

The Equality Bill Q&A

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The Equality Bill promises the biggest shake up in discrimination law since the 1970s. Its provisions will have serious repercussions for employers, especially as regards positive discrimination, openness on pay and the extension of age discrimination to the provision of goods, facilities and services. What should employers be most concerned about?

Does the Bill permit positive discrimination?

As the law currently stands, an employer can take limited positive action to address under-representation of a particular group (for example, women) in its workforce. This can take the form of targeted advertising or training but any subsequent selection must be carried out on merit alone. The Bill proposes that where two candidates for a job are equally qualified, under-representation could be used to decide between them. This proposal would therefore extend permissible positive action into what is currently unlawful positive discrimination.

Does the Bill therefore allow discrimination against white men?

In most situations it will be groups other than white men which are under-represented in a workforce. In those situations, some white men will potentially lose out if employers adopt positive discrimination. There may however, be situations where white men are under-represented in a workforce. In those situations under-representation would become a permissible tie-breaker, allowing an employer to select white men on the basis of their race or gender.

Significantly, this proposal shifts the emphasis of discrimination law away from the right of the individual to be treated on merit alone, to one where being a member of a particular group (defined for example, by gender or race) can determine a person's employment opportunities. This is confusing because the Ministerial Foreword to the white paper begins "Everyone has the right to be treated fairly ..." The proposal actually means that someone who, through no fault of their own, happens to be in an over-represented group will potentially be treated less favourably simply by membership of that group.

Is positive discrimination going to be mandatory?

The aim of the Bill is to give employers greater freedom to fast-track or select recruits from under-represented groups. Use of positive discrimination will not be mandatory. However, the apparent determination of the Government to limit the award of public contracts to providers who can demonstrate diverse workforces adds significant commercial pressure to employers operating in that market to recruit more people from under-represented groups.

Are employers going to have to be more transparent on equality issues?

There are a range of measures in the white paper aimed at increasing transparency. These include: banning confidentiality provisions regarding pay; an equality "kite-mark" for businesses which demonstrate their equality credentials; and, in the public sector, revised equality reporting requirements.

What's happening with age discrimination?

Age discrimination is already unlawful in employment. The Equality Bill will enable the Government to extend this to the provision of goods, facilities and services. The detail will be dealt with in secondary legislation after further consultation. This change will not affect different treatment on the grounds of age where the treatment is justifiable – the examples given in the white paper include free bus passes for the over-60s and group holidays for particular age groups.

Does the Bill deal with public equality duties?

40,000 public sector employers have duties to promote equality in respect of race, disability and gender rather than merely duties to avoid discrimination. The white paper indicates that a new streamlined Equality Duty will replace the existing duties and will be extended to cover gender reassignment, age, sexual orientation and religion or belief.

How will the Bill be enforced?

The Government believes that strong and effective enforcement is necessary to make a reality of legal rights. The Bill is likely to include a number of new enforcement powers including: allowing Tribunals to make wider recommendations to employers in discrimination cases and the

possible introduction of representative actions, allowing unions to bring a single claim on behalf of a group of employees.

What happens next?

A detailed paper on the content of the Bill and the Government's response to last year's consultation will be published shortly. Over the coming months there will be further consultation with various bodies on different aspects of the proposals before the Bill is introduced in the next parliamentary session.

For further information, please contact Richard Kenyon.

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