HOUSE OF LORDS

# Library Note

## Equality Bill
## (HL Bill 20 of 2009–10)

The Equality Bill aims to strengthen, harmonise and in some cases extend existing discrimination law that has developed over some 40 years. The Bill has completed its passage through the House of Commons and is due for a second reading in the House of Lords on 15th December 2009.

This House of Lords Library Note focuses on the report stage debates in the House of Commons and subsequent divisions on three particular issues: mandatory pay audits, positive action and the definition of employment for the purposes of religion.

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10th December 2009
LLN 2009/012

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## 1. Introduction

The Equality Bill (HC Bill 85, 2008–09) was introduced in the House of Commons on 24th April 2009 and was read for a second time on 11th May 2009. The Bill was considered in 20 sittings of a Public Bill Committee between 2nd June and 7th July. The Committee took evidence from a range of organisations during the first four sittings and received various written memoranda.

A carry-over motion to the 2009–10 session was agreed by the House of Commons on 13th May 2009. Consequently, the first reading, second reading and committee stages of the Equality Bill (HC Bill 5, 2009–10) in the current session were formal, without debate.

The Commons report stage of the Equality Bill took place on 2nd December 2009, with the third reading debate following the end of the report stage (HC *Hansard*, cols 1111–1233). The Bill (HL Bill 20, 2009–10) was presented to the House of Lords on 3rd December 2009.

Several consultations and a number of reports fed into the Equality Bill. These are outlined in the Explanatory Notes and are listed in the bibliography to this Note. The Bill comprises 210 clauses in 15 Parts, with 28 Schedules.

The Equality Bill aims to harmonise and in some cases extend existing discrimination law that has developed over some 40 years. The Explanatory Notes to the Bill (HL Bill 20–EN) name nine pieces of legislation currently covering existing discrimination law. In some instances, the Equality Bill will extend discrimination law to cover the 'protected characteristics' of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

The Bill will also strengthen the law in a number of areas. It will:

- place a new duty on certain public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions;

- extend the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;

- extend the circumstances in which a person is protected against discrimination by allowing people to make a claim if they are directly discriminated against because of a combination of two relevant protected characteristics;

- create a duty on listed public bodies when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to: the need to eliminate conduct which the Bill prohibits; the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and the need to foster good relations between people who share a relevant protected characteristic and people who do not. The practical effect is that listed public bodies will have to consider how their policies,

programmes and service delivery will affect people with the protected characteristics;

- allow an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic;

- extend the permission for political parties to use women-only shortlists for election candidates to 2030;

- enable an employment tribunal to make a recommendation to a respondent who has lost a discrimination claim to take certain steps to remedy matters not just for the benefit of the individual claimant (who may have already left the organisation concerned) but also the wider workforce.

(HL Bill 20–EN, para 12)

During report stage and also in the debate on third reading, several MPs expressed their frustration and concern at what they thought an inadequate amount of time for the report stage debate. The Conservative Shadow Spokesperson for Women, Theresa May, said that “more time should be given on Report, given the large number of amendments and new clauses tabled by Hon. Members from both sides of the House and by the Government” (HC *Hansard*, 2nd December 2009, col 1227). Several opposition MPs said that the resulting time constraints emphasised the importance of proper scrutiny by the House of Lords (*ibid*, cols 1226–1227).

The Bill was considered by the Joint Committee on Human Rights, who published their report on 12th November 2009 (HL Paper 169, 2008–09). The report follows the layout of the Bill and makes a number of recommendations.

The House of Commons Library has produced a number of publications on the Bill. Of particular importance are those prepared for the second reading in the House of Commons (House of Commons Library, *Equality Bill,* 7th May 2009, HCRP 09/42)—and the research paper prepared following the committee stage, (House of Commons Library, *Equality Bill Committee Stage Report,*13th November 2009, HCRP 09/83). A further paper from the House of Commons Library examined Schedule 9(2) and the debates on employment exceptions for the purposes of religion in advance of the report stage of the Equality Bill (House of Commons Library, *Equality Bill 2008–09: sexual orientation and religious employment*, 15th July 2009, SN/BT/5132).

This Note focuses on the report stage debates in the House of Commons and subsequent divisions on mandatory pay audits, positive action and the definition of employment for the purposes of religion.

## 2. Mandatory pay audits

The Equality Bill, as introduced in the House of Commons, contains provisions on transparency in pay that may lead to new requirements on businesses to publish information relating to gender pay disparities. Clause 75 (now 78) requires employers in the private and voluntary sector with more than 250 employees to publish information about the differences in pay between their male and female employees. The regulations

may specify, among other things, the form and timing of the publication, which will be no more frequently than annually. The Explanatory Notes state that "the Government's aim is for employers regularly to publish such information on a voluntary basis. To give voluntary arrangements time to work, the Government does not intend to make regulations under this power before April 2013" (HC Bill 5–EN, para 278).

The Bill also provides a power to impose specific duties (clause 149, now 152), that will result in the requirement of all public sector employers with more than 150 employees to publish annually a gender pay audit. This was outlined in the Government response to the consultation on the Equality Bill (Cm 7454, July 2008, para 147).

In their report on the Equality Bill, the Joint Committee on Human Rights welcomed Clause 75, which it described as proactive, but noted:

> To be effective, it should require the Minister to make regulations about mandatory pay audits. As it stands, the power under Clause 75 will be exercised only if there has been insufficient voluntary publication by employers by 2013. This unnecessarily delays making the changes that are needed to address the gender pay gap. Furthermore, the Bill fails to indicate how much detail employers will be required to publish. Instead, this is to be decided after the publication by recommendations by the EHRC. Therefore the Bill provides no certainty that employers will be required to publish information in sufficient detail to address the gender pay gap. We recommend that the Bill should include a wider power than in Clause 75(1) for Ministers to make regulations about mandatory pay audits.
>
> (Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 12th November 2009, HL Paper 169, 2008–09, para 194)

At committee stage in the Commons there was some disagreement amongst opposition MPs, with the Liberal Democrats criticising the Government's approach to transparency for not going far enough (see House of Commons Library, *Equality Bill Committee Stage Report,* 13th November 2009, HCRP 09/83, pp 8–9, for further details). Consequently, at report stage, Lynne Featherstone, Liberal Democrat Shadow Minister for Equalities, tabled new clause 3 on mandatory pay audits. This would require employers with more than 100 employees, rather than 250, to publish information on the gender pay gap and also to provide information aimed at revealing occupational segregation between men and women, and unlawful pay inequality (work of equal value being paid at different rates). In their report on the Bill, the Joint Committee on Human Rights said that this amendment deserved serious consideration (para 195).

Introducing this new clause at report stage, Lynne Featherstone argued that the Government's proposal suggested that information be published voluntarily until at least 2013, despite the fact that even though the Equal Pay Act had been passed 39 years ago, women were still paid 17 per cent less than men. New clause 3, she argued, would expose overall patterns of pay and empower employees to see for themselves whether they were being discriminated against. She also pointed out that mandatory pay audits had the support of Unison and the Fawcett Society (HC *Hansard*, 2nd December 2009, cols 1133–5). Commenting on the Government's measure on gender pay audits, Lynne Featherstone said, "unfortunately, although the Government's proposed measure will help by allowing the monitoring commission to check on the overall pattern, it will not empower the individual" (*ibid*, col 1135).

Speaking on the requirement for gender pay reporting, John Penrose, Conservative MP for Weston-super-Mare, agreed that "the gender pay gap is one of the most pernicious, long-standing, significant and unjustifiable examples of workplace inequality in this

country, and it is caused by many facets of our society, not least direct discrimination" (*ibid*, col 1125). However, he argued that if direct discrimination by employers was eradicated, there would still be a gender pay gap caused by complex and inter-twined issues, for example, flexible working practices and a lack of suitable, affordable childcare (*ibid*, cols 1125–9). John Penrose went on to say: "different parts of the gender pay gap are caused by different things, require different public policy responses" (*ibid*, col 1132).

A further issue raised by John Penrose was that of the costs to the private sector of gender pay reporting. He pointed to the increased Government estimate of the cost of implementing gender pay audits in the private sector from £92 per company to £215, but argued that these figures "are still not remotely believable" (*ibid*, cols 1129–30).

In her response, Lynne Featherstone said that the amendment applied to companies with more than 100 employees, based on evidence from the Women's Commission, and said "we view 100 as providing a reasonable level at which companies could operate without enormous expense. Quite frankly, we do not believe that the expense will be enormous at all, although the Hon. Member for Weston-super-Mare seems to think that it is prohibitive" (*ibid*, col 1133).

Responding on behalf of the Government on new clause 3, the Solicitor-General, Vera Baird, said that where mandatory pay audits had been attempted—for example, in some local authorities and in Sweden—there was no evidence that they had worked. She went on to say that the Equality Bill would ban secrecy clauses and pointed to:

> ... work that is being done, which is being thoroughly supported by the CBI and other employers, with the EHRC and the TUC, to try to work out the optimum measurements that will disclose pay structures effectively without imposing an unfair and unnecessary burden. However, the whole negotiation has been on the basis that pay transparency is agreed to be the most important factor.
>
> (*ibid*, col 1162)

Vera Baird went on to explain that there would be compulsion in the public sector that would start immediately when the legislation came into force. In terms of the private sector, she noted:

> We have seen a new understanding emerge that prosperity in business goes hand in hand with equality and diversity—and we are keen to encourage that. It is not just a question of waiting for something to happen. That is why, even before the Bill becomes law, the commission is working to produce, within a matter of weeks, the measurements that it will ask the private sector to implement. Those measurements have been arrived at…with the full buy-in of the major employers' organisations. I have met the representative of the CBI… many times on this issue, and she asserts voluntarily, without being pressed into doing so by me, that she intends to drive through compliance with these measures by her employers. If we can harness that power from both sides, it will be much better than engendering conflict by introducing a mandatory scheme that has not worked elsewhere.
>
> (*ibid*, cols 1162–3)

She also denied that the Government's position on not supporting mandatory pay audits demonstrated a lack of political will or determination and she expressed confidence that the cause of equal pay "will go up 10 gears when the legislation comes into force" (*ibid*, col 1162).

The House divided on Lynne Featherstone's amendment on mandatory pay audits. The amendment was not accepted by the House, with 77 MPs voting in favour and 427 voting against.

### 3. Positive action: recruitment and promotion

Current discrimination legislation allows employers to undertake a variety of positive action measures, but it does not allow employers to take any form of positive action at the actual point of recruitment or promotion. Clause 155 (now 158) extends what is permitted by European law, and applies in relation to all 'protected characteristics' of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It allows an employer to take a protected characteristic into consideration when deciding who to recruit or promote, where an individual might otherwise be at a disadvantage or is under-represented. The clause specifies that:

> This can be done only where the candidates are as qualified as each other. The question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance.
>
> (HC Bill 5–EN, para 532)

The Explanatory Notes give the following examples:

- A police service which employs disproportionately low numbers of people from an ethnic minority background identifies a number of candidates who are as qualified as each other for recruitment and gives preferential selection to a candidate from an ethnic minority background. This would not be unlawful, provided the comparative merits of other candidates were also taken into consideration.

- An employer offers a job to a woman on the basis that women are under-represented in the company's workforce when there was a male candidate who was more qualified. This would be unlawful direct discrimination.

(*ibid*, para 535)

In their recent report on the Equality Bill, the Joint Committee on Human Rights commented that these provisions are intended to give employers and service providers more scope to adopt positive action measures, if they choose to do so and "are permissive, not prescriptive" (Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 12th November 2009, HL Paper 169, 2008–09, para 283). Consequently the Committee welcomed the positive actions in clause 155 but warned that it also imposes "artificial and potentially unworkable pre-conditions which unduly limit the ability of employers to make use of positive action" (*ibid*, para 286). The Committee

outlined apparent contradictions between clause 155 and European law, and recommended that:

> The requirement that employees be "equally qualified" be deleted from clause 155(4) and replaced by wording which more accurately reflects the approach adopted in the case-law of the European Court of Justice. If this requirement is retained, it may prove very difficult to comply with in practice and deter employers from making use of positive action measures.
>
> (*ibid*, para 287)

An amendment was introduced at the Bill's report stage by John Penrose (Conservative) which he described as "rather technical and seeks to draw a distinction between someone who is 'equally qualified' as opposed to someone who is 'as qualified'" (HC *Hansard*, 2nd December 2009, col 1123). This had been discussed at committee stage at some length. Explaining the debate on this issue at committee stage, John Penrose said that it appeared that the distinction between positive action and positive discrimination was strengthened by the use of the words "equally qualified" (see HC Public Bill Committee: Equality Bill, 30th June 2009, cols 604–18, for more details). John Penrose set out the reasoning that lay behind the amendment:

> If two people are equally qualified for a job—what we might call a "tiebreak situation"—an employer may choose someone with a protected characteristic, say from a particular racial group or of a particular sexual orientation, in preference to someone who has not such a characteristic. The important point is that the two candidates are equally qualified. That would not, of course, breach the crucial distinction between positive action and positive discrimination. However, in Committee, we had a concerned and detailed debate about the Government's rephrasing of that provision, so that instead of being "equally qualified", it reads "as qualified". That is important because we are worried that "as qualified" might mean that of two candidates who are both adequately qualified—they both clear a minimum threshold as defined by the employer as required for the job in question—the candidate who is best qualified and well above the minimum threshold, but does not have any of the protected characteristics, may not get the job because the employer would be within their rights to give it to someone who is less well qualified but had cleared the hurdle and possessed a protected characteristic. That would breach the important distinction between positive action—giving people a hand in their preparation—and positive discrimination, which is allowing the decision on who is offered a job to be made on any grounds other than merit.
>
> (HC *Hansard*, 2nd December 2009, col 1124)

John Penrose also commented on briefing from the EHRC and others that had used the term "equally qualified" rather than "as qualified," that implied that there had been some consensus on the former rather than the latter. However, the Solicitor-General corrected John Penrose and commented that the EHRC chairman had assured her on the previous day that they were in absolute agreement with the Government on the issue (*ibid*, col 1124).

Responding to this amendment at report stage, the Solicitor-General, Vera Baird, said that replacing the phrase "as qualified as" with "equally qualified to" may have unintended consequences and that the Government wished to maintain the position that they held in committee (*ibid*, col 1175).

The House divided on John Penrose's amendment on positive action. The amendment was defeated, with 160 MPs voting in favour and 354 voting against.

Speaking at third reading, Teresa May (Conservative) referred to comments made by John Penrose on positive action in recruitment, and said that:

> We have consistently supported positive action on the basis that it could be used as a tiebreaker when there are two equally qualified candidates… we hope to return to this issue in the other place.
>
> (*ibid*, col 1228)

### 4. Work: exceptions

Schedule 9(2) of the Equality Bill tightens regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 and provides an exception for religious organisations in employment matters. The Explanatory Notes state:

> Where employment is for the purposes of an organised religion, this paragraph allows the employer to apply a requirement to be of a particular sex, not to be a transsexual person or make a requirement related to the employee's marriage, civil partnership or sexual orientation.
>
> (HC Bill 5–EN, para 758)

The requirement must be "a proportionate way of complying with the doctrines of the religion" or because by employing a person with the requirement, conflict is avoided with a significant number of the religion's followers' religious views due to the nature and context of the employment. The requirement must be crucial to a post and:

> Employment can only be classified as being for the purposes of an organised religion if the employment wholly or mainly involves promoting the religion, or explaining its doctrines, or leading or assisting in the observance of religious practices or ceremonies.
>
> (*ibid*, para 760)

In their report on the Equality Bill, the Joint Committee on Human Rights welcomed the clarification provided by Schedule 9(2) and said:

> We accept that some limitations on non-discrimination on grounds of religion or belief may be justified and appropriate in relation to religious organisations and that the exemption in Schedule 9(2) fulfils that role. We also consider that in general the provisions of Schedule 9(2) and 9(3) strike the correct balance between the right to equality and non-discrimination and the rights to freedom of religion or belief and association.
>
> (Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 12th November 2009, HL Paper 169, 2008–09, para 174)

An amendment to Schedule 9(2) was tabled by David Drew (Labour/Co-Operative) at report stage which aimed to remove sub-paragraph (8) of Schedule 9(2). The amendment was initially raised in the report stage debate by Mark Harper (Conservative)

who outlined the reason for the amendment, saying that "many Christian and other religious organisations are concerned that the definition is new, will change the law and narrow the scope of the exemption" (HC *Hansard*, 2nd December 2009, col 1187).

David Drew said that his "simple answer" as to why the Government's interpretation of the employment exemption is narrow "is that even if we argued… that ministers as part of organised religion have certain protections—in some cases those protections have been found wanting by the courts under existing legislation" (*ibid*, col 1191).

Mark Harper explained that he, and other members, supported this amendment as they believed that the Government had narrowed the scope of the employment exception. Further, he claimed that the European Commission, by issuing a reasoned opinion, had indicated that the exemptions passed in 2003 were broader than allowed by the Employment Directive of 2000. He was opposed to what he saw as lobbying by the European Commission:

> I believe, as do the other Members who signed amendment 37, that that safeguard would not apply to religion, and we feel strongly that there is a need for protection. We are not asking for a change in the law; we are merely asking for the status quo to be reinforced. It is irrelevant to us whether the narrowing of the definition is a result of the Government's own inclination or of pressure from the European Union. The simple fact is that if sub-paragraph (8) is removed, we shall feel that the position has been clarified.
>
> (*ibid*, cols 1189–92)

David Drew continued:

> I hope that the Government will think again and will agree to take us back to where we thought we were… Rather than taking an even harder line and restricting even further the freedom of operation of people who, in good faith, pursue their religious convictions. I tabled the amendment because I believe in freedom of conscience. I do not believe that that there should be a right to discriminate against people who are, for instance, gay or disabled, but I do believe that people have a right to work with fellow members of their faith. I believe that that right should be recognised, and should not be undermined by people who come in and say—as happens too often nowadays—that they want exactly the same rights as members of organised religions whose faith they may not share and whose goals they may not wish to pursue.
>
> (*ibid*, col 1192)

Concluding, David Drew said that he hoped that the amendment would be accepted by the House, and that if it was not, the House of Lords would give the amendment careful consideration.

The House divided on David Drew's amendment to remove sub-paragraph (8) of Schedule 9(2). The amendment was defeated, with 170 MPs voting in favour and 314 voting against.

## 5. Third reading

Introducing the third reading of the Bill, the Solicitor-General, Vera Baird, referred to the Government's "proud history of equalities legislation" continuing with this Equality Bill. She went on to say that the Bill:

> ... sets out groundbreaking new laws that will help narrow the gap between rich and poor, place equality at the heart of what public bodies do, require transparency and therefore action to tackle the gender pay gap and outlaw age discrimination outside the workplace. In all those ways it will significantly strengthen Britain's equality legislation, which for the first time is brought together coherently in one place. It is what we have described as a "plain English Bill"—that is to say that the final version will have the legal clauses on one side of the page and explanatory notes on the other to optimise accessibility.
>
> (HC *Hansard*, 2nd December 2009, col 1226)

Summing up for the Opposition, Teresa May, Shadow Minister for Women, said:

> Equality is not just for the good times. We all want to ensure that equality and fairness drive what we do, but we must recognise that equality has been given a bad name in recent years, with many people thinking that it is something given to others and not to them.
>
> We are clear that equality should never be the enemy of common sense. It should not get in the way of businesses, communities or the public sector, but instead it should help them to work better. That is the approach that we have taken, and it is the one that we will continue to take.
>
> (*ibid*, col 1229)

From the Liberal Democrat benches, Lynne Featherstone said that her party welcomed the Bill and its harmonising aims. She continued:

> We oppose the Government on almost nothing in it, but believe that it should have gone further. I have great concerns that the things that were not included in the Bill, or in respect of which the Bill does not go far enough, will not see the light of day if there is a change of Government.
>
> (*ibid*, col 1229)

The House divided on the third reading of the Equality Bill, with 338 voting in favour of the Bill and 8 MPs voting against.

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