

## CHAPTER 19

### THE EQUALITY ACT 2010: THE TRIUMPH OF HARRIET HARMAN

The worst government is often the most moral. One composed of cynics is often very tolerant and humane. But when fanatics are on top there is no limit to oppression.

**HL Mencken** 1880–1956 American journalist, essayist, magazine editor, satirist, critic of American life and culture: *Minority Report* (1956)

The speedy introduction of Labour's Equality Bill 2010 – the insidious public sector 'Equality Duty' – the vision that lies at the heart of the current coalition government – coalition politicians' dereliction of duty – transparency, accountability, blah, blah, blah – (legal) positive action v (illegal) positive discrimination: can *you* spot the difference? – two very different objectives: equality of outcome v equality of opportunity

Only a month before a 13-year-long Labour administration came to an end after the May 2010 general election, a piece of legislation received Royal Assent: The Equality Bill 2010. This was surely the crowning glory of Harriet Harman's career, although by the time it was brought into effect by a Commencement Order three months later, she was sitting on the opposition benches.

Much of Ms Harman's evident cheerfulness in opposition is due, I suspect, to the degree with which the left-wing philosophy behind the Act was accepted by the coalition government: not least by the new Prime Minister as we shall see in the next chapter. The Commencement Order which enabled 90 per cent of the Act to be brought into force on 1 October 2010 was made on 5 July 2010, just eight weeks after the formation of the coalition: unseemly haste, you might well think.

The gender-related aspects of the Act, guidance related to them, and associated consultation exercises, all bear militant feminist hallmarks. It is taken as a fact that the gender pay gap results from discrimination against women, and that differences in outcomes directly and proportionately reflect differences in opportunities. A consultation exercise concerning the public sector ‘Equality Duty’ was started on 19 August 2010 and completed on 10 November 2010. From the Equalities Office website:

An important part of the Act is the public sector Equality Duty, which has a key role in ensuring that fairness is at the heart of public bodies’ work and that public services meet the needs of different groups. The Act also gives ministers the power to impose specific duties, which are legal requirements designed to help public bodies meet their obligations under the public sector Equality Duty.

This consultation seeks your views on our proposals for draft regulations for the specific duties and the list of public bodies that will be subject to the general and specific duties.

This consultation will be of interest to:

- public bodies;
- those monitoring the performance of public bodies;
- others who perform public functions; and
- organisations that are interested in how public services can eliminate discrimination, advance equality and foster good relations.

Comments from other interested parties are also welcome.

Much is made in the associated 72-page consultation document, ‘Equality Act 2010: The public sector Equality Duty – Promoting equality through transparency’, about the impact that transparency will have on accountability. Back to the consultation document:

The Equality Act 2010 replaced the existing anti-discrimination laws with a single Act. It included a new public sector Equality Duty, replacing the separate public sector equality duties relating to race, disability and sex, and also covering age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment more fully. The Equality Duty consists of a general duty, set out in the Act itself, and specific duties imposed through regulations.

The general duty is set out in section 149 of the Act. In summary, those subject to the Equality Duty must have due regard to the need to:

- eliminate unlawful discrimination, harassment, victimisation;
- advance equality of opportunity between different groups;
- foster good relations between different groups.

Section 153 of the Act gives Ministers the power to impose specific duties through regulations. The specific duties are legal requirements designed to help public bodies meet the general duty. A consultation document published in June 2009<sup>1</sup> set out proposals for specific duties, and a policy statement published in January 2010<sup>2</sup> set out the previous Government's proposed approach. We have considered the results of that consultation and the earlier proposals and developed a new approach in line with the Coalition Government's guiding principles of freedom, fairness and responsibility. Our new approach also takes into account the Government's clear aim of replacing top-down interventions from the centre with local democratic accountability driven by transparency and decentralisation.

<sup>1</sup> *Equality Bill: Making it Work – Policy proposals for specific duties: A consultation*  
[www.equalities.gov.uk/pdf/Specific%20Duties%20Consultation%20DocumentWEB.pdf](http://www.equalities.gov.uk/pdf/Specific%20Duties%20Consultation%20DocumentWEB.pdf)

<sup>2</sup> *Equality Bill: Making it work – Policy proposals for specific duties: Policy Statement*  
[www.equalities.gov.uk/PDF/psdresp\\_GEO\\_MakingItWork\\_acc.pdf](http://www.equalities.gov.uk/PDF/psdresp_GEO_MakingItWork_acc.pdf)

The coalition government's approaches to the issue of increasing equality and fairness are largely those favoured by Ms Harman and her like over many years, but with less central government involvement. Later in the consultation document:

This Government's guiding principles are freedom, fairness and responsibility, and a shared desire to work in the national interest. There are too many barriers to social mobility and equal opportunities in Britain today. We need concerted action from government and public service providers to help tear down the barriers and create a fairer society...

Public sector bodies have huge potential to create a fairer society through the way they deliver their services, the people they recruit, and the jobs and training they offer to their staff. They also have effective levers to encourage business, civil society organisations and other bodies to use their creativity and resources to bring about a lasting change of culture through the way in which they commission and procure services...

The Government is committed to re-distributing power away from Westminster and Whitehall back to local communities. We are intent on liberating public bodies from top-down targets. We need to have faith in those engaged in front-line service delivery to work with local people to identify local priorities and to design services to meet the needs of the people they serve. Central government must give them the freedom to manage their operations in the way that delivers the best outcomes for the public.

These changes put public sector professionals, working together with citizens, in the driving seat, but greater freedom must be accompanied with greater accountability. Not accountability to Whitehall departments or bureaucratic quangos, but to the people who fund and use their services. We do not intend to prescribe how public bodies go about their business, but we will ensure that we put in place the right framework which empowers citizens to scrutinise the data and evidence on which their public services perform. We will do this by bringing data into the daylight – letting people see for themselves the information public bodies are using to make decisions and the data on their performance. Citizens will then be able to judge, challenge, applaud [Author's note: applaud? You couldn't make it up, could you?] and hold to account the public bodies they ultimately pay for. This is the vision that lies at the heart of this Government and guides our approach to the public sector Equality Duty.

If this is a vision, I'm a Pot Noodle. How on earth can citizens hold public bodies to account, if not through their elected representatives? This is an astonishing dereliction of duty on the part of our politicians. The resulting accountability vacuum will be filled, and filled quickly, by special interest groups such as The Fawcett Society. The consultation document goes on to cover, 'Our proposals for specific duties':

Public bodies will be judged by citizens on the basis of clear information about the equality results they achieve, rather than on whether they have completed a tick-box list of processes... [Author's note: this is highly disingenuous. The 'tick-box list of processes' refers to the need to provide evidence that opportunities have been made equally available to different groups, e.g. men and women. By abandoning this principle, and demanding instead equality of *outcome*, we end up in an incredible position. Taking a theoretical scenario where a number of senior positions are on offer, and applications from men outnumber those from women in the ratio of 10:1, women should – under the equality of outcome principle – still land at least half the jobs; and in practise more than half, as part of the drive to 'improve' the organisation's overall gender balance. Is it just me, or is this utter madness?]

We will require public bodies to publish a range of equality data relating both to their workforces and to the services they provide. Different bodies will necessarily publish different data sets relating to their particular business, but there are some common principles that will guide them in how they publish their data. Publication of data must be done in a way that is open and freely available to third parties, such as community groups and equality campaigners, who can re-use this data to hold public bodies to account. This means that equality data must be pro-actively released in a way that is consistent with the Public Data Principles set out by the Public Sector Transparency Board established by the Prime Minister. These Principles include:

- timeliness;

- fine granularity; [Author's note: I assume this means, 'sufficiently detailed to give feminists *something* to whine about.']
- openness;
- aggregated and anonymised data;
- standardised formats; and
- publication under a standard open licence which allows free re-use (including commercial re-use) of the data for any lawful purpose without further permission...

Where organisations are making slow progress on eliminating discrimination, advancing equality and fostering good relations, arming citizens and civil society groups [Author's note: hmm... it's a long shot, but might the groups include The Fawcett Society, by any chance?] with information which will allow them to apply public pressure to drive a faster pace of change...

We will require public bodies with 150 or more employees to publish data on equality in their workforces... we would expect this to include data on *important inequalities such as the gender pay gap* [Author's italics], the proportion of staff from ethnic minority communities and the distribution of disabled employees throughout an organisation's structure. Public bodies will be required to publish this data at least annually...

As well as ensuring public bodies are transparent about their equality data, we also want them to be transparent about the equality outcomes they are going to work towards. We will require public bodies, as part of their normal business planning process, to set equality outcome objectives, informed by the evidence and data they publish. These objectives should be specific, relevant and above all measurable. This will enable meaningful scrutiny by citizens and other interested groups who will be able to tell, from the equality data, whether a public body is achieving what it set out to achieve. This approach is in line with the government's emphasis on democratic, rather than bureaucratic, accountability.

Elsewhere on the Equalities Office's website – the 'FAQ' section – we are encouraged to believe there will be a

distinction between a new weasel term, ‘positive action’, and ‘positive discrimination’:

## **POSITIVE ACTION**

### **When will the positive action provisions of the Equality Act 2010 come into force?**

The general positive action provisions (section 158), together with those relating specifically to the selection of candidates by political parties (sections 104 & 105), will come into force on 1 October 2010. Ministers are currently considering the provisions that relate to positive action in recruitment and promotion (section 159).

### **What exactly is positive action?**

The term ‘positive action’ covers a range of measures [Author’s note: er, such as what, exactly?] which organisations can use where those with a ‘protected characteristic’ (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation):

- experience some sort of disadvantage because of that characteristic;
- have particular needs linked to that characteristic; or
- are disproportionately under-represented in a particular activity.

Where any of these conditions apply, positive action can be taken to overcome that disadvantage, meet that need or encourage participation in that activity. Positive action can be taken in relation to a wide group of activities, such as *employment* [Author’s italics], education, training and service delivery. Positive action measures can be used to counteract the effects of past discrimination so that people in such groups have equal opportunities to achieve their potential.

### **Will the Equality Act 2010 allow the use of positive discrimination?**

No. Positive discrimination means favouring a particular under-represented or otherwise disadvantaged group solely

because they have a particular protected characteristic. Positive discrimination is generally unlawful in the UK and there are currently no plans to change that position.

**Does the use of positive action measures mean the introduction of quotas?**

No. The Equality Act 2010 does not permit the use of quotas, which would represent a form of positive discrimination and, as such, would be inconsistent with EU law and would go against the merit principle [Author's note: the word 'merit' doesn't appear in the 72-page consultation document we've considered in this chapter.]

**What measures are in place to ensure that organisations do not misuse the positive action provisions?**

The provisions make clear that any positive action measures taken have to be a *proportionate means* [Author's note: what on earth is the meaning of the term 'proportionate means' in this context?] of:

- achieving the aim of overcoming a disadvantage suffered by persons who share a particular protected characteristic;
- addressing disproportionate under-representation in an activity by persons who share a particular protected characteristic; or
- meeting the specific needs of people with a particular protected characteristic.

**Is it a requirement for organisations to use the positive actions provisions?**

No. All forms of positive action are entirely voluntary, whether those measures relate to employment, the provision of services or the work of political parties. There is no compulsory requirement for any organisation to use any of the positive action provisions.

Now let me take this slowly for the sake of my sanity:

*Positive action (legal)*

'Positive action can be taken in relation to a wide range of activities, such as employment...'

*Positive discrimination (illegal)*

‘Positive discrimination means favouring a particular under-represented or otherwise disadvantaged group solely because they have a particular protected characteristic.’

So, what’s the difference between positive action and positive discrimination? It’s perfectly obvious: there is none. Public sector bodies will have *no choice* but to adopt widespread positive action – positive discrimination – to achieve their equality targets, or they will face criticism from The Equality and Human Rights Commission, The Fawcett Society, and other organisations. In the absence of anyone stopping public sector organisations from adopting positive discrimination, and politicians having declared themselves unaccountable in the matter, the militant feminists will have a field day. We shouldn’t hold our breath waiting for the Prime Minister to intervene, for reasons which will become obvious in the next chapter.

The government’s policies are hopelessly confused because they pursue two different and often competing objectives: equality of outcome (traditionally a left-of-centre objective) and equality of opportunity (for many years a common objective across the political spectrum). Its instincts are to favour the former over the latter whenever they conflict. Public bodies have been required to comply with the General Duty of the Equality Act from 1 April 2011. From the consultation document:

The Equality and Human Rights Commission will produce practical guidance 12 weeks before the entry into force of the regulations to explain the requirements of the general and specific duties in more detail and set out what different types and sizes of public bodies need to do to comply. In addition, central government is committed to working to help public bodies understand what they must do in order to implement the Equality Duty. It is essential that there are measures in

place to give public bodies confidence in complying with the Duty, and to ensure that it is effective in helping public bodies to deliver equality *outcomes* [Author's italics].

The Equality Act 2010 was a remarkable triumph for Harriet Harman and militant feminism, and brought to you by the Prime Minister and leader of the Conservative party, David Cameron.