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Regulating for equality in employment – is Britain on the right road with the Single Equality Bill?

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Introduction

In a recently published review of the past thirty years of British employment equality legislation (Dickens 2007), I concluded that it had followed a largely positive regulatory trajectory. There has been a shift from piecemeal and patchwork coverage towards inclusiveness, integration and (potentially) intersectionality, and from 'anti-discrimination' towards active promotion of equality. Progress has been slow, uneven and at times hesitant, but we have come a long way.

In the 1970s major statutes were enacted which provide the basis for the current legal framework. At that time the reach of the law was primarily sex and race(covering race, colour, nationality or ethnic or national origin), plus equal pay legislation. Improvements were made to these statutes over the years, including an important 1983 extension of the Equal Pay Act to encompass equal pay for work of equal value (not just the same or similar work). In 1995 a Disability Discrimination Act (DDA) was enacted - a limited piece of legislation significantly improved by more recent amendments. In 2003 (following European Union requirements) the British legislation directly addressed employment equality in respect of sexual orientation, and included the grounds of religion or belief. The most recent extension of scope occurred in October 2006 when age discrimination in employment was outlawed.

As it developed, the equality legislation became more complex, fragmented and inconsistent, both within and between the different strands. Some problems and inadequacies have been addressed, others remain, new ones have arisen. Currently there is both new institution building and further legislative reform.

Institution building has occurred with the creation in October 2007 of a new Commission – the Equality and Human Rights Commission. The EHRC subsumes and widens the coverage of three pre-existing separate equality bodies, which dealt with sex, race and disability. The legislative reform takes the form of a new, long awaited, single Equality Bill, the stated purpose of which is to simplify, modernise and make more effective the framework for discrimination law. A single Act, expected next year, will replace the 9 major pieces of discrimination legislation and the 100 or so statutory instruments setting out connected rules and regulations which have developed over the past 40 years. The Government has indicated the likely contents of this Act in *Framework for a Fairer Future – The Equality Bill* (Government Equalities Office:2008).

In this presentation I consider whether current and proposed developments (particularly those proposed in the Equality Bill) are sufficient to address what I identify as four areas of deficiency in the British legislative equality package. The four are: a two track approach; an emphasis on individuals rather than power holders; how equality is conceptualized and, fourthly, deficiencies in enforcement.

Deficiency 1: A two-track approach to promoting equality.

I noted that part of the positive trajectory over the years has been a move from non-discrimination towards promoting equality. This has been a very recent shift and only a partial one. It is manifested in the enactment of positive equality duties requiring public authorities to tackle discrimination and to promote equality for race (in the year 2000), disability (in 2005) and gender (in 2006).

Early research indicated that not all public authorities are meeting their statutory duties and evidence suggests that in practice too much emphasis has been placed on procedures and bureaucratic process rather than measurable outcomes, or on seeking to understand and address the causes of inequality and its re-production.

The Single Equality Act will bring together the separate duties into a single equality duty affecting public bodies as providers of services as well as in their role as employers. This will cover also the extended grounds (gender reassignment, age, sexual orientation, religion or belief) and promises an approach which will help focus attention on outcomes rather than producing plans and documents. *Framework for a Fairer Future* (hereafter *F4FF*) indicates that public bodies will be required to report on gender pay; ethnic minority employment and disability employment – a move to greater transparency which will help identify progress on the duties.

The positive duties and reporting requirements will still apply only in the public sector. Yet 80% of people are employed in the private sector. Survey data shows that (despite some catching up) the private sector lags the public sector in terms of equality measures and reducing the pay gap (Kersley et al 2006). The gender pay gap, for example, in the private sector is double that in the public sector.

At present the emphasis on not unlawfully discriminating rather than any legal requirement to act means that what compliance with the law requires of private sector employers is fairly limited. Having different standards in the public and private sector does not contribute to a simplified and coherent approach (an aim of the Single Equality Act). Rather it implies a hierarchy or two track system.

In the private sector there is to be continued reliance on benevolence or enlightened self interest as the trigger for pro-active measures– an inadequate basis for the pursuit of equality. Appreciation of a business case(s) can stimulate voluntary employer action on equality but such action is likely to be partial and contingent, and can risk 'fair weather' equality. Once we get onto the business case terrain it is possible to argue a business case

against taking equality action; employers can and do benefit from labour market discrimination.

F4FF proposes a 'light touch' measure for the private sector – a voluntary 'kite mark' scheme which it is expected would stimulate greater transparency in terms of companies reporting on equality achievements. A kite mark scheme will help those private sector employers who are taking action on equality to flash their credentials – to stakeholders, customers, the media, employees. It could represent a valuable improvement on the current self-stick label of 'we are an equal opportunity employer' – a claim which research so often reveals to have little or nothing at all behind it. But if it is to do so then the kite mark has to be genuinely earned through independent evaluation of progress towards appropriately rigorous objectives.

An incentive to obtain such a badge might be to make it a requirement of those bidding for public contracts. This link is not being made explicitly in *F4FF* although the public sector equality duties do require public bodies to consider how to promote equality through their procurement functions and there is a hint that this might be strengthened. Some £160 billion is spent by the public sector on private sector contracts every year. *F4FF* notes that 30% of British companies are contracted by the public sector. Yet the use of national and local state power through procurement/ contract compliance has not been developed in Britain as a lever for stimulating equality action in the private sector. Early developments were halted in the 1980s and, although legislative change makes greater use now possible, it is an underused tool.

Deficiency 2 – too little required of power holders; too much of individuals

The British equality legislation generally, and in its practical operation, has fostered an individual rather than organizational focus. Too much rests on individuals in challenging discrimination, too little is required of organizations (the power holders) – particularly in the private sector. A focus on changing organizations would push beyond the 'deficit' model, seen as requiring 'special' provisions to overcome 'disadvantage', helping women/minority ethnic groups etc. adapt to and get on within structures as they currently are. A focus on changing organizations to promote equality calls for changes in male gendered, culturally bounded (but taken as neutral) organisational and occupational structures, practices, norms, and value systems to accommodate all. British legislation has not moved very far in this direction.

The DDA includes an important positive duty on employers to make 'reasonable adjustment' to assist disabled people. This requirement (although not a free standing obligation) acknowledges that the way in which work and workplaces are structured pose barriers for people with disabilities - but none of the other discrimination legislation imposes in express terms a duty of adjustment.

The enactment of a strengthened positive duty to eliminate discrimination and actively promote equality potentially offers a route for bringing about an organisational focus to tackling discrimination and disadvantage rather than an individual one. As noted, it

represents a very important development in the British legislative package: a move away from 'non-discrimination' towards promoting equality facilitates the targeting of inequality and disadvantage – and not only that arising from discrimination - rather than attempting neutrality. It constitutes a shift away from legislative reliance on a retrospective, individualised victim-centred complaints approach, towards pro-active, pre-emptive action by power-holders. But, as noted earlier, this shift is mandated only in the public sector.

The government is committed to closing the gender pay gap (currently at 17%). One element in a pro-active, organisation focussed approach to tackling pay inequality would be to require organisations to undertake pay reviews and to make the implementation of pay equity plans mandatory. Mandatory equal pay audits have been advocated by various reviews at different times but *F4FF* does not commit the government to this route. It talks instead about gathering evidence on the effectiveness of equal pay job evaluation audits and spreading best practice. Although the government sees transparency as vital to exposing unequal pay the only concrete measure offered is a modest one. The document proposes to increase transparency by making it unlawful to prohibit employees from discussing with colleagues what they earn. Almost a quarter of employers in Britain bar employees from disclosing their pay to others; such gagging clauses will be outlawed. Whilst this may give individuals more knowledge about any inequality, it does not of itself give them more power to tackle it.

Deficiency no. 3. Conceptualisation of equality

There are, of course, employers in the private sector who do take voluntary, proactive steps to promote equality. There are organisations which are concerned with achieving and valuing diversity in their workforces. Ironically perhaps, the conceptualisation of equality in the British legislation as treating people the same can act as a barrier to this – hence my identifying it as a deficiency.

The race and sex discrimination legislation generally embody a symmetrical approach to an asymmetrical social problem (i.e. men and white people are not discriminated against to the extent that women and BME workers are, yet they are equally protected). This results in most forms of positive action to aid disadvantaged groups being prevented by the legislation, which is concerned with halting present discrimination but does nothing to overcome the effects of past discrimination. The extent to which positive action is permitted under current British legislation is very limited (e.g. allowing some outreach recruitment and training to improve the position of a currently under-represented group under sex and race legislation or to prevent or compensate for disadvantages linked to sexual orientation, religion or belief or age) and no positive (or reverse) discrimination is allowed.

The concept of equality as 'equal treatment' resonates with notions of assimilation (to a male, white, heterosexual norm) and integration, rather than with recognition and valuing of difference. It has thwarted employers seeking to increase representation or attainment of disadvantaged groups by positive (affirmative) action. *F4FF* proposes to allow some

'positive action to open up opportunities'. Specifically it proposes a very modest measure - allowing employers to take account of under-representation of particular groups when selecting between two equally qualified candidates. This should overcome problems which have arisen in certain cases (for example the attempt by some police Chief Constables to recruit a police force more representative of the local community it serves) but *F4FF* is at pains to point out that such positive action will not be required – it is purely voluntary, there is to be no 'fixed rule' (p27).

Deficiency no 4. Enforcement, sanctions and remedies.

A two pronged approach was adopted for enforcement of the British discrimination legislation. One prong is administrative (agency) enforcement through the equality commissions, which were given investigative powers and the ability to issue enforceable non-discrimination notices and had sole powers to initiate proceedings in certain areas (such as discriminatory advertisements). These – so far relatively underused - powers are now vested in strengthened form in the EHRC.

The second prong is individual complaints of rights violation to the tri-partite Employment Tribunals (ETs). These are quasi-courts specialising in employment disputes arising from individual statutory rights (not just discrimination issues). Appeal on point of law only, not fact, is to a higher specialist body, the Employment Appeal Tribunal (EAT), and thence to the ordinary courts. Where complaints are made to ETs conciliation is offered by a separate state funded body (the Advisory Conciliation and Arbitration Service (Acas)) so disputes may be settled without the need for a tribunal hearing. Most cases are abandoned withdrawn or settled without an ET hearing.

Agency enforcement is important as it allows structural discrimination to be tackled where no individual victim may be in a position to bring a complaint. It can perform an educative role and it highlights the importance accorded by the state to the elimination of discrimination, emphasising the elimination of discrimination in the public interest rather than punishment of, or redress for, individuals. There have been some achievements via the agency enforcement route in Britain, but in practice the weight of enforcement has fallen on the second prong – the individual 'victim-complains' route of the ETs - despite the inevitable limits on the ability and effectiveness of individual litigation to bring about social change.

It is commonplace that the ETs have not delivered the cheap, accessible, informal, expert, speedy route to justice in employment disputes they were intended to be, although they score above the ordinary courts on these measures. The gap between the original aspiration and reality is particularly marked in discrimination jurisdictions, notably equal pay cases where inordinate delays and complexity were described by the EAT as amounting to a denial of justice. There have been general reforms to the system, driven largely by cost concerns and a desire to keep cases out of the tribunals, and also specific changes designed to ameliorate some of the problems facing discrimination complainants. But complainants still have to seek to enforce their rights within an adversarial tribunal system where procedures, despite some modification, remain

complex and slow, where unrepresented applicants are at a disadvantage but where no legal aid is available. These are important issues relating to access to justice

Despite important changes, recent qualitative research into race discrimination cases by Aston and colleagues (2006) found the problems in the early years of the 21st century were similar to those being documented in the 1980s: many claimants represented themselves in the absence of other options; felt inadequately prepared and disadvantaged compared to the employer; did not consider the tribunals user-friendly, and many suffered adverse financial and health effects. Although the equality commissions could assist individual complainants very few received such support. In large part this is a function of limited budgets with demand for assistance far outstripping its provision. In 2005 for example the Commission for Racial Equality fully supported only 3 individual cases.

Success rates for applicants are low in the cases which are determined by an ET. This is particularly and consistently so in race discrimination cases where applicants have less than a one in five chance of having their claim upheld.

Further, the approach to remedies reflects a concept of discrimination which concerns unfair treatment of individuals rather than focussing on structural sources of social group disadvantage. The emphasis is on compensating the individual rather than requiring unfairly discriminating employers to change their behaviour. Although there is provision for the tribunal to make an Action recommendation these are not commonly made. The courts have given this remedy a restrictive interpretation so its potential has not been exploited. A recommendation relates to the particular case and is designed to reduce the adverse effect of discrimination on the complainant rather than seek to bring about changes in employer policies, procedures or practices more generally. As complainants have often left their discriminatory employer no recommendation appears appropriate.

It is now being proposed that ETs be allowed to make broader recommendations which will benefit the wider workforce (even if the applicant has left) and help prevent similar types of discrimination in the future. An example would be a recommendation that the employer review procedures or introduce an equal opportunity policy. There is scope for some imaginative action on the part of ETs here but it is not proposed that tribunals be permitted to order remedial action, even for the individual, let alone for any others found to be similarly situated.

The main remedy in practice is a financial one and likely to remain so. There are some large awards in individual cases but median awards are not particularly high.
Latest figures (2006) show the average award was just over £13,000 (slightly down on the previous year) and the median around £7,500 – taken across all the discrimination jurisdictions (313 cases). One can question the dissuasive impact of this level of award.

The individual remedy approach applies also to equal pay cases even though it is the case that instances of unequal pay rarely exist in isolation from the pay system as a whole. A successful claim under the EqPA does not alter anything beyond the individual claimant's

contract. Currently the ET system is under strain from the weight of equal value cases. In 2006-7 the number of equal pay claims rose again – by 155% to 44,013. Many are cases with multiple claimants against the same employer – but all have to be brought as individual claims. Equal value claims increasingly are collective not individual disputes but the legislative structure for tackling gender pay inequality in the UK fails to recognise this.

The individualised, private law model which predominates in employment rights in Britain places an importance upon awareness of rights and a capacity/willingness to enforce them. This is not evenly distributed and poses particular problems in respect of the equality legislation. A move away from reliance on the 'victim-complains' approach would be desirable but appears unlikely (although it is found in other areas, such as the National Minimum Wage). If the individual route is to remain a major enforcement prong it is imperative that more is done to make people aware of their rights to bring cases, to support them in so doing and to provide effective remedies.

There is no provision for class actions in the British legislation - reflecting the legislation's lack of firm commitment to a concept of equality more clearly focussed on remedying group disadvantage. Agency supported (or agency initiated) class action suits would allow discrimination to be challenged without a worker who has been affected having to be found or identified. Class action allows embedded institutional practices to be challenged; can result in more substantial penalties for discriminators and acknowledges that discriminatory practices affect people by virtue of their membership of a group.

Despite these advantages class action is not being proposed in *F4FF*. However there is currently a separate evidence collecting process underway on the case for introducing representative actions. While not the same as class action it would nonetheless be a marked departure for Britain. If introduced in the discrimination area it would allow the possibility of organised private litigation, with trade unions or other designated voluntary organisations able to take cases to court on behalf of a group of individuals as a single claim.

Currently bodies such a trade unions do not feature as actors in the legislative framework. There is no attempt to harness the regulatory power of collective bargaining as an adjunct to state regulation.

A missed opportunity

In the *BJIR* article (Dickens 2007) I suggested that it would be a missed opportunity if, in bringing together the existing separate strands, the legislators failed to grasp the opportunity to embed more positive approaches to equality within a harmonised, consistent, comprehensive and coherent framework which gives sufficient recognition to the fact that societal discrimination extends well beyond individual acts of prejudice and places more emphasis on the responsibility of organisations – in the private as well as public sector - and individuals to generate change. I noted that the Single Equality Act

provided an ideal opportunity to address limitations of British equality law and to reconsider and strengthen enforcement mechanisms, to provide a better fit with the contemporary nature of employment and employing organisations, and to draw upon improved understanding of the nature of discrimination, the structural sources of disadvantage and the legislative measures likely to promote fair representation, equality and diversity.

It appears from *F4FF* that the opportunity is not being grasped. At this time the signs are that the Single Equality Act risks being more about tidying up the equality legislation than radically improving it.

References [i]

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Kersley, B. et al (2006) *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* London: Routledge

[i] More detailed referencing to research studies may be found in the BJIR article (Dickens 2007).