

EXPLANATORY MEMORANDUM TO
THE EQUALITY ACT 2010 (CONSEQUENTIAL AMENDMENTS, SAVING
AND SUPPLEMENTARY PROVISIONS) ORDER 2010

2010 No. 2279

1. This explanatory memorandum has been prepared by the Government Equalities Office.

This memorandum contains information for the Joint Committee on Statutory Instruments and the Merits Committee of the House of Lords.

2. **Purpose of the instrument**

2.1 This Order makes minor amendments to the Equality Act 2010 (“the Act”), and minor amendments and repeals to other primary legislation, which are consequent on, or supplementary to, commencement of the Act. The amendments to the Act are supplementary to commencement, in that they give full effect to one of the main purposes of the Act, namely to harmonise and restate equality law. The amendments achieve that by making minor corrections and by updating certain references to reflect recent amendments to some of the current equality provisions. In so doing, the amendments do not change the existing law; rather they ensure that its effect is maintained. The amendments to other legislation are necessary to remove references to legislation that is repealed by the Act or to replace these references with a reference to the Act.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The powers used to make this Order are in section 207(4), 207(6), 207(7) and 216 of the Act in their application to section 216 (commencement). The attention of the Committee is drawn in particular to the scope of the power under s207(7) which, on commencement, enables an order under s207(4)(b), (containing consequential, incidental, supplementary, transitional, transitory or saving provisions) to be made in a separate instrument to the instrument which commences the relevant provision(s) of the Act. In addition, section 207(7)(b) provides that it does not matter whether the commencement has taken place.

3.2 The power to make consequential and other minor amendments to primary legislation, including the Act that contains the enabling powers, through secondary legislation is not novel.¹ The Act itself is long and harmonises a large body of law and unfortunately, a few minor points were

¹ See, for example, S.I. 2005/3496 (made under equivalent consequential etc powers in sections 172 and 173 of the Serious Organised Crime and Police Act 2005) which makes a number of corrections to the 2005 Act, including an amendment of the extent provision to ensure that a certain provision of the Act has effect in Scotland and Northern Ireland (as well as in England and Wales).

overlooked during the passage of the Act through Parliament. In addition there are a number of consequential amendments to other legislation that are necessary to ensure that the Act is fully effective.

3.3 Taken together the powers in sections 207(4)(b), 207(6), 207(7) and 216 make it possible to make amendments to correct such minor defects and insert consequential amendments. What is more unusual about the powers in the Act is that while they provide that such amendments must be linked to the commencement of the relevant provision, they also permit them to be contained in a separate instrument to the commencement order, and to be made irrespective of whether commencement has taken place. The effect is twofold. First, providing for these powers to be exercised in separate instruments means the affirmative procedure is used appropriately for consideration of the amendments to primary legislation and not for the question of commencement itself. Second, the provisions will enable any consequential amendments that are identified late, to be made after commencement of the relevant section, to ensure the Act and any legislation affected by it is not defective.

3.4 The second feature is not, in fact, relied on as this Order should come into force at the same time as the related provisions of the Act. It is anticipated that the core provisions of the Act² will come into force on 1st October 2010 by separate commencement order (“Commencement Order No. 2”)³. It is intended to bring this Order into force on the same date.

3.5 This Order makes consequential amendments to Acts of the Scottish Parliament. This is permissible by virtue of section 207(6) read together with the definition of “enactment” in section 212(1). None of the amendments make policy changes to devolved matters. Scottish Parliamentary Counsel has approved the provisions of the Order that relate to Scottish legislation.

3.6 By virtue of section 208(2), this Order is subject to the affirmative procedure because it amends primary legislation.

4. Legislative Context

4.1 This Order is one of a series of instruments that will implement the Act which received Royal Assent on 8 April 2010. The Act replaces and harmonises previous discrimination legislation, such as the Equal Pay Act 1970 (“the 1970 Act”), the Sex Discrimination Act 1975 (“the 1975 Act”), the Race Relations Act 1976 (“the 1976 Act”) and the Disability Discrimination Act 1995 (“the 1995 Act”) and a series of instruments relating to discrimination because of sexual orientation, religion and belief and age.

4.2 The Equality Act (Commencement No 1) Order 2010 (SI 2010/1736) was made on 5 July 2010. This brought certain sections of the Act into force for the purpose of making subordinate legislation, Codes of Practice and guidance.

² See paragraph 4.3 for a summary of the core provisions.

³ See paragraph 4.2 for details of Commencement Order No. 1.

4.3 As explained in paragraph 3.3 it is intended that Commencement Order No.2 will bring the core provisions of the Act into force on 1 October 2010, including the key concepts and definitions (Part 2) and the application of the Act in respect of services (Part 3), premises (Part 4), work (Part 5), education (Part 6), associations (Part 7), other prohibited conduct (Part 8), enforcement (Part 9), contracts (Part 10) and transport for disabled people (Part 12) together with linked provision contained in other Parts and the Schedules to the Act. Remaining provisions of the Act will be commenced in due course.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

The Secretary of State for the Home Department and Minister for Women and Equalities, Theresa May, has made the following statement regarding Human Rights:

In my view the provisions of the Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010 are compatible with the Convention rights.

7. Policy background

7.1 The overall policy objectives of the Act are to streamline (through simplification) and strengthen equality law. In particular, the Act replaces, fully or in part, nine major pieces of existing legislation and puts protection against discrimination etc on a more consistent basis.

7.1.2 This Order is necessary so that the Act can fulfil its policy objectives. The Order ensures that the Act itself works properly, that other Acts continue to operate effectively where there are cross-references to existing equality legislation and, where appropriate, makes supplementary provision to harmonise non-discrimination provisions in other legislation to reflect the changes in the law.

7.2 Articles 2 to 13 amend the Act itself.

7.2.1. The amendments in Article 3 are supplementary to the commencement of section 87 in that they are needed to make that section work in Scotland (as well as England and Wales). Section 87 refers to powers exercisable under the Education Act 1996, but the equivalent powers in Scotland are contained in the Education (Scotland) Act 1980. Article 3 corrects this inadvertent omission by providing references for Scotland that correspond to the references for England and Wales to the Education Act 1996.

7.2.2. Article 4 is supplementary to the commencement of section 94 in that it is necessary for Chapter 2 of Part 6 to have a definition for “conferment” (which had been omitted in error). This reproduces section 31A(9) of the 1995 Act to ensure that the current definition is not narrowed.

7.2.3. Article 5 amends section 108(4) to remove a doubt as to the breadth of the provision and thus ensure that the scope of the protection provided by the existing law is maintained. The amendment is supplemental to the commencement of section 108 in that it gives effect to the general purpose of restatement.

7.2.4. Sections 132(5) and 134(6) of the Act provide for the calculation of the earliest date when arrears of pay or damages can be paid in a claim for a breach of an equality clause or rule in Scotland. Section 135 makes supplementary provision to explain terms used in the Act in relation to the calculation of this arrears period. The explanatory notes for sections 132 and 135 say that the purpose of these provisions is to replicate the effect of the corresponding provisions in existing law (see in particular paragraphs 442, 445, 448 and 450 of the Notes). But sections 132, 134 and 135 do not, as they stand, correctly restate the arrears period in Scotland that is currently provided for by section 2ZC of the 1970 Act. The amendments made by Articles 6 and 7 of this Order are therefore supplemental, in that they are needed to give effect to the general purpose of restatement, by ensuring that the arrears period in Scotland remains unchanged.

7.2.5 The amendments in Articles 8 and 11 are consequential on the coming into force of the Lisbon Treaty and update references to Community law so that they now refer to EU law.

7.2.6. Article 9 reproduces an amendment which has been made to section 19 of the 1995 Act by the Rail Passengers’ Rights and Obligations Regulations 2010 (SI 2010/1504) which were laid before Parliament on 2 June. The amendment is supplementary to the commencement of Part 9 of Schedule 3 in that it is needed to update that Part of that Schedule so as to reproduce the full effect of section 19 of the 1995 Act as amended.

7.2.7 Article 10 removes the reference to the Learning and Skills Council (“the LSC”) which was abolished on 1st April 2010. As such it is supplementary to the commencement of paragraph 4 of Schedule 11 to the Act to ensure the references in the Act are up to date.

7.2.8 Articles 12 and 13 give effect to the Schedules to the Order which amend Schedules 26 and 27 of the Act which make amendments and repeals to other legislation respectively.

7.2.9 Articles 14 to 16 amend the sections of the 1975 Act, the 1976 Act and the 1995 Act that contain the public sector equality duty (“public sector duty provisions”). These three Acts will be repealed when the core provisions of the Act are commenced. However, it is intended that the public sector duty

provisions of the Act will not be commenced before April 2011, so the existing public sector duty provisions will remain in force⁴ until the new provisions are commenced. These continuing public sector duty provisions need to be amended to reflect the new key concepts introduced by the Act (including definitions). In addition, the effects of certain other provisions in the current Acts, which will otherwise be repealed in October 2010, need to be saved for the purposes of the public sector duty provisions.

7.3. Schedule 1 amends Schedule 26 to the Act to add further amendments to primary legislation that are consequential on the commencement of the main provisions of the Act. It also inserts a Part 2 to Schedule 2 for amendments to Acts of the Scottish Parliament. The amendments to Schedule 26 are inserted in chronological order and Schedule 1 provides for the renumbering of Schedule 26 to take account of these additional paragraphs. The Order is structured in this way so that when it comes into force the consequential amendments to other legislation will all be in one place, in accordance with one of the main purposes of the Act which is to consolidate and streamline the law. Most of the amendments replace references to the repealed Acts and Regulations with references to the Act, and these are self-explanatory; however, the following amendments are more substantive.

7.3.1 Paragraph 6 of the renumbered Schedule 26 amends Schedule 1 to the Estate Agents Act 1979. Under section 3 of the 1979 Act the Office of Fair Trading can issue a prohibition order where they are satisfied that a person is unfit to carry on work as an estate agent. One of the grounds for issuing such an order is that the person has committed discrimination. Schedule 1 sets out the circumstances where a person is deemed to have committed discrimination for the purpose of section 3. One of the cases is where a finding of discrimination has been made against a person under section 66 of the 1975 Act and another is where such a finding has been made under section 57 of the 1976 Act. These provide for claims of discrimination to be brought in the field of goods and services (which includes the disposal and management of premises).

7.3.2. Paragraph 6 of Schedule 26 replaces the references to these sections of the 1975 Act and the 1976 Act with references to claims brought under section 113 of the Act, in relation to claims under Part 3 (goods and services) and Part 4 (premises) of the Act. The current law covers breaches of discrimination law because of sex or race only, but this is anomalous because estate agents are subject to the anti-discrimination provisions in relation to all protected characteristics covered by Parts 3 and 4 and it has never been the policy intention to give lesser protection to other protected characteristics. The current position has arisen because of the piecemeal way in which existing legislation has been applied. In accordance with the underlying purpose of the Act which is to harmonise equality provisions where possible, the amendments made to the 1979 Act in this Order mean that the provision covers findings of discrimination in relation to all protected characteristics covered by Parts 3 and 4 of the Act..

⁴ The repeal of the existing provisions will not be commenced by Commencement Order No. 2.

7.3.3. Paragraph 22 of the renumbered Schedule 26 amends the Enterprise and New Towns (Scotland) Act 1990. Section 17 of the 1990 Act requires Scottish Enterprise and Highlands and Islands Enterprise to encourage employers to use positive action provisions in the 1975 Act, the 1976 Act and the 1995 Act. These provisions have been replaced by section 158 of the Act. Section 158 is drafted to provide a clearer and more flexible framework for employers who want to use positive action measures. As the substantive law on positive action has changed, the effect of the amendment to section 17 of the 1990 Act is to reflect the wider and more flexible circumstances in which positive action can be used by employers. It is supplemental on commencement of section 158 to reflect the change in the law.

7.3.4. Paragraph 45 of the renumbered Schedule 26 amends paragraph 6 of Schedule 5 to the School Standards and Framework Act 1998. Paragraph 6 provides that when schools adjudicators are considering cases (relating to, among other things, schools admissions) they should take into account certain duties owed by the governing body or local authority under the 1975 Act, the 1976 Act and the 1995 Act. As with the Estate Agents Act 1979, the position is anomalous because local authorities and governing bodies are subject to anti-discrimination law in relation to other protected characteristics. This is not the policy intention and is a result of the piecemeal nature of existing legislation. In addition, the Act extends protection to gender reassignment and pregnancy and maternity for the first time in the field of education. The amendment in paragraph 45 harmonises provision so that adjudicators must take account of the duties owed by governing bodies and local authorities in relation to all protected characteristics to which Parts 3 and 6 apply. This is supplemental to the commencement of Parts 3 and 6 of the Act and reflects the underlying purpose of the Act which is to streamline provisions where possible.

7.4 Schedule 2 replaces the table of repeals in Schedule 27 to the Act. The existing repeals in the Act are reproduced in the table but additional repeals have been added. All the repeals inserted into the table are consequential on the commencement of the core provisions of the Act and relate to provisions in other Acts which will be spent on repeal of the 1975 Act, the 1976 Act and the 1995 Act and other legislation or where terms have become redundant because of a replacement provision in the Act. In the case of a provision which amends an existing equality provision, the repeal of the amending provision is, in the usual way, provided for only in the repeals table (and is not founded in a separate amendment).

8. Consultation outcome

8.1 No specific consultation was undertaken on this Order. However, a wide-ranging consultation was carried out in June 2007 – “A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain”, which proposed the harmonisation and simplification of existing equality legislation. This was followed in June and July 2008 by two Command Papers

(Framework for a Fairer Future – the Equality Bill, Cm 7341; the Equality Bill – Government response to the consultation, Cm 7533). In addition, during the Bill’s passage through Parliament further documents were published on particular aspects (multiple – now combined (dual) discrimination; policy proposals for specific duties; ending age discrimination in services and public functions).

8.2 Nearly all respondents to the 2007 consultation, and indeed the majority of those who made views known to the Equality Bill Committee and through other means as the Bill was going through Parliament, agreed with the objective of streamlining equality law and replacing with a new single Equality Act, the current nine major pieces of discrimination legislation.

9. Guidance

9.1 No guidance has been specifically published alongside this Order as it is a largely technical instrument the purpose of which is to ensure existing legislation continues to work when the Act is commenced. The first set of a series of summary guidance on the Equality Act was published on 5 July, for employers, employees, the voluntary sector, individuals and public sector organisations. This will be followed by further “quick-start” guides which focus on specific provisions (e.g. gender reassignment; disability; private clubs), again for different audiences. This will be backed by comprehensive and detailed guidance produced by the Equality and Human Rights Commission, together with statutory Codes.

10. Impact

10.1 The impact of this particular Order on business, charities or voluntary bodies is considered to be negligible. The only provisions which extend existing law are:

- Potential prohibition by the OFT under the amended Estate Agents Act 1979 against people working as estate agents who have been found to have discriminated. Currently, this applies for sex and race discrimination. This Order extends it to apply to discrimination because of all the protected characteristics. If these additional powers were used, there may be a minor effect on a business needing to recruit a replacement for an offending (and prohibited) estate agent, but the powers should be a deterrent and overall the impact is regarded as negligible.
- Potential outcomes of cases involving non-admission to schools. Currently, school adjudicators (who decide on complaints about non-admission, among other things) must take into account various anti-discrimination duties of school governing bodies in respect of race, sex and disability. This Order extends the factors to cover all the protected characteristics. The effect of adding the remaining protected characteristics as factors to be taken into account is considered to be negligible.

10.2 The impact on the public sector is considered to be negligible, for the reasons indicated above.

10.3 A separate Impact Assessment has not been prepared for this Order which is consequential on the measures in the Act. The final Impact Assessment for the Act as a whole (available at <http://www.equalities.gov.uk/pdf/Equality%20Act%20Impact.pdf>) estimated that one-off costs in year one for all sectors would amount to £241m to £283m, with benefits amounting in year one to £102m to £134m – the main reason for the “gap” between costs and benefits being the one-off costs of familiarisation with the new law. Thereafter, the final Impact Assessment estimates recurring costs per year as £29m to £70m; and recurring benefits as £99m to £131m, including as a result of simplification.

11. Regulating small business

11.1 The legislation applies to small business. The Impact Assessment for the Act as a whole looks at the effect on small businesses of the various measures in the Act, including familiarisation costs and a consideration of the impact on small firms.

12. Monitoring & review

12.1 The Government Equalities Office is developing a project to establish an evaluation framework for the Act as a whole, including establishing a “before/after” baseline against which to measure change. This will enable relevant data to start to be collected. It is intended to complete a full evaluation 4-5 years following enactment.

13. Contact

Wally Ford at the Government Equalities Office. Tel 0303 444 3023 or email wally.ford@geo.gsi.gov.uk can answer any queries regarding the instrument.