



The Pursuit of Equality

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As society continues to diversify and evolve, a fundamental tenet of any democratic society is ensuring that laws are enacted to protect the rights of individuals. As a case in point, over the past 20 years, the United Kingdom (“UK”) has sought to protect its people with respect to their varying ethnicities and cultures, religious beliefs, sexual orientations, ages and sexes. Indeed, as of September 30th, 2010, there were 9 pieces of legislation and 100 statutory instruments that made discrimination on an array of grounds unlawful. This past year in the UK saw a major addition in the area of anti-discrimination laws with the introduction of the Equality Act (the “Act”).

Officially enacted on October 1st, 2010, the Act seeks to simplify previous laws and encompass all potential forms of discrimination. As stated in the New Law Journal, the Act comprises “*a single statute to replace the complex web of legislation that has grown up over the years, [which] will make it easier for people to understand their rights and understand their obligations.*”¹ Many hope the Act will promote greater harmonization and clarity within the workplace as well as encourage transparency and consistency, all of which are laudable features of any good law within a modern democratic society.

The Act itself is divided into 16 parts and totals over 200 pages. The first part outlines the public sector’s duty to reduce socioeconomic inequalities when making decisions of a strategic nature. The “Protected Characteristics” and prohibited conduct that amounts to discrimination are found in Part 2. The Protected Characteristics now include: Age, Disability, Gender reassignment, Marriage and Civil Partnership, Pregnancy and Maternity, Race, Religion or Belief, Sex and Sexual Orientation. The law is inclusive of differing groups within each Protected Characteristic, for example, under Race it is unlawful to discriminate on the grounds of skin colour, ethnicity or national origin.

Parts 3 and 4 deal with Public Functions and Premises and Part 5 outlines discrimination as it relates to the workforce and employment; of particular interest to lawyers are sections 47-48, which ban discrimination at the Bar of England and Wales. The inclusion of these sections encourages the Bar to become more diverse and accessible to under-represented individuals, thereby addressing a common criticism of the profession.

Discrimination in the context of education and associations, including political parties, is discussed in Parts 6 and 7 respectively. Prohibited

¹ “Equal but different,” Siobhan Atkin *New Law Journal* 1352, 2 October 2008.

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conduct in the context of ancillary relief is dealt with in Part 8. General guidance on procedure is found in Part 9; of particular note is section 136 which outlines the burden of proof, which is the civil burden on a balance of probabilities, unless the conduct of the discrimination is criminal in which case it would be the criminal standard (beyond a reasonable doubt). Once a prima facie case is established, the burden is on the accused to prove that discrimination has not occurred. Section 137 discusses the finality of previous findings under previous Acts, which deals with anti-discrimination. Accordingly, a litigant would not be free to pursue a new cause of action from a previous factual matrix under this legislation. Part 10 discusses contracts whereas Part 11 focuses on the Advancement of Equality, including the promotion of positive action in recruitment (see below).

Disabled persons receive protection under the 12th and 13th Parts. General exceptions to discrimination including national security, charities and sport are found in Part 14 of the Act. Accordingly for example, in sports a person does not contravene the Act if in a competitive sport, the physical strength of the average female would put her at a disadvantage when compared to the physical strength of the average male. Part 15 discusses family property and the final part of the Act, Part 16, contains provisions on general and miscellaneous elements such as civil partnerships on religious premises.

While the Act is being heralded by some as a necessary piece of legislation, it would be remiss not to mention some of its potential downfalls. The estimated cost to introduce the Act will be between £240.9 and £282.6 million in the first year,² which will no doubt be controversial in the current economic climate. Costs will necessarily increase as the Act is being introduced in phases over the coming years; the Protected Characteristic of age will be in effect by 2012.

Given that the Act now affects many groups, a challenge is ensuring that these groups have an understanding of the mechanics of applying it in practice.³ Employers will have to ensure that their practices and codes of conduct comply with the Act or else face a potential onslaught of claims by employees, as more individuals become aware of their rights and seek the jurisdiction of tribunals and courts to remedy them.

² Equality Act 2010: preparing for the challenge 22 April 2010

³ "Equality Act: an update" Keen, Spence. *New Law Journal* 1331, 1 October 2010.

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The biggest area of contention for critics of the Act is the fact that in theory companies can now positively discriminate when recruiting. In essence, if two equally qualified individuals are applying for a particular job, an employer will be entitled to select the individual from an under-represented group of people on the basis of ethnicity and sex. This arguably amounts to affirmative action which has come under heavy critique for years in numerous jurisdictions.

The introduction of the Act in the UK begs the question of whether it is a foreshadowing of what could, rather what *should* happen in Bermuda. Will our politicians look to our UK counterparts as a forerunner for more comprehensive legislation promoting equality here? Equality in Bermuda could be furthered in a myriad of ways, either by amending the Human Rights Act 1981, resurrecting the Workforce Equity Bill or introducing wholly new legislation.

There are indicators that the Bermuda Government (the “Government”) is seeking to improve the right to equality here. In October 2010, around the same time as the enactment of the Act, the Government took strides to promote women’s equality with the formation of a Women’s Council. The Council was created to deal with outstanding issues included but not limited to equal pay, workplace sexual harassment and maternity leave. The Government has also announced that in the summer of 2011, Bermuda will become a new signatory to the Convention for the Elimination of all forms of Discrimination Against Women (“CEDAW”)⁴.

In November of 2010, there was intimation by the Minister of Youth Affairs and Families that an amendment to the Human Rights Act 1981 to include protection on the grounds of sexual orientation could soon take place. Minister Blakeney stated that his Ministry will work with community stakeholders and that the Government feels that they will be prepared to address the amendment issue.

Further, in 2007 the Workforce Equity Bill (the “Bill”) was proposed. The then Government thought that the way to combat the apparent disparity between Blacks and Whites was to enact a law which would put the onus on companies to right the wrong. Statistics have shown that Blacks are under-represented at the Executive Management level; in 2007, Black Bermudians occupied only 27 percent of executive positions. Conversely, Blacks had greater representation in lower positions as compared to their

⁴ “Pledge made on bill of rights” Strangeways, Sam. *The Royal Gazette* 18 November 2010.

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White counterparts.⁵ In essence, the Bill would impose a fine on companies with 40 or more employees that blocked the progress of Black Bermudians between the ages of 16 and 64 in the workplace. The Bill, however, would not be a free-for-all for companies to hire unqualified individuals on the basis of race; section 5(b) of the Bill states that an employer cannot hire or promote individuals who do not meet the essential qualifications for the work to be performed.

The Bill was met with vehement opposition because it raised affirmative action type objections and singled out Black Bermudians as the only group meriting protection. The Bill was silenced, removed from the floor of the House for debate and “*disappeared into the abyss*”⁶ as lamented by some. In September 2009, the Royal Gazette reported that the situation of disparity had not improved in that in 2007-08, the median annual income for Blacks was \$50,539 while for Whites it was more than 40% higher at \$71,607⁷. Some thought, wrongly, that these figures would encourage Government to resurrect the Bill.

The newly appointed Premier, Ms. Paula A. Cox has espoused the need to “*formulate an action plan to redress inequities in access to jobs and opportunities*”⁸. It has been reported that this may appear in the form of a new Equal Pay Act, a law that will seek to equalize the pay disparities between men and women and Blacks and Whites.

The legislation adopted and proposed in both the UK and Bermuda illustrates that both communities acknowledge that there are inequalities in their societies that continue to need redressing by appropriate and evolving legislation. One hopes that the Bermuda Government will get into better step with the UK by modernizing its current legislation to include groups that continue to need protecting in the interests of a better and more humane society.

⁵ “New law proposed to boost black Bermudians at work” *The Royal Gazette* 28 September 2007.

⁶ “Creating fairness in the workplace a key goal” Smith, Tim. *The Royal Gazette* 5 November 2009.

⁷ “Govt eyes Workforce Equity Bill again.” Taylor, Matthew *The Royal Gazette* 21 September 2009.

⁸ “Creating fairness in the workplace a key goal” Smith, Tim. *The Royal Gazette* 5 November 2009.