessment of the legal framework in NI see also Equality Commission for Northern Ireland (2018). *Women in Northern Ireland. UN Convention on the Elimination of All Forms of Discrimination against Women. Submission to inform 'List of Issues' Consideration (Examination of United Kingdom, 2019)*, at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT\\_CEDAW\\_IFS\\_GBR\\_31397\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_IFS_GBR_31397_E.pdf).



rights at the whim of future governments without the protection of an international court'.<sup>219</sup>

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<sup>219</sup> Independent (2019), 'A no-deal Brexit would be a disaster for women – this is why', 30 January 2019, available at <https://www.independent.co.uk/voices/brexit-vote-theresa-may-no-deal-eu-crash-out-women-sexism-feminism-a8753881.html>.

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