PROSPERITY INSTITUTE

Some More Equal Than Others

The Case Against the Equality Act

Alka Seghal Cuthbert and Anna Loutfi
Foreword by Lord Sewell CBE

Contents

Glossary

ACAS: Advisory, Conciliation and Arbitration Service

BME: Black and minority ethnic

CARD: Campaign Against Racial Discrimination

EA 2010: Equality Act 2010

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EHRC: Ethics and Human Rights Commission

ERA 1996: Employment Rights Act 1996

ERT: Equal Rights Trust

HRA 1998: Human Rights Acct 1998

PCP: Provision, criterion, or practice

PSED: Public sector equality duty

RRA 1965: Race Relations Act 1965

SOSR: Some other substantial reason

WRES: Workforce race equality standard

About the authors

Alka Sehgal Cuthbert is an educator, academic, author, and campaigner. She is the Director of Don't Divide Us, author of numerous specialist texts on education, and co-editor of *What Should Schools Teach? Disciplines, Subjects and the Pursuit of Truth*. She is co-author of the 2025 Don't Divide Us report *The Equality Act Isn't Working*. She has spoken at numerous prestigious conferences and gave evidence to the 2016 All-Party Parliamentary Group Inquiry (APPGI) on Knowledge and Skills in Education.

Anna Loutfi is a specialist employment and equality barrister practising from 4-5 Gray's Inn Square in London. She was called to the Bar in 2019 and is regularly instructed in employment law matters including discrimination, whistleblowing, unfair dismissal and related workplace disputes. She has extensive experience in equality and human rights law, free speech, and disability law, and is the co-author of the 2025 Don't Divide Us report *The Equality Act Isn't Working*.

Foreword

Britain finds itself wrestling with the weight of its past—not through the familiar lenses of slavery or colonialism, but through a particular piece of legislation that has quietly reshaped our society. The Equality Act 2010, introduced by the Labour government and subsequently upheld by the Conservatives, demands scrutiny. Why has this legislation gone largely unquestioned? Why have so few on the Right mounted a serious challenge to it? Remarkably, no one has even dared question its so-called progressive credentials.

I confess to a certain amusement whenever I hear Lord Glasman, that Blue Labour heretic, recount his joke about Labour's capture by the "progressive" agenda. It goes something like this: when visiting your doctor, the last thing you want to hear is that your condition is "progressive." The authors of *Some More Equal Than Others: The Case Against the Equality Act* have produced precisely the paper needed to excise all those "progressive" cells from our body politic. One line in the paper stands out with particular force: "the Equality Act 2010 enacted a fundamental and unprecedented shift from negative legal prohibitions against discrimination to a positive legal duty to enforce equality".

This distinction matters enormously. The Equality Act is qualitatively different from earlier anti-discrimination legislation. It was demonstrably the product of a sustained campaign by internationalist lawyers seeking to revolutionise traditional British understandings of equality, freedom, and discrimination. The Act's core features—protected characteristics, the Public Sector Equality Duty, and the requirement for positive action—have together created a system of justified discrimination.

We built a monster. The original intent of anti-discrimination law was to give citizens legal recourse against discriminatory acts. Instead, we created something far more ambitious: a framework that grants sweeping powers to the state and its agencies to actively enforce equality. The problem is not merely that this power exists—it is that access to it remains unevenly distributed. Notably absent from the Act's protected characteristics are class and geography, the two factors that most reliably determine one's prospects in modern Britain.

The paper before you offers three paths forward: repeal and replacement with a minimal anti-discrimination framework, full repeal, or partial repeal. Change is clearly necessary. Our ongoing debates about police training and anti-discrimination guidelines may have overlooked a more fundamental problem: we have embedded a flawed ideology into our legislative architecture itself.

In 2021, I chaired the Commission for Race and Ethnic Disparities. We produced a substantial report examining policing, crime, health, education, and employment, putting forward genuinely progressive recommendations including abolishing the term BAME—a clumsy acronym that erased meaningful ethnic distinctions. Yet the report did not go far enough. It should have called for a comprehensive overhaul of the Equality Act 2010.

What we discovered was that public bodies, unable to implement the Act's equality duties themselves, outsourced the task to so-called experts. These consultants were expected to interpret not only the abstract concept of "equality" but also its application to specific local contexts. This was PhD-level work assigned to the nearest American-influenced activist, who simply told institutions they were racially sinful. In Nottingham, Southampton, Belfast, and Rotherham, we have witnessed the harmful—and in some cases deadly—consequences of this approach.

Lord Sewell CBE

Endorsements

“When the Equality Act was drawn up it brought together decades of anti-discrimination legislation, but it also created new duties which have allowed identity politics and grievance culture to run rife. Across workplaces and within the public sector, promoting the needs of minority groups has caused division and distracted too many organisations from their core purpose. When the police are unable to stop criminals, when the NHS cannot say what a woman is, and when judges are no longer appointed on merit, we have to acknowledge that something is going badly wrong. We will only right the ship if we get back to treating people by the content of their character rather than their protected characteristics.

This report both exposes the problems and identifies ways we can restore balance. It is a great addition to the discussion as we work to bring about much-needed changes in law and culture.”

—The Rt. Hon. Claire Coutinho MP, Shadow Minister for Women and Equalities

"The Equality Act has never lived up to its name. Quite the reverse. Rather than ensuring that everyone in Britain is treated equally, it has created a system of discrimination across the public sector and in the workplace. Groups such as white working-class boys are now denied opportunities purely because of the colour of their skin. The British people never consented to this divisive legal regime; it was thrust upon them by a dying New Labour government, under the influence of distant European judges and lawyers. And we never needed it: British law was and is already perfectly capable of protecting people from discrimination. This new Prosperity Institute paper makes an inarguable case against the Equality Act. It lays bare the Act's origins, dysfunctions, and incompatibility with Britain's legal tradition, and clearly lays out the possible routes back to a system of genuine fairness based on merit and equality under the law. Anyone serious about delivering Britain from the grip of identity politics should read it."

—The Rt. Hon. Suella Braverman MP, Reform UK Spokesperson for Education, Skills, and Equality

Executive summary

The Equality Act 2010 received royal assent on 8th of April 2010. Less than a month later, in the 2010 general election, its Labour architects were decisively rejected at the ballot box. However, the subsequent Conservative government allowed the Equality Act to remain on the statue book throughout their fourteen years in power and it remains there still.

When first presented, the Equality Act was portrayed as a simple consolidation and simplification of existing anti-discrimination legislation, ranging from the Race Relations Act 1965 to more recent Acts such as the Disability Discrimination Act 1995.

This paper proves this characterisation entirely false and recommends either repeal or fundamental reform of the Equality Act. By means of an unwelcome revolution in our historic understandings of equality, freedom, and discrimination, the Act has left us less equal, less free, and with more justified discrimination than at any time in living memory.

"Orwellian" is an overused adjective, but the Equality Act has undoubtedly institutionalised the idea which George Orwell famously satirised in *Animal Farm*: "All animals are equal, but some animals are more equal than others".

History and genesis of the Equality Act

The Equality Act was always intended to be far more than a mere consolidation of existing legislation. The Act drew heavily on the Equal Rights Trust's 2008 Declaration on the Principles of Equality, which explicitly sought to change Britain's understanding of both equality and anti-discrimination. This came in the wider context of increased European influence on domestic law via the Social Protocol and the Human Rights Act 1998, which incorporated provisions of the European Convention on Human Rights into domestic law.

Whilst earlier anti-discrimination legislation such as the Race Relations Act 1965 largely confined itself to restricting specific acts of discrimination during a period of much greater political participation, the Equality Act was the product of an international group of lawyers imposing wide-ranging positive law upon the British public amidst dwindling voter turnout.

The principal legal shift was from a concept of negative law, in which certain specific acts of discrimination were prescribed in order to safeguard legal equality for all, to a concept of positive law in which discrimination is assumed to be the norm and bodies and individuals have a positive duty to actively achieve a new, wide-ranging definition of equality in numerous areas of life between those with certain protected characteristics and those without.

This shift has undermined traditional British understandings of equality and freedom. The dual influences of Christianity and Enlightenment thought led to a clear understanding of individual moral, legal, and political equality, in which all stood alike before God, the judge, and our political channels. All individuals were assumed to be innately free to interact and contract with one an-

other, a freedom recognised by the state, not conferred by it.

How the Equality Act works (and how it fails)

The failures of the Equality Act are features, not bugs. Its ill effects on British life are the Act working as intended. We have identified seven principal features of the Act:

- the system of protected characteristics
- a vague definition of discrimination
- the public sector equality duty
- positive action
- disability discrimination and the anticipatory duty
- incoherence regarding protected belief and free speech
- over-reliance on guidance

Each of these inherent defects in the Act has led to a wide-ranging system of justified discrimination which pervades both the public and private sectors, as well as everyday interactions in workplaces and private life.

Two case studies

To evidence the ill effects of the Act, we examine two case studies, relating respectively to the private and public sectors.

The first, *Thandi and Others v Next Retail Ltd and Next Distribution Ltd* ("the *Next* case") demonstrates how the Equality Act's concept of "equal work" has resulted in the ability of judges to control the price mechanism of private businesses in a supposedly free market by means of highly spurious claims to unequal treatment based on sex.

The second, *Carol Richardson v York & Scarborough Teaching Hospitals NHS Foundation Trust* ("the *Richardson* case"), demonstrates how the Equality Act's public sector equality duty and positive action stipulations create a clear system of justified discrimination and ethnic segregation by restricting opportunities for advancement to people of certain ethnicities.

Recommendations

This report gives three options for dealing with the Equality Act:

- Full repeal, with subsequent action such as abolition of the Equality and Human Rights Commission, a common law restoration committee, and a review of ACAS
- Repeal and replacement of the Act with a "bare" anti-discrimination framework which includes disability. This could be achieved via amendment to the Employment Rights Act 1996.
- Partial repeal, targeting the most egregious elements of the Act such as the PSED, positive action, indirect discrimination, harassment, equal work, religion and belief protections, and gender reassignment provisions.

We propose that, whatever framework replaces or reforms the Equality Act, that it be governed by the concept of the materiality or immateriality of personal characteristics in any alleged discrimination.

1. The history and genesis of the Equality Act

Main points

- The Equality Act 2010 enacted **a fundamental and unprecedented shift** from negative legal prohibitions against discrimination to a positive legal duty to enforce equality.
- A network of lawyers and NGOs, highly influenced by Europe, actively shaped the Equality Act, most notably the Equal Rights Trust and their 2008 Declaration of Principles on Equality.
- Earlier British anti-discrimination legislation, such as the Race Relations Act 1965, differs significantly in kind from the Equality Act.

It has long been argued that the Equality Act ('EA 2010') is no different in kind to earlier anti-discrimination legislation in Britain, and that it simply "consolidated"[1] earlier legislation in order to make the law "more accessible and easier to understand"[2] and "easier to use".[3]

This claim is demonstrably false. The Equality Act is a unique innovation in Britain's legal system for two important reasons.

First, it is unique in its scope. It directly affects all public institutions and, indirectly, extends to private businesses.

Second, it changes the overarching commitment of Britain's legal system from freedom embodied in common law to equality via constitutional codification.

We argue that the Equality Act has had deeply negative consequences for Britain's traditional legal system and wider culture by demoting freedom and universal equality and replacing it with a culture of risk-aversion and victimhood. From our study, we conclude that these are not problems contingent on poor implementation or political activists; rather they are inherent within the Equality Act itself.

Background to the Equality Act

The idea of bringing together various laws on equality to create a single piece of legislation, was first mooted in 1997—the year New Labour came to power—in the course of a project led by two politically influential figures: Bob Hepple and Lord Lester.

Hepple had been a member of the African National Congress in apartheid South Africa before

1 UK Government, "Public Sector Equality Duty: guidance for public authorities", 18 December 2023. (link)
2 Harriet Harman, "The Equality Act", *harrietharman.org*, accessed 29 May 2026. (link)
3 Equality and Human Rights Commission, "Equality Act FAQs", accessed 29 May 2026. (link)

moving to the UK in the early 1960s. He became a QC and a Cambridge academic, specialising in labour and equality law. He also established the Campaign Against Racial Discrimination (CARD) in 1964 and was chair of its legal subcommittee. In 1997 he was a member of the Runnymede Trust's Commission for Multi-Ethnic Britain.

Lord Lester was a member of the Labour Party who, as a young human rights lawyer, had helped to draft the 1965 Race Relations Act. A prominent member of CARD, he co-founded the Runnymede Trust in 1968 and was its chairman between 1991-1993. By 1997 Hepple, then Master of Clare College at Cambridge University, and Lord Lester had convened a small group of people from organisations involved in law and race relations, including the Runnymede Trust and JUSTICE, a law reform charity. Their aim was

> to review and evaluate proposals for the reform of UK anti-discrimination legislation, based on an assessment of the experiences of those affected by the legislation. The specific objectives were to develop a legislative framework, to propose other measures that will promote equal opportunity policies and to spur compliance with those policies, and to ensure that the UK is in full compliance with its obligations under EU law and international human rights law.[4]

The framework they arrived at in 2008, set out in the Declaration of Principles on Equality by the Equal Rights Trust (ERT) (of which Hepple and Lord Lester were Chairs), differed from previous anti-discrimination legislation in two important respects:

1. It **embodied a shift from *negative* conceptions of law, in which law is an instrument for the prevention and punishment of that which is expressly forbidden, to a *positive* idea of law** in which law itself is seen as the agent by which society will be reformed.
2. It reversed the order of priority in the chain of legislative accountability: **instead of being ultimately answerable to the British electorate at the ballot box, equalities legislation was to be addressed primarily to trans-national officials** such as the law officers of the European Union and related bodies, and the United Nations.[5]

Accordingly, of the 128 original signatories supporting the Declaration, only 26 were based in the UK; and of the 26, only one was not an academic and/or legal professional working in human rights or equalities law. This was the exclusive social stratum which gave birth to the Declaration, the document which proved to be the dominant influence on the subsequent Equality Act.

European influence

The Equality Act is also a product of the growing influence of Europe on British domestic legislation during the premiership of Tony Blair.

Blair signed the Treaty of Amsterdam in October 1997, reversing John Major's opt-out of the Social Protocol of the 1993 Maastricht Treaty, which addresses areas such as workers' rights and equal opportunities. In this context the EA 2010 can be seen as one of several legal instruments that reinforce each other, the most important of which are the European Convention on Human Rights

4 Bob Hepple, Mary Coussey and Tufyal Choudhary, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000), xiii.

5 Equal Rights Trust, "Declaration of Principles on Equality", 2008, accessed 1 June 2026. (link)

(ECHR) and the Human Rights Act (HRA) 1998, which incorporated ECHR provisions into domestic law.[6]

One notable example of how European law based on constitutional codification came to actively shape Britain's political priorities, including the EA 2010, is the 'living instrument' doctrine. This doctrine was introduced by European Court of Human Rights (ECtHR) in 1978 and rendered interpretation of ECHR case law open to perpetual revision according to "changing social conditions".[7] The Preamble of the ERT's Declaration presents the doctrine in embellished form:

> *Noting* that while legal provisions relating to equality should provide legal certainty, those responsible should be willing to improve and interpret legislation in order to reflect the changing experiences of all people disadvantaged by inequality.[8]

Note how "changing social conditions" in 1978 becomes "changing experiences of *all people disadvantaged by inequality*" (our emphasis) by 2008; this wording is a premonition of the protected characteristics enshrined in the EA 2010 in 2010.

From anti-discrimination to "equality"

In the creation of a positive legislative framework designed to promote equal opportunity (as modelled in the Declaration), the EA 2010 expanded the remit of the law and moved it above and beyond prohibiting specified acts of discrimination. This shift brings with it two significant problems, however.

First, **the goal of ensuring equal opportunity is loose and diffuse compared to prohibiting acts of discrimination.**

Second, implementing all-encompassing legislation based on an idea of social equality developed by lawyers means that **all sorts of social interactions have become matters for the courts to decide**, whether or not the idea of equality is (a) relevant in a specific instance or (b) best served by legal intervention.

To demonstrate this point, we can compare the changing definitions of discrimination between an earlier piece of British anti-discrimination legislation—the Race Relations Act 1965—and the ERT'S 2008 Declaration and the eventual EA 2010.

Changing definitions of discrimination

Definition of discrimination in the Race Relations Act 1965[9]

In response to concerns over rising levels of post-WW2 Commonwealth immigration, the Conservatives passed the Immigration Act 1962, which was strengthened further by Labour in 1968.

6 Britain was one of the original signatories of the European Convention on Human Rights in 1951, at which time it was more akin to an international agreement which left Britain's domestic political and legal arrangements relatively unaffected, although there was criticism at the time of its potential to undermine the British constitution.

7 Suella Braverman and Guy Dampier, *Why and How to Leave the ECHR: Roadmap to Freedom* (London: Prosperity Institute Report, 2025), 9. (link)

8 Equal Rights Trust, "Declaration", 4.

9 HM Government, "Race Relations Act 1965", accessed 1 June 2026. (link)

In between these two Acts, Harold Wilson's Labour government passed the Race Relations Act 1965. The Act was heavily criticised at the time, and subsequently, due to its effects on free speech and criminalising swathes of ordinary people.[10] Nonetheless, **the Act prohibited actions that both parties agreed were not desirable and merited prohibition.**

The Act's prohibitions regarding discrimination are as follows:

1. (1): It shall be unlawful for any person, being proprietor or manager of or employed for the purposes of any place of public resort to which this section applies, **to practice discrimination on the ground of colour, race, or ethnic or national origins against persons seeking access to or facilities or services at that place . . .**

   (3): For the purposes of this section a person discriminates against another person **if he refuses or neglects to afford him access to the place in question, or any facilities or services available there, in the like manner and on the like terms in and on which such access, facilities or services are available to other member of the public resorting thereto.**

The Race Relations Act 1968 extended legal provisions to include employment and housing in addition to places of public resort, but there was no substantive change to the definition of what discrimination entailed.

It is evident that this legislation places negative prohibitions on certain acts. This is entirely different in kind to the positive duties imposed by the EA 2010.

What is more, despite its flaws and contemporary opposition, **the RRA was passed in an era of high political engagement.** The turnout in 1964 was 77.1%; in 1966, 75.8%. By contrast, in 2010 and 2015, the turnout fell to 65.1% and 65.2% respectively.[11] By 2024 it had fallen below 60%. The argument for broad public consent for the Government's definition of discrimination was far stronger in the mid-1960s than it was by 2010 or is today.

Definition of discrimination in the ERT's Declaration 2008

The ERT's 2008 Declaration starkly demonstrates the pivot from negative legal prohibition to the imposition of positive legal duty, most notably in principles 1, 4, and 5:

> 1 The Right to Equality
>
> The right to equality is the right of all human beings to be equal in dignity, **to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.** All human beings are equal before the law and have the right to equal protection and benefit of the law.[12]
>
> 4 The Right to Non-discrimination
>
> The right to non-discrimination is a free-standing, fundamental right, subsumed in the right

10 Laurie Wastell, "The Race Relations Act and the Origins of Two-Tier Justice", *Pimlico Journal*, 28 November 2025, accessed 20 May 2026. (link)

11 Closer, "Turnout at UK General Elections", accessed 1 June 2026. (link)

12 Equal Rights Trust, "Declaration", 5.

to equality.[13]

5 Definition of Discrimination

Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination **(i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.**[14]

Definition of discrimination in the Equality Act 2010[15]

Whilst it does not adopt the precise language of the ERT's Declaration[16], the EA 2010 puts into law the shift from negative prohibition to positive duty which was put forward in the Declaration:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

19 Indirect discrimination

(1) A person (A) discriminates against another (B) **if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

Summary of differences

Change from negative legal prohibition to positive legal duty

The first notable difference is that **the mandatory response to discrimination changes from being a *negative legal prohibition* of discriminatory actions to a *positive legal duty* to bring an end to discrimination.**

The RRA prohibits concrete acts such as the denial of access. By contrast section 149 (1)(a) and (b), the Public Sector Equality Duty (PSED), requires "the elimination of discrimination, harassment and victimisation or any other conduct that is prohibited or under this Act." Harassment, defined in section 26 (1)(a) and (b) of the EA 2010, is defined as "unwanted conduct related to a protected characteristic' that has 'the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment."

Without the restriction to concrete acts, roles, or location, the definition of discrimination

13 Equal Rights Trust, "Declaration", 6.

14 Equal Rights Trust, "Declaration", 5-6.

15 HM Government, "Equality Act 2010", accessed 2 June 2026. (link)

16 A detailed comparison of the provisions and definitions of the ERT's declaration and the eventual EA 2010 is provided in Appendix 1.

is, in principle, open to unending expansion in reach and definitional malleability, and has few limits in terms of its reach under section 149 (1)(c) which requires public authorities to "foster good relations" between those who possess a protected characteristic and those who do not; and section 149(2) which extends PSED duties beyond public authorities to anyone exercising a public function.

Increasingly vague definitions of discrimination

The second, related difference is the extent to which definitions are precise or vague.

Principle 15 of the Declaration stipulates that realising "the right to equality" requires addressing "the different forms and manifestation of discrimination *and disadvantage*" (our emphasis). Already **we see a conflation of two distinct social phenomena, discrimination and disadvantage, as if their meanings and legal weight were coterminous.**

Two years later, **the EA 2010 2010, defines discrimination as "less favourable" treatment – a catch-all phrase which moves even further away from precise definition.**

Expanding number of groups discriminated against

The third key variable is the number of groups identified as having a legal right of redress for discrimination.

In 1965, discrimination was prohibited against individuals on four grounds: colour, race, ethnicity, or national origin.[17] In the 2008 Declaration, twenty-three groups were listed. In this respect the 2010 EA 2010 could be said to be an improvement, in that there are "only" nine protected characteristics. **Yet in principle the number could be increased *ad infinitum* on the basis of perceived present or historical social disadvantage or unfavourable treatment.**

The Table in Appendix 1 shows the extent of overlap between the ERT's Declaration and the EA 2010. Of the twenty-seven principles in the Declaration, only seven are not found in the EA 2010: 18 are directly incorporated in the EA 2010 and 2 are found in the Crime and Disorder Act 1998, and the Criminal Justice Act 2003.[18]

An intentional transformation

The above comparison of differences dismantles the argument that the Equality Act merely consolidated existing legislation.

Yet **this point is not only proven by critics but is even admitted by the Act's architects.** Discussing the Act after its passage, Bob Hepple outlined "five generations of legislation", explicitly noting the shift from formal equality to transformative equality:

- 1st generation: formal equality of RRA 1965
- 2nd generation: extension of formal equality of the RRA 1968
- 3rd generation: further extension of formal equality of the Equal Pay Act 1970 and Sex

17 Discrimination on grounds of religious belief had existed in Northern Ireland since 1973 in the Northern Ireland Constitution Act and subsequent legislation. In Britain it was introduced in 2003 Employment (Religion and Belief) Regulations.

18 The seven principles excluded are: 1 (general statement on equality); 4 (non-discrimination as a right); 15 (specificity of equality legislation); 16 (participation); 20 (standing RE: other organisations in judicial/administrative processes); 26 (prohibition of regressive interpretation); 27 (derogations and reservations).

Discrimination Act 1975. Moving towards substantive equality in the provision of compensation for discrimination and new monitoring bodies such as the Equal Opportunity Commission.

- 4th generation: the incorporation via secondary legislation of the Race Directive and Framework Employment Directive between 2003-2007
- 5th generation: transformative, comprehensive equality.

Hepple writes of the fifth generation: "In other words, public bodies had to mainstream equality into the exercise of all their functions."[19]

The revolution wrought by the Equality Act, then, is not a projection by its critics, but a proud achievement by its advocates.

The threat to our historical understanding of freedom and equality

The changes outlined above are significant enough to pose a profound threat to historic British notions of legal equality and freedom.

The threat to equality

A nuanced concept of equality already existed in Britain's legal traditions, emerging from both traditional Christian and modern Enlightenment thought.

In their critique of the principle of equality, Keith Joseph and Jonathan Sumption point out that Christianity did not value equality *per se,* but that Christian Scripture upholds the idea of *moral* equality.[20] **In God's eyes an individual's wealth or social status does not count**. Judaeo-Christian moral equality, then, was the seed from which subsequent legal and social concepts of equality have developed.

In *God is an Englishman* , Bijan Omrani demonstrates the antiquity of the British legal system and its roots in England's Christian history.[21] **Important facets of the common law such as innocence until proven guilty and the importance of due process were established from the pages of Scripture and embedded in the emerging bodies of canon and secular law from the Anglo-Saxon period onwards.**

These ideas were further developed in the Middle Ages when such beliefs were consolidated into a theoretically inalienable right to trial in court. Other conspicuous landmarks include *Magna Carta* and the Bill of Rights. Although there were obvious developments as enfranchisement and so forth were extended to different groups, **the ability of the English law to ensure equality for all was renowned long before the Equality Act 2010.** William Blackstone could say of the law in the eighteenth century that it was "the perfection of reason".[22] In the twentieth century, Lord Denning, quoting Thomas Fuller, famously summarised our legal system by saying "Be you never so high, the law is above you".

This historic understanding has been radically undermined by the EA 2010.

19 Bob Hepple, "The New Single Equality Act in Britain", *The Equal Rights Review*, vol. 5 (2010), 13. (link)

20 Keith Joseph and Jonathan Sumption, *Equality* (London: John Murray Press, 1979), 5.

21 Bijan Omrani, *God is an Englishman: Christianity and the Creation of England* (London: Forum, 2025), 41-68.

22 William Blackstone, *Commentary on the Laws of England*, vol. 1, ed. George Sharswood (Indianapolis: Liberty Fund) 70. (link)

The threat to freedom

The EA 2010 also poses a significant threat to the freedom of thought, speech and association that has characterised Britain's legal and cultural development and its democratic principles.

Whereas negative freedom is concerned to minimise government or state restrictions on the scope of speech and action on the part of individuals, positive freedom is concerned with what is needed for freedoms to be made substantive. These different foundational concepts give rise to different views of the role and scope, of the state in public and civic life.

The concept of negative freedom rests on a *de facto* assumption that individuals are innately free, being moral equals before God and political equals by virtue of the right to vote. Social and economic inequalities are open to amelioration in the realm of political action undertaken by adult citizens, who, in a democracy, have various freedoms, including the rights of communication and association, through which to argue their case. The role of the state here is one of a light touch; its punitive power is limited to concrete individual breaches of laws that have general consent. It is the component of general consent that aggregates individual persons, or groups, into a larger *demos* or public.

The concept of positive freedom, embodied in the EA 2010, rests on an assumption that freedom and equality are goods to be conferred by the state upon individuals whose innate powers are limited or unrealisable due to social and economic inequalities. Here the role of the state is to be more interventionist in addressing inequality directly at the level of national policy. The tendency is to look for patterns among disadvantaged individuals to arrive at disadvantaged groups whose equality the state can actively secure. This could describe the post-war social democratic state. As long as the predicates of economic growth, political stability, and a quantum of moral consensus were in place, the two approaches could co-exist. However, it is clear that this is no longer the case and our political class struggles to find other means of ensuring social order, stability, and moral legitimacy.

Conclusion

The Equality Act is often defended as the mere consolidation of a variety of earlier pieces of anti-discrimination legislation. The preceding survey puts the lie to this narrative.

Earlier anti-discrimination legislation was far from perfect and often a post-hoc response to failures in immigration policy, but it at least had the virtues of being formulated during an era of high political participation and largely limiting itself to prohibiting concrete acts of discrimination.

The Equality Act is different in kind. It was the result of a concerted, top-down effort by European-influenced lawyers to shift anti-discrimination law from negative prohibition of certain acts to a positive duty toward certain groups, undertaken in an era of dwindling voter turnout and minimal public consent. It is also unique in scope, in its extension of this duty to all public institutions and, indirectly, private ones.

The effects of this are grave, undermining the concepts of legal equality and freedom which have shaped the British legal and constitutional tradition, and indeed the traditions of so many other common law jurisdictions around the world which are based on our own. The Equality Act serves, in the end, to make the British people less equal and less free.

2. How the Equality Act works (and how it fails)

Main points

- Protected characteristics, the PSED, and positive action have revolutionised British law**, shifting it from the presumption of innocence for all to the presumption of discrimination against some**, creating a system of justified discrimination against those without protected characteristics.
- The anticipatory duty regarding disability has turned the employer-employee relationship from one of mutual exchange to a form of welfare dependency.
- The inherent flaws of the Equality Act have generated an excess of poor and inaccurate guidance which damages the workplace.

In this section we consider how the Equality Act has revolutionised a legal framework previously based on formal equality and the limited prohibition of concrete acts, and how widespread political, legal, and social dysfunction have ensued as a result.

We will focus on seven features of the Act and their ill effects:

1. The system of protected characteristics
2. A vague definition of discrimination
3. The public sector equality duty
4. Positive action
5. The anticipatory duty regarding disability
6. Incoherence regarding protected beliefs and free speech.
7. Over-reliance on guidance

1. The system of protected characteristics

What are protected characteristics?

In 2010, when the EA 2010 was passed, Bob Hepple noted special features of the new law which made it suitable as a "model for other countries". These included: (1) the creation of an Equality and Human Rights Commission (EHRC); (2) definitions of different kinds of discrimination "across all protected characteristics"; and (3) positive duties "to advance equality" (including provisions on "positive action" and the "public sector equality duty").[23]

| 23 Hepple, "The New Single Equality Act in Britain", 1.

There are nine protected characteristics, and they are listed under s 4 of the EA 2010. **These are the nine grounds on which it is unlawful to discriminate, and they refer to a relationship in law between the state and the claimant's protected group identity.** Because the claimant in law has a protected group identity, there is no need for a claimant *per se*. The legal person all but disappears; the claimant is a legal entity only insofar as s/he represents a group identified by its protected characteristic.

As noted in the first chapter, when the Equality Bill was drafted, nine characteristics were selected, which were drawn from the ERT's declaration:

- Age, sex, and sexual orientation were retained from the ERT's list.
- Gender identity was converted to "gender reassignment" in order to align with the terminology of earlier statute.[24]
- Disability was retained with such a wide definition that it arguably redefined disability as any persistent (ill) health status.[25]
- Maternity, civil, and family/carer status were codified as "marriage and civil partnership" and "pregnancy and maternity".
- Race, colour, nationality, ethnicity or ethnic origins, nationality (with potentially the addition of caste by secondary legislation) were incorporated under the rubric of "race".
- Political and other opinions, previously protected under Articles 10 and 14 of the European Convention on Human Rights, were excised from the EA 2010 altogether, while religion/philosophical belief were retained.

Group inequality replaces individual equality

In theory, protected characteristics are neutral. However, in practice, the Act's wider architecture—principally section 1's instruction to "reduce… inequalities of outcome" rather than ensure equality of opportunity —means that protected characteristics function as an ideological mechanism, dispensing with the notion of *individual equality* and replacing it with the notion of *group inequality*, with the Act making it the business of the state to both mitigate against and "correct for" this supposed inequality.

This has had **numerous deleterious effects, most notably in the realm of employment.**

Perverse incentives in employment

In the world of employment law in particular, the ideological approach of the EA 2010 creates perverse incentives on the part of both employee and employer alike.

Employees

The EA 2010 encourages employees to view all contractual breaches, disagreements or workplace disputes through the lens of discrimination, and to claim the breach occurred because of, or in relation to, a protected characteristic.

For example, the recent case of *Nicole Hogger v Genesis PR Ltd* illustrates a dispute over a claim which could have been brought on grounds of unfair dismissal under the Employment Rights Act

24 HM Government, Gender Recognition Act 2004. (link)

25 "Impairment" with an "adverse effect" on normal day-to-day activities, according to s 6.

1996.[26] Instead, it was claimed as disability discrimination. Her boss had called her "disorganised" and the judgment was that this undermined Hogger. The suggested course of action was that the employer should have considered, with the complainant, what plans could have been put in place to prevent the undesired conduct (e.g. missing important meetings, poor punctuality).[27]

Under the EA 2010 regime, the disgruntled worker has recourse to claim not only for the ordinary statutory right to not be unfairly dismissed but, additionally, for discrimination where he or she can insist that, but for the worker's membership of a particular group, the act complained of would not have happened. All unfavourable or less than favourable treatment becomes arguably unlawful discrimination within this system and there is no clear way to avoid EA 2010 litigation in such circumstances.

Employers

Since the EA 2010's PSED imposes, *inter alia*, the duty to exercise public functions "in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage," **it serves to further discourage public sector employers from taking any action which might *subjectively be perceived* as discrimination.**[28]

While private employers may not have all the specific duties applicable to public bodies (e.g. publishing information), they are included in the core provisions. The system of protected characteristics therefore marks a qualitative shift away from any "simple" anti-discrimination paradigm.

Equal pay burden: As Lady Arden makes clear in her Supreme Court judgment in the recent *Asda* case,[29] the EA 2010 does not "simply consolidate and modernise the earlier legislation on equal pay", but institutes new, positive duties on government ministers and employers to take positive steps to "deter differences in pay" and to carry out equal pay audits as ordered by the Employment Tribunal[30], as well as requiring (from 2017) organisations employing 250 or more employees to publish and report specific figures about their gender pay gap.[31]

Token hiring: The EA 2010's shift away from objective anti-discrimination towards a subjective approach, in which all decision-making is potentially or arguably discriminatory, **has the effect of increasing 'defensive' or 'tokenistic' hiring and recruitment practices (in which employers focus on achieving demographic inclusion of underrepresented groups within the workforce rather than hiring or promoting for merit, potential or skills).** This discriminatory logic was clearly exposed in the case of the three Thames Valley Police officers who won their claim of race discrimination when they were bypassed for promotion because of their white ethnicity in favour of a less experienced and less qualified non-white employee.[32]

Avoidance of hiring and discipline: Conversely, where a business has been once scarred by losing an EA 2010 claim in the Employment Tribunal**, it is not uncommon for an advocate to hear**

26 *Ms Nicole Hogger v Genesis PR Ltd,* case no. 3301581/2024 (Employment Tribunal, 20 August 2025), Reasons. (link)

27 *The Telegraph*, "Woman with ADHD wins £35k after boss calls her 'disorganised'", 23 January 2026. (link)

28 Section 1(1) EA 2010.

29 *Asda Stores Ltd (Appellant) v Brierley and others (Respondents)* [2021] UKSC 10, para. 10. (link)

30 S 139A EA 2010, as amended by the Enterprise and Regulatory Reform Act 2013. (link)

31 HM Government, Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (link). These were made under sections 78 and 207 of the EA 2010.

32 George Lithgow, *BBC*, "Police officers win race discrimination claim", 13 August 2024. (link)

privileged conversations in which (particularly, small to medium- sized) business owners will vocally resolve in private to *avoid* hiring from groups considered to be 'high liability' for vexatious claims brought under the EA 2010 (such as women of child-bearing age or from ethnic minority backgrounds). Elsewhere, schools and other institutions become increasingly reluctant to discipline individuals where a protected group may seem likely to claim discrimination.[33]

Compliance burden: Moreover, in addition to the increased threat of litigation, organisations frequently become mired in the tick box exercises of 'compliance documentation' (such as Equality Act impact assessments) or feel compelled to bring in expert EA 2010 consultants to advise on situations in which the needs of one protected group are perceived to clash with those of another (as in the debates over whether biological men identifying as transwomen can enter single sex female spaces, for example).

Compliance and consultancy exercises in respect of protected characteristics often involve partisan activist groups, such as *Stonewall*, an advocacy group paid almost £600,000 of taxpayers' money by the Department of Education in the years 2017-2021.[34] **A government corporate report on EDI spending within the Civil Service found that a total of over £27m had been spent between 2022 -2023.**[35] Such exercises are wasteful and facilitate ideological overreach into mainstream public life. More worryingly, **they reinforce the protected characteristics system as the overarching schema for the entire system of British law, as if deterring differential treatment on grounds of protected characteristics was a central legal tenet of our legal system**, over and above principles such as a presumption of common law freedom, the rule of law, or equality before the law.

2. A vague definition of discrimination

The second principal feature of the Act which has wrought dysfunction is its vague definition of discrimination.

Without conceptual clarity or precise definition, especially in respect of legal powers and how they may be used to require or prohibit certain actions, there is no rule of law in any meaningful sense.[36] **In the anti-discrimination framework provided by the EA 2010 (which we prefer to call a 'justified discrimination' framework), there are no limits on what might constitute discriminatory conduct.** Moreover, at least in direct discrimination claims, it is irrelevant *why* there has been less favourable treatment: discrimination is inherent in the act, irrespective of any intention or motive driving the actions of the discriminator.

Types of discrimination

The three main types of discrimination set out in the Equality Act are:

33 See *Mairs v Trafford Council and the Governing Body of Kings Road Primary School* for an example where weak leadership, including failure to deal properly with complaints against, and from, the complainant contributed to the claimant winning on grounds of race-based victimisation. See *Mairs v Trafford Council and The Governing Body of Kings Road Primary School*, case no. 2404732/2022 (Employment Tribunal, 2023). (link)

34 Lucy Bannerman, *The Times*, "Education ministry spent £600,000 on Stonewall schemes", 5 November 2021. (link)

35 Cabinet Office, "CS EDI Expenditure Review Data", corporate report, 29 May 2025. (link)

36 In *The Morality of Law*, Lon Fuller argues that to be constitutive of law, a legal principle must be capable of guiding human conduct. That rules must be clear and intelligible is one such constitutive principle. See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 96.

- *direct* discrimination
- *indirect* discrimination
- *harassment*

All of these may be widely construed to include any conduct.

Direct discrimination

The test for direct discrimination is "less favourable treatment" because of a protected characteristic (requiring a comparator). Any treatment deemed comparatively less favourable is direct discrimination if attributable to a protected characteristic.[37]

Indirect discrimination

The test for indirect discrimination requires identification of a general rule, or provision, criterion, or practice (PCP) which cannot be objectively justified and puts the bearer of a protected characteristic at a particular disadvantage. Any PCP in respect of any pleaded disadvantage is indirect discrimination if the disadvantage is linked to a protected characteristic.[38]

Harassment

Harassment is "unwanted conduct" related to a protected characteristic and any conduct may be deemed unwanted, with a large part of the test resting on the subjective perception of the claimant.[39] The second and third part of the test for harassment (s 26(4)) is a consideration of other circumstances of the case, and whether it is reasonable for the conduct to have the effect of violating dignity or creating an offensive environment. These may seem useful caveats but the claimant's perception as a valid justification has already been conceded.

Disability discrimination

Discrimination arising from disability is a stand-alone clause which tests for unfavourable treatment "because of *something arising* in consequence of" a disability. Any treatment may be unfavourable and will be discriminatory if the treatment is for the "something arising" rather than for the disability itself. This is an extremely broad test, and employers will fall foul of it unless they can demonstrate that they had no actual or constructive knowledge of the disability, or that the treatment was proportionate to achieve a legitimate aim.[40]

In *Jandu* the claimant was dyslexic.[41] In 2020, she was subjected to redundancy selection criteria by her employer, who marked her down for "accuracy and attention to detail". Under s 15 of the EA 2010, the claimant pleaded that any mistakes or errors in her work, any incomplete or late work, any unclear communication on the claimant's part, any difficulties in balancing her work tasks, and any lack of accuracy or attention to detail were matters arising from her dyslexia.

The Tribunal held that the claimant had indeed been marked down because of something arising from her disability and that the employer had not established its treatment of the claimant as a proportionate means of achieving a legitimate aim. The case is a stark illustration of the pitfalls

37 HM Government, "Equality Act 2010", s13. (link)
38 HM Government, "Equality Act 2010", s19. (link)
39 HM Government, "Equality Act", s26. (link) For the subjective test see s26(4)(a).
40 HM Government, "Equality Act", s15. (link)
41 *Ms R Jandu v Marks and Spencer Plc,* Case No. 2200275/2021 (Employment Tribunal, London Central, April 21, 2022). (link)

for employers of engaging in any treatment of an employee that is not favourable, given the wide definition of disability and the wide, "catch-all" test under s 15.

Does this differ from other legal ambiguities?

It could be argued that the ambiguity around equality is no different to questions of reasonableness or proportionality, on which judges are routinely required to make rulings.

However, what we call the 'catch all' approach of the EA 2010, is qualitatively different from any general judicial need to assess what is reasonable or proportionate within common law rules, remedies, and precedents based on custom because, under the EA 2010, *any conduct* may engage the legislation's specific, statutory prohibitions against discrimination and be found wanting as 'prohibited conduct'. This is not at all how common law jurisdictions typically work, where an action may be reasonably anticipated to be unlawful if it violates established judicial precedents or central tenets of the legal system overall (an employment contract based on an illegal act such as fraud, for example, will be unenforceable). In common law, reasonableness operates as a foundational benchmark for **principles such as *foreseeability* and *consistency***, so that an individual can be expected to anticipate what conduct will likely engage a legal prohibition.

However, under the EA 2010 there is little a party can do to reasonably anticipate what may or may not count later as discriminatory conduct. In an NHS 2022 'toolkit' entitled *Challenging Microagressions*, readers are warned that the most common form of discrimination in the workplace are "everyday actions" which, "intentionally or unintentionally", communicate the power and privilege of an "in group" based on protected characteristics.[42] Such conduct *might reasonably* include asking someone from an ethnic minority background person where they are from, or asking a woman whether she wants to have children, or using the "wrong" gender pronouns for a transperson. But such conduct would also include actions which could, on no sensible reading, *reasonably* be anticipated as having the prohibited effect, such as asking a colleague who happens to be Asian to speak up, or being 'too impressed' by a colleague's qualifications where the colleague happens to be black.[43]

The catch-all approach of the EA 2010 renders all human conduct capable of infringing the equality regime (particularly under the subjective test for harassment under s 26). This approach is highly injurious to an older British system traditionally erected on fairness, rationality, and the rule of law**.** It produces, among other corrosive effects, chilled workplaces which are not conducive to teamwork or collaboration. **HR departments will invariably struggle to separate discrimination from 'the eggshell effect', whereby an employee who is not performing well relies on the protected characteristics system to immunise themselves against criticism (with everyone walking on eggshells around them). Employers and employees alike cannot be certain as to what conduct might be perceived as hostile messaging toward protected characteristics and therefore which conduct is likely or not to engage the EA 2010.** Judicial interpretation becomes increasingly perverse or irrational as the distinction between discriminatory conduct and conduct unreasonably construed as discrimination after the fact becomes

42 Imperial College Health Care (NHS Trust), *Challenging Microagressions Toolkit*, March 2022. (link)

43 The *Elkarim* case is an example. On failing to reach selection stage for an internal promotion, one of his complaints was having been asked to disclose his degree classification. See *Mr N Awad Elkarim v Network Rail Infrastructure Limited*, case no. 3335306/2018 (Employment Tribunal, Cambridge, 2020). (link)

impossible to arbitrate (and collapses).

In *Grant v HM Land Registry*, Elias LJ described the EA 2010 definition of harassment (under s 26), namely the words "violating B's dignity", or "creating an intimidating, hostile, degrading, humiliating or offensive environment for B" as significant words enacting "an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".[44] **In practice, however, while the weighty definition of harassment under s 26 EA 2010 may encourage judicial discernment before making a finding of harassment, the protected characteristics system overall encourages litigants rather than deterring them from bringing multiple (even voluminous) hypersensitive claims.**

In the case of *Sithirapathy v PSI CRO UK Ltd [2017]*, for example, **the claimant brought 42 discrimination and harassment complaints before the Tribunal, all of which failed.** Judge Hawksworth found that the statements alleged as sex and sexual orientation harassment to have been "very unfortunate and clumsy", but they did not meet the threshold of unlawful harassment.[45] However, the learned Judge could just as easily have gone the other way and found unlawful harassment. There is nothing in the EA 2010 (contra Elias LJ's *obiter* in the case of *Grant*) to prevent "clumsy" conduct from meeting the threshold for harassment or constituting discrimination. Such unpredictability helps no-one.

Under a s 15 claim for discrimination arising from a disability, for example, an Employment Tribunal will have to determine whether "something" arising from a disabling condition such as ADHD (such as the claimant's heightened sense of anxiety) played a "more than trivial" role in influencing unfavourable treatment complained of. A finding of "more than trivial" will ensure the claim succeeds[46], shifting the burden of proof yet further away from the claimant, who only has to show a *prima facie* case that discrimination may be the explanation for the acts complained of; the burden then shifts under the EA 2010 to the respondent, who must show that the act complained of was *not* discriminatory.[47]

Common law reasonableness evaporates under the system of protected characteristics, as the key question becomes not what a hypothetical reasonable person would do in similar circumstances, but whether the respondent can justify what the claimant alleges him to have done.

3. The public sector equality duty

Another central feature of the EA 2010 is the public sector equality duty.

Outlined in section 149, the PSED requires public authorities to

> have due regard to the need to—
>
> (a)eliminate discrimination, harassment, victimisation and any other conduct

44 *Grant v HM Land Registry & EHRC* [2011] EWA Civ 769. (link)

45 *Miss N Sithirapathy v PSI CRO UK Ltd and Others*, case no. 3353038/2017 (Employment Tribunal, UK), 6 July 6 2021. (link)

46 See *R J Toghill v Lidl Great Britain Ltd*, case no. 1602900/2023 (Employment Tribunal, Cardiff), corrected judgment, 26 September 2024. (link)

47 HM Governemnt, "Equality Act 2010", s 136(2). (link)

> that is prohibited by or under this Act;
>
> (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

This includes the need to "advance equality of opportunity" and "foster good relations" between those with protected characteristicd and those without. Section 5 (a) and (b) stipulate this includes tackling prejudice and promoting understanding.

The PSED gives the legal decision maker the power to evaluate and judge any action according to whether it tackles prejudice or promotes understanding.

This takes the law beyond redress for discrimination and into the realms of pre-empting discrimination, leading to social engineering and behaviourism. **Section 149(6) states that to meet its requirements, employers may need to treat "some persons more favourably than others", a clear allowance for justified discrimination.**

The following clause attempts to balance this by warning that this should not be taken as "permitting conduct that would be otherwise prohibited by or under this Act." **But law should not be based on logical contradictions.** If person A is treated more favourably, it is hard to see how person B may not reasonably construe that as unfair. But to pursue their case legally, they would need to find a protected characteristic onto which to hitch a claim of unfavourable treatment. This is a legal source, or endorsement, of a culture of competitive victimhood and the basis for a form of justified discrimination against those without protected characteristics.

4. Positive action

Another mechanism introduced by the Equality Act is positive action.

Outlined in sections 158 and 159 of the Act, positive action allows for persons or organisation to undertake

> any action which is a proportionate means of achieving the aim of—
>
> > (a)enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
> >
> > (b)meeting those needs, or
> >
> > (c)enabling or encouraging persons who share the protected characteristic to participate in that activity.

Whereas the PSED places a positive duty on all public bodies to have due regard for anti-discrimination, **positive action allows for any body, private or public, to take positive steps for the sake of anti-discrimination, such as in workplace "equality" policies or programs.**

Whilst positive action may seem less onerous than the PSED, **its effect is similar, in that it enables individuals and bodies to perform justified discrimination against individuals and groups who do not have protected characteristics.**

5. Disability discrimination law and the anticipatory duty

Under sections 20 and 21 of the EA 2010, employers, controllers of premises, service providers and providers carrying out public functions, schools, and higher education bodies are all required to take "such steps as it is reasonable to have to taken" to avoid a disabled person being put at a "substantial disadvantage" as a result of any PCP[48], any physical feature[49], and any lack of an auxiliary aid or service (such as a sign language interpreter)[50], with the costs of any adjustment to be borne by the provider.[51]

An "anticipatory" duty is one which is therefore *owed* to bearers of protected characteristics. Such a duty is arguably unobjectionable in respect of disabilities where the adjustments are straightforward and can therefore be rationalised (e.g. a wheelchair user needing lifts or ramps in order to access a building). However, **the EA 2010's definition of disability as any long-term "impairment" adversely affecting normal day-to-day activities has resulted in an enormous body of case law addressed solely to the esoteric question of whether mental or emotional states such as stress or anxiety amount to a protected characteristic (e.g. generalised anxiety disorder (GAD), panic disorder, severe social anxiety).** Assuming a condition is considered permanent enough to qualify as a disability within sections 20-21 EA 2010, questions then arise as to what reasonable adjustments could have been offered by, say, an employer of an anxious employee.

In *Clifford v British Airways plc*,[52] the claimant, who was a cabin crew member for British Airways, was dismissed on grounds of incapacity after more than one year of (partly unauthorised) sick leave. The claimant claimed that her anxiety and depression amounted to a disability which left her unable to fly. Under the transformative equality regime, the employer was in breach of the EA 2010 not only because it had dismissed the claimant (for reasons, the Tribunal held, arising from her disability) but because British Airways had not played a proactive role in rehabilitating a long-term absentee. The employer should have helped the claimant rebuild her confidence by making the reasonable adjustments of a phased return and redeploying her to ground duties. The claimant's claims for unfair dismissal and failure to make reasonable adjustments succeeded. (Her claims of disability-related harassment and sex discrimination were not upheld).

Disability discrimination is an increasingly complex field, but already under the EA 2010, there has been an expansion of the employer's duties of care, such that **the hierarchical relationship between employer (wage payer) and employee (wage earner) has been converted into one of dependency, more akin to the relationship between welfare state and welfare recipient,** in which the employer (like the welfare state) provides employees with financial assistance in return for the employee's best endeavours to work.

6. Incoherence regarding protected belief and free speech

The increasing incompatibility between equality and freedom is most evident in the sphere of employment, where **an employee dismissed or sanctioned for his speech will claim he has**

48 HM Government, "Equality Act 2010", s 20(3). (link)

49 HM Government, "Equality Act 2010", s 20(4). (link)

50 HM Government, "Equality Act 2010", s 20(5) (link)

51 The only exception is where a landlord of uncommenced provisions on common parts of leasehold premises can require the leaseholder/tenant to pay the costs of the adjustment.

52 *HM Courts & Tribunals Service, Miss J Clifford v British Airways Plc*, case no. 3315469/2022 and 3310358/2023 (Employment Tribunal, decision 6 June 2025, published 11 July 2025), written reasons. (link)

been discriminated for his *protected belief*, rather than currently appealing to a positive right to free *expression* under the ECHR regime and domestic law in respect of the Human Rights Act 1998 (which does not directly bind private employers as it does public authorities) or citing increasingly moribund common law liberties.[53]

In the renowned case of *Forstater*, it was established upon appeal that the claimant, Maya Forstater, had been discriminated against for her protected belief that "biological sex is real, important, immutable and not to be conflated with gender identity", according her a limited right to express aspects of this "belief", but not to manifest objectionable aspects of the belief (by, e.g. misgendering a transgender person).[54] **What is lost in discussions which focus on Forstater's supposed victory for free speech is that had the claimant presented her views as (mere) *opinion*, or even scientific fact, these would have fallen outside of the narrow definition of belief in the EA 2010.**

At first instance, the Tribunal judge held that the belief that biological sex is real was "absolutist" in nature, and "is incompatible with human dignity and fundamental rights of others", therefore failing to qualify as protection under s 10 EA 2010.[55] Upon appeal, the Employment Appeal Tribunal concluded that if the claimant's belief would not mean that she "would always, indiscriminately and gratuitously use the wrong or non-preferred pronouns when referring to or communicating with trans persons" then her belief could not rightly be called "absolutist".[56] In other words, **Forstater's appeal did not secure any common law or human right to free expression, but rather solidified a rigid, codified system of judge-approved, protected "beliefs".** Forstater simply added to the list of protected beliefs her own belief that biological sex is (tautologically) biological sex, rather than "gender identity". Forstater named her beliefs "gender critical" and in future any party unwilling to accept the doctrine of transgenderism (e.g. at work) will have to claim that they hold "gender critical beliefs" that correspond exactly with those of the claimant in *Forstater* if they wish to seek legal protection. It is worth noting that no tribunal has ever tested the converse belief that a person *can* change sex because sex is mutable, and yet this belief is deemed protected, *a priori*, simply because "gender reassignment" is listed as a protected characteristic under the EA 2010.

This is irrational law. Moreover, **Forstater's common law liberties, which include freedom from compelled speech (where a party is compelled to express a view that she does not hold), were swept aside, on the grounds that not using preferred pronouns would be *misgendering*, and could even amount to s 26 harassment under the EA 2010**.[57] It is hard to see how this case represents a defence of free speech in any way, since it makes judges into the gatekeepers of what speech is protected.

7. Over-reliance on guidance

Another ill effect of what we have called the EA 2010's 'catch all' approach is an excessive institutional reliance on extra-judicial (statutory or non-statury) guidance published by government

53 The stated position of the Prosperity Institute is that Britain must withdraw from the ECHR and repeal the HRA 1998, but we here describe the current legal architecture. See Damien Shannon, *Leaving the European Convention on Human Rights: A Draft Bill* (London: Prosperity Institute, 2026), 9. (link)

54 *Maya Forstater v CGD Europe and Others*, UKEAT/0105/20/JOJ (Employment Appeal Tribunal, 10 June 2021). (link)

55 *Maya Forstater v CGD Europe and Others*, para. 15.

56 *Maya Forstater v CGD Europe and Others*, para. 89-90;

57 *Maya Forstater v CGD Europe and Others*, para. 99. For common law doctrine against compelled speech see Baroness (Lady) Hale in *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49, at, especially, para. 52. (link)

or by non-departmental public bodies (such as the EHRC or ACAS (Advice, Conciliation, and Arbitration Service)), or by partisan, activist campaigning groups (such as Stonewall).

Guidance takes precedence over law when statute is not fit for purpose, either because it is poorly drafted, its key concepts are ill-defined, or both. Increased reliance on guidance is detrimental to the legal system in various ways. This is because, all too often, guidance:

- fails to set out the law clearly;
- misstates the law (wilfully or through ignorance);
- lays claim to legal requirements that do not exist;
- does not distinguish between advice and legal requirement;
- identifies legal effects without any corresponding law in place;
- empowers ministers to issue guidance or legal directions without any delegation of power from Parliament or real understanding of the relevant issues.

Many of these problems were clearly identified by barrister Akua Reindorf in her 2020 Review of the LGBT lobby group, Stonewall, and possible misrepresentations of the EA 2010 in its guidance for universities and HE institutions.[58]

In an already overloaded legal culture, guidance (often conflicting) *will* be incorrectly enforced by HR departments and public authorities as if it were law or has the force of law; or, conversely, as if the law itself were nothing more than guidance. This supports a public impression that legal decision-making is partly arbitrary or subject to caprice; or, most worrying of all in a parliamentary democracy, that "law", like guidance, is not subject to parliamentary scrutiny or procedure.

58 Akua Reindorf, "Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020", University of Essex, 21 December 2020. (link)

3. Two case studies

Main points

- The *Next* case demonstrates how **the Equality Act's categories of 'equal work' and 'indirect discrimination' have effectively resulted in giving judges the power to determine wage rates**, irrespective of market conditions.
- The *Richardson* case demonstrates how **positive action and the PSED have created a system of justified discrimination which segregates people by race.**

This section surveys two case studies which serve as particularly egregious examples of the ill effects of the Equality Act.

The first, *Thandi and Others v Next Retail* demonstrates how the EA 2010 has given judges the power to control the price mechanism when it comes to salaries, distorting the labour market and undermining the ability of employers and employees to freely contract with one another.

The second, *Richardson v York & Scarborough Teaching Hospitals NHS Foundation Trust* demonstrates how the EA 2010 has created a system of justified discrimination, including deliberate segregation by skin colour.

1. The *Next* case: How 'equal value work' and 'indirect discrimination' lead to judicial control of the price mechanism

The journey toward the current quagmire of equal pay legislation and rulings was first adumbrated in the Equal Pay Act 1970. However, the EA 2010 instituted a new level of judicial control.

In the case of *Thandi and Others v Next Retail Ltd and Next Distribution Ltd* 3,540 claimants working as retail consultants brought an equal pay sex discrimination claim via three lead (email) claimants in relation to four (male) comparators who worked as warehouse operatives for *Next Retail Ltd* or *Next Distribution Ltd* across a similar time period. The claim was for work of equal value.[59] At the time of writing, there are ongoing appeals in the case, so any final settlement has yet to be confirmed, but a figure of a £30m payout by Next has been mooted publicly.[60]

The Equality Act 2010 defines "equal work" between A and a comparator (B) thus:

> (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
>
> (a) like B's work,
>
> (b) rated as equivalent to B's work, or

59 Ms M Thandi and Others v Next Retail Ltd and Next Distribution Ltd [2024] ET 1302019/2018; [2025] IRLR 123. (link)

60 Slaughter and May, "Equal pay update", 30 August 2024. (link)

(c) of equal value to B's work.

(2)A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—

(a) neither like B's work nor rated as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.[61]

In upholding the claim, the Tribunal commissioned and relied on an independent expert report which was presented with the judgment. Its findings were neither challenged nor conceded by the respondents.[62] The Tribunal was in unanimous agreement with the report's conclusions which meant they had found against the respondents' six material factor justifications, one of which was "market forces and market price". Through a complex factor analysis, the report breaks down the work undertaken by retail consultants and warehouse operatives into discrete components such as physical skills, mental skills, planning and organising and so forth; allocates numerical scores; compares score sheets with various weightings (see Appendices 2-5). **Having stripped two forms of very different concrete human labour into numerical abstractions, 'equivalence' was found. In principle, the method could dissolve the qualitative differences between the work of a neuroscientist and a cleaner.**

At paras. 2.2.9-10 of the report, the authors go on to note that when dealing with the question of work of "equal value", the assumption is that the work compared is "different work". This is the crux of the innovative legal mechanism within s 65 of the EA 2010, which goes beyond importing an implied contractual term of equal pay for equal work into the universal employment contract (a mechanism inherited from the Equal Pay Act 1970); but, further, **allows the conversion of different work into equal work by an employment tribunal on the basis of chosen factors or work**

61 HM Government, "Equality Act 2010", s 65. (link)

62 *REPORT of the INDEPENDENT EXPERTS In Case Number 1806552/2022 & Others Ms Thandi & others v Next Retail Limited*, accessed 2 June 2026. (link)

elements capable of being "realistically assessed".

In a somewhat esoteric differentiation between express and discrete weighting in equal value cases, the authors write:

> Generally, it is our view that discrete weighting has no place in a scheme used to assess work in an Equal Value case. That is because it will almost always be based on a pre-conception about the value of certain work elements. Preconceptions of this sort must always be avoided by Independent Experts. Any scheme which has as its starting point - "This qualification is paramount" or that "This skill is vital" is nearly always going to be biased or at least open to charges of bias or discrimination (paras 2.2.16-2.2.17).

Practical judgments of employers about the nature of work required, and the experience and/or qualifications of employees can be dismissed as "preconceptions". The value judgments of employers are negatively compared to the implied objectivity of independent experts. Yet it would be hard to ascertain the differences between things such as "a very high degree of dexterity", "a high degree of dexterity", and "a degree of dexterity" (see Appendix 2) without subjective judgment.

Direct and indirect discrimination in relation to equal value work

Once equal value had been determined between the claimants and their male comparators, in respect of the direct discrimination claims, the Tribunal had to decide whether the employer, in relying on "market forces and market price" as causes of differential treatment, perceived the claimants' roles as "women's work" and the comparators' roles as "men's work". Then, it had to be determined whether or not the employer had discerned that a differential between the two market rates was reflective of a broader, inherently discriminatory pattern in the wider society, and if so did the employer discriminate by taking advantage of it, leading to less favourable treatment of the claimants because of the claimants' sex (such as not receiving bonuses paid to male comparators, because of an assumption that "female dominated job groups" would not require financial incentives to complete tasks).

In respect of the indirect discrimination, an employer cannot justify separate pay structures for male-dominated and female-dominated job groups doing work of equal value, where the structures result in lower pay for the female group, since this is indirect sex discrimination.[63] Indirect discrimination in equal pay sex discrimination cases requires the claimant to show that their employer applied a PCP which was not a proportionate means of achieving a legitimate aim; and, when applied, put the female job group at a particular disadvantage when compared with their male comparators. In this case, the claimant cited three PCPs: (i) requiring periods of full-time work for warehouse roles; (ii) requiring shift work (including nights) for warehouse roles; and (iii) fixing retail pay unilaterally by reference to market rates (or market rates adjusted by the national minimum wage) and fixing warehouse pay through collective bargaining.

The Tribunal had to determine whether these PCPs put the claimants (women) at a particular disadvantage when compared with their comparators (men).

The Employment Tribunal tasked itself with assessing whether market rates at the wider societal

63 See *Enderby v Frenchay Health Authority*, European Court of Justice (1992) C-127/92, [1993] IRLR 591. (link)

level were "inherently discriminatory", being affected by gender breakdowns of the relevant job groups and therefore "sex tainted", and whether this was relevant "as a matter of law" (going to the heart of questions of legitimacy and proportionality).

In effect, **the equal value pay clause encourages employers to prioritise risk aversion over meritocracy.** Judges are now charged with the power to override market price mechanisms as well as making moral judgments about social and cultural conditions.

Judicial control of price mechanism

In conclusion, the positive duty to actively reduce disadvantage has conferred a new role upon the courts and tribunals, tasking them with interpreting and applying the equal pay legislation in line with the political ethic of the PSED. **The result is the blurring of judicial and government functions, as the courts operate as quasi-administrative state departments, with one radical new judicial duty being the determination of parity in pricing and pay structures over market mechanisms which should favour freedom and individual choice.** Simple discrimination is replaced by the positive duty contained within the PSED and the legal system is subject to overhaul, as the movement to "combat sexism" gains pace in mainstream institutional life. **Law is now the arbiter of contractual terms formerly decided in the civic sphere.**

Law further becomes a mechanism of political enforcement. Judicial power is no longer confined to assessing simple discrimination (whereby one party is paid less for the same work on the basis that their labour is prejudicially seen to be of less valued by reason of sex or colour). **Rather, the remit of judicial power increasingly expands to include the management of workplace and contractual relationships, and the setting of prices and pay grades/structures within the private sector.** The legal system becomes an arm of government within an overarching statist system.

2. The *Richardson* case: How positive action and the PSED create justified discrimination

In *Carol Richardson v York & Scarborough Teaching Hospitals NHS Foundation Trust*[64], the PSED was enacted by the respondent (an NHS Trust) via the NHS Workforce Race Equality Standard (WRES), according to which NHS organisations "are required to demonstrate progress against a number of indicators of workforce equality, including a specific indicator to address BME [black, minority ethnic] representation within its workforce".[65] The respondent Trust was clear that BME referred to "non-white" persons, and that the EA 2010 permitted the Trust (under the combined remit of the PSED, WRES, and positive action) to offer separate professional training to BME colleagues on the grounds that "non-white" colleagues were under-represented in non-clinical middle and senior management and in non-doctor clinical roles, with "white" applicants more likely to be appointed from shortlists.

The claimant brought claims for direct discrimination and argued that the policy of separating colleagues by skin colour for training purposes was prohibited segregation[66], and that BME was not an adequate metric, since there was no data within the WRES schema to

64 Adam McCulloch, "'Divisive' training course tribunal claim fails", *Personnel Today*, 23 February 2026. (link)

65 NHS, "Workforce Race Equality Standard", accessed 2 June 2026. (link)

66 Racial segregation is always less favourable treatment under s 13(5) of the EA 2010.

demonstrate that "non white" skin colour was a determining factor in questions of need, disadvantage, or underrepresentation.

Moreover**, the claimant argued that, on her interpretation of the EA 2010, racial segregation could never be justified using a positive action defence.** This was untested law, and the Tribunal avoided addressing it by finding that there had been no intention to segregate (therefore no segregation had occurred), and that while there had been direct discrimination against white persons like the claimant, who would have felt excluded from the BME training course, this was justified on positive action grounds. In other words, low representation of non-white staff in certain clinical roles *had to be* attributable to skin colour and no other factor.

The case is under appeal, but the first instance judgment is a clear indication of how **the PSED and positive action combine to create onerous, expensive, and ultimately meaningless initiatives across the public sector**.

More concerningly, **these provisions allow, if not encourage, deliberate segregation by colour (which has never been law or policy in Britain) as justified discrimination.**

4. Conclusion and recommendations

Main points

- Full repeal of the Equality Act could allow for a return to traditional contractual and legal freedoms
- Repealing the Equality Act and replacing it with amendments to the Employment Rights Act 1996 could provide a framework to protect disability and genuine discrimination over immaterial characteristics
- Partial repeal, though less desirable, could target the PSED and positive action, indirect discrimination, harassment, equal work, religion and belief, and gender reassignment

These authors consider that the EA 2010 has installed in British law a system of protected characteristics which is destructive to traditional presumptions of common law liberty, replacing individual freedom with collective victimhood. The EA 2010 enforces a political system of formal inequality. It enacts the progressive dynamic which George Orwell famously warned of in *Animal Farm*: "All animals are equal, but some animals are more equal than others." It creates a litigious culture in the workplace, built on perverse incentives.

The EA 2010 regime did not emerge organically from historic struggle; it is a radical tool of legal imperialism, imposing "comprehensive" and "transformative" equality programmes opposed to the democratic first principle of *formal* equality**.**

The free legal individual is replaced by the protected characteristic: an emblem of alleged historic, systemic disadvantage. Discrimination is construed as the norm to be constantly undone, not the anomaly; the civil burden of proof is moved from claimant to respondent; all human conduct is "caught" by the relevant legal tests; litigation is normalised as a method of political correction for past ideological errors.

Judges increasingly have powers to restrict common law liberty, deciding:

(i) what speech and thought is *permitted* (over what is prohibited);

(ii) which conduct is *not* discriminatory (within a framework in which *all* conduct is *potentially* discriminatory); and

(iii) what wages are *fair* (irrespective of market conditions)

The system of protected characteristics cannot be retained without eroding the rule of law and destroying traditional legal first principles, in particular that of formal equality. The Act's provisions blur the boundaries between criminal and civil law which results in criminalising a greater range of innocuous human conduct. In redefining discrimination as "unfavourable treatment", the door is opened to the influence of dominant cultural trends in legal interpretation and decision-making when, traditionally, the aim was to minimise effects of the cultural zeitgeist.

We propose that, in order to undo these harmful effects, repeal or major reform of the Equality Act is required.

Immaterial and material relevance

Alongside repeals, our proposal is **to introduce the concept of 'material' and 'immaterial' relevance to the consideration of discrimination claims with regard to contractually agreed work**. This would redirect the focus of law to reality rather than utopian aims grounded in speculative critical social theory. We do not ignore the fact that employees and employers may have legitimate grievances, but our recommendations redirect the focus of grievance away from identity politics and towards stronger identification of their role as a member of a work-based public role. There are two substantial benefits of this redirection.

First, legal **redress for legitimate grievance becomes easier for both claimant and respondent** without the additional obfuscatory categories of the EA 2010.

Second, claims pursued in the name of breach of contract (instead of in the name of redress for more subjective, individualised grievance) could contribute to the moral and cultural reconstitution of the workplace as part of the public sphere, where **individual employees and employers voluntarily bind themselves to a shared contractual agreement and that which offends but falls outwith are matters they are free to resolve themselves as free, equally morally autonomous citizens.**

Recommendations

We propose three possible ways forward: full repeal; replacement; and partial repeal. Each have their various strengths and weaknesses.

1. Full repeal

One option is **full repeal of the Equality Act**, which would allow a return to traditional contractual legal and common law principles based on individual freedom, without the imposition of the statutory, group-focused justified discrimination framework of protected characteristics.

Private individuals and employees would be left to determine whether to contract, with whom they contract, and what specific risks they accept as part of entering a contract, subject to existing consumer or employee protection laws[67] and underpinned by common law contractual principles of illegality, duress, and incapacity.

Public authorities would no longer be bound by any PSED. Currently, they would continue (as with private bodies exercising public functions) to act compatibly with the ECHR section 6 of the HRA 1998. The Convention contains a general prohibition on discrimination "on any ground" (Article 14). The "on any ground" principle must be clarified in domestic law so that it is understood that no person may be prevented from exercising their Convention rights "on any ground" – which is the true meaning of Article 14. However, as has been recommended in other Prosperity Institute publications, withdrawal from the ECHR and repeal of the HRA 1998 should be sought, and would be in keeping with and supportive of the aims of this paper.

67 In particular the Employee Rights Act 1996 and Employment Rights Act 2025.

Robust parliamentary action supporting a full repeal of the EA 2010 would further include:

(i) Clarity on **repeal dates and transitional provision for EA 2010 claims in progress** through the courts and tribunals.

(ii) **Removal of protected characteristics from other statutory frameworks** (e.g. protected characteristics as the basis for aggravated offences under s 28 of the Crime and Disorder Act 1998) and proposed amendments.[68]

(iii) Statutory **prohibitions on hiring, training, or recruitment practices which can be demonstrably shown to select for protected characteristics** (as listed in the repealed Act) over performance competencies and performance-related qualifications.

(iv) **Abolition of the Equality and Human Rights Commission.**

(v) **Creation of a House of Lords Select Committee and/or All-Party Parliamentary Group on common law restoration**, focusing on traditional first principles and mitigation of business and institutional uncertainty post repeal.

(vi) Commission of an **independent review on reform and overhaul of existing ACAS early conciliation methods.** The system is prone to heavy delays and is currently not fit for purpose. Under the current EA 2010 regime, employment discrimination claims (the bulk of all discrimination claims) can be pleaded as an alternative to serious workplace mediation, with little risk of being struck out.[69] An independent review on successful strategies in workplace mediation would, in the wake of a full repeal of the EA 2010, focused on revitalising structured dispute resolution in the workplace in the interests of both employer and employee. It would consider means of tackling low employer engagement; reducing late/rushed conciliation within the initial 6 week window; improving the speed and efficiency of negotiations; and integrating trade union support structures within a non-partisan, non-advisory, neutral mediation service.

The authors recognise that disability is the only protected characteristic that deals with *actually disabling* physical and mental impairments, unlike the other eight protected characteristics, where immutable characteristics and/or lifestyle choices are construed *as if* they were permanently disabling conditions. For this reason, **legislative provisions on disability access and support may legitimately form part of a tighter type of anti-discrimination statutory framework** (see next section).

2. Repeal and replace

A second option is to repeal the EA 2010 and to replace it with a "bare" statutory anti-discrimination framework, which includes disability.

Amendment of the Employment Rights Act 1996

The proposed anti-discrimination statutory framework would **replace the system of protected characteristics in the EA 2010 with statutory recognition of any person's right to enter an agreement on negotiated contractual terms, without being penalised in the course of doing**

68 For example, see House of Lords, "Crime and Policing Bill: Third Marshalled List of Amendments to be Moved on Report", para. 334 (Lord Hanson of Flint), 4 March 2026 (link). The proposed amendments would add disability, sexual orientation, and transgender identity to race and religion as grounds for aggravated offences (under ss29-32 of the Crime and Disorder Act 1998).

69 The current tribunal jurisdiction operates on the default (general) proposition that it is inappropriate to strike out discrimination claims, giving employees sometimes unlimited leverage to plead discrimination on spurious grounds or independently of time limitation, often to bolster (or litigate in place of) an out of time or weak claim for unfair dismissal claim. See Lords Hope and Steyn (famously) in *Anyanwu v South Bank Students Union* [2001] UKHL 14, ICR 391. Accessed 8 June 2026. (link).

so on the basis of any personal characteristic. A personal characteristic is one which is immaterial to contractual performance.

In existing employment law, it is already well established that for a dismissal to be legal, the employer must show the reason for the dismissal and show that the reason for the dismissal is fair (i.e. related to capability/performance, conduct, redundancy, statutory restriction, or some other substantial reason (SOSR)).

A simple amendment to the Employment Rights Act (ERA) 1996 could support a new, bare anti-discrimination statutory framework, clarifying that any personal characteristic, insofar as it is immaterial to the successful performance of an employee's contractual role, cannot be a fair reason for dismissal; nor can it be a SOSR. Dismissal on grounds of an immaterial personal characteristic will always render any dismissal unfair *and* discriminatory, so long as the employee has served the relevant qualifying period.[70]

Disability

Where there is an inability on the part of the employee to perform his contracted role, there is a fair reason for dismissal (on capability grounds already set down in the ERA 1996[71]).

Asserted disability cannot create an obligation on the part of the employer to retain an employee who does not, or cannot, perform their contractual obligations. Employers are not responsible for employee rehabilitation or general well-being; this is the responsibility of freely associating persons who are self-governing.

Controllers of premises may be required by statutory provision within the new framework to ensure wheelchair access and other disability support services where the need arises. Reasonable adjustments could be devised on a case-by-case basis through dialogue.

Prior to the EA 2010, the Disability Discrimination Act 1995 had already established an employer's duty to make reasonable adjustments to prevent disabled applicants or employees from being at a substantial disadvantage.[72] **What is clearly needed on behalf of employers and public bodies alike, post or absent full repeal of the EA 2010, is a much more robust definition of disability,** such that any preserved anticipatory duty to make reasonable adjustments would not apply to any "physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities", but only to qualifying impairments. These could be registered on a Disabled Persons Employment Register, modelled after the registers in existence prior to December 1996 (after the 1995 Act came into force).[73]

Immaterial personal characteristics

We also propose that, in a new possible framework, **no employer, private business, or public body will hire, retain or dismiss staff on the basis of personal characteristics over qualitative performance considerations.** Where an employer, on the grounds of an immaterial person-

70 From 1 January 2027, with the passing of the Employment Rights Act 2025, this qualifying period drops to six months.

71 HM Government, "Employment Rights Act 1996", s 98(2)(a). (link)

72 HM Government, "Disability Discrimination Act 1995", s 6(1). (link)

73 "Under the Disabled Persons (Employment) Act 1944 the Government was required to establish and maintain a disabled persons employment register, and employers with 20 or more employees were required to employ a quota (3%) of registered disabled people. Registration was voluntary and only a small proportion of disabled people ever registered". See UK Parliament, "Registering as disabled in England", research briefing, 3 May 2023, accessed 3 June 2026. (link)

al characteristic, enacts one of the following detriments

- dismisses an employee;
- engages in non-payment (or partial payment or reduction) of an employee's wages;
- fails to promote an employee; or
- fails to provide an employee with career/training development opportunities;

that employer will, in the new statutory framework, be in breach of the employment contract. This entitles the employee to repudiate the contract and claim damages, including aggravated damages for particularly egregious material breaches.

The core concept underpinning the new framework is no longer the protected characteristic. Nor, even, is it the broader category of 'personal characteristic'.

The core concept in the new framework is immateriality. Unlawful breach is inherent in any of the detriments listed above, where the detriment is caused by reason of an immaterial personal characteristic.

Put differently, where the personal characteristic is immaterial to the claimant's ability to meet their contractual obligations, yet is at the same time material to the employer's decision to enact a detriment, there is an unlawful breach. Our reconceptualisation of discrimination provides limits to the law, limits necessary for democracy; and it acknowledges human intentionality which is, at present, ignored by the EA 2010.

3. Partial repeal

This is not the preferred option by the authors, on the grounds that it retains the anti-democratic and repressive system of protected characteristics. However, partial repeal could be a politically sensitive approach on a journey toward gradual overall repeal and possible replacement.

PSED and positive action

The authors' recommendation, under a partial repeal option, is **complete excision of Part 11 (the PSED and related positive action provisions under s 158 -159).**

Indirect discrimination

Further repeals of parts of the EA 2010 should consider **removing section 19 (indirect discrimination) in its entirety (including section 19A).** Indirect discrimination rests on the claimant having to identify a 'PCP', a concept not defined in statute, and one which can be very widely construed. To prevent further unnecessary drafting to narrow and clarify the PCP in law, section 19 should be repealed.

Section 19A, a relatively recent amendment reflecting case law at the Court of Justice of the European Union[74] **and in subsequent domestic law**[75] **is a good indication of the future direction of travel if the EA 2010 is retained intact. This section continues the project of widening the net to catch ever more forms of discrimination.** On a purposive interpretation,

74 See *CHEZ Razpredelienie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Case C-83/14, [2015] EUECJ C-83/14, ECLI:EU:C:2015:480. (link)

75 See *Mrs J Follows v Nationwide Building Society* [2021] UKET 2201937/2018. (link)

section 19A prohibits "associative indirect discrimination", according to which an employer will have to objectively justify any particular disadvantage they cause to an employee by virtue of the employee's association with some other party claiming a certain protected characteristic (e.g. an employee failing to get promotion because they care for a disabled relative). Section 19A stealthily extends the general anticipatory duty on employers in respect of an employee's disability to cover, potentially, *any associate* of the employee. This direction of travel is unsustainable, continuing the expanding reach of the state as discrimination becomes increasingly indistinguishable from ordinary human affairs. Section 19A should be repealed along with section 19 proper.

Harassment

Section 26 (harassment) should be repealed. "Unwanted conduct", even "of a sexual nature", as the EA 2010 puts it, either meets the criminal threshold or it does not.[76] If it does not, it falls out of the purview of the law. Unwanted sexual conduct is covered in the provisions of criminal statute.[77]

Equal work

"Equal work" should be amended under section 65 of the EA 2010, and redefined as "the same work", removing references to "like" work, "equivalent" work, and work of "equal value".

Religion and belief

If protected characteristics are to be retained in the context of a partial repeal, **there needs to be serious consideration of whether "religion/belief" can stand on the back of the test in *Grainger* to exclude political (and other) opinion.** We have argued that belief protections under the current regime seriously damage common law presumptions of freedom of expression (currently secured under Articles 9 and 10 ECHR).

Gender reassignment

Most protected characteristics are too broadly defined and dependent on subjective definition (e.g. race, disability) to be anything but repressive. Others are so poorly defined they generate unsustainable levels of legal uncertainty in a rule of law-based society. "Gender reassignment", for example, refers to reassignment of "physiological or other attributes of sex" in the EA 2010, with no reference to age.[78] "Acquired gender" is the phrase used for the protected status of persons over 18 in the Gender Recognition Act 2004.[79] "Sex" in the EA 2010 refers to "a man or to a woman"—that is, natal or *biological sex* according to the recent Supreme Court decision in *For Women Scotland*).[80] However, **no definition of sex, gender, or gender reassignment (legal or otherwise) currently would assist a judge in a direct discrimination equal pay claim where a female claimant's comparator was a biological (natal) male who had undergone gender reassignment of some kind and claimed female employee status.**

The system of protected characteristics is increasingly becoming unworkable and so any partial repeal would, at the very least, command a full review of each protected characteristic, and clarification of each definition.

76 HM Government, "Equality Act 2010", s 26(2)(a). (link)

77 See HM Government, "Sexual Offences Act 2003" (link) and "Protection from Harassment Act 1997" (link).

78 HM Government, "Equality Act 2010" s 7. (link)

79 HM Government, "Gender Recognition Act 2004", s 1. (link)

80 HM Government, "Equality Act 2010" s 11 (link); UK Supreme Court, *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)*, UKSC 2024/0042, 19 March 2024 (link).

Appendices

Appendix 1

The table shows those principles from the Equal Rights Trust's 2008 Declaration of Principles of Equality which were transferred or incorporated into the Equality Act 2010.

ERT 2008 Declaration	Equality Act
Principles 2 and 3: Equal treatment and positive action	Positive action, s 158/159
Principle 5: Definition of discrimination - discrimination prohibited against 23 identified groups	9 listed protected characteristics - political or other opinion not included (is included in Declaration)
Principle 5: Direct discrimination - when someone, 'for a reason related to one or more prohibited grounds' is treated 'less favourably.'	S 13: Direct discrimination – "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
Principle 5: Indirect discrimination - when a provision, criterion or practice (ppc) puts persons with "characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons" unless objectively justified by legitimate aim and appropriate means.	S 19: Indirect discrimination – "A person (A) discriminates against another (B) if A applies to B a PCP which is discriminatory in relation to a relevant protected characteristic of B's."
Principle 6: Relationship between the grounds of discrimination - "equal protection regardless of the ground or combination of grounds concerned."	S 14(1) Combined discrimination: Dual characteristics. Deals with discrimination because of a combination of two relevant protected characteristics in comparison to treatment of a person without those characteristics. (2) Relevant characteristics = 7, without marriage/civil partnership and pregnancy/maternity which are included in the 9 listed in government guidance.
Principle 7: Discrimination and violence - where violence or its incitement is motivated wholly or partly by victim having a characteristic associated with a prohibited ground.	Not in EA 2010, but racial aggravation component is found in Crime & Disorder Act 1998 and Criminal Justice Act 2003
Principles 8 and 9: Scope of application and right-holders. All legal persons "must be able to assert a right to protection against discrimination" when based on members, employees and others have "a characteristic associated with a prohibited ground"	Details of application are distributed across several sections: s 28, services and public functions; s 32 - premises; s 84, schools; s 90, higher education; s 95, general qualification bodies; s 100 - associations; s 205 - Crown.
Principles 10 and 11: Duty-bearers and giving effect to the right to equality	Duties of Ministers of the Crown to "make provision" for reducing socio-economic inequalities and to reform and harmonise other equality law in relation to protected characteristics is stated in the introductory text.

ERT 2008 Declaration	Equality Act
Principle 12: Obligation regarding multiple discrimination - extends positive action to overcoming past disadvantages related to combination of two or more prohibited grounds.	Not explicitly stated in EA 2010, but cases show the concept of past disadvantages is being mobilised especially in harassment claims (s 26) where criteria include violation of dignity and creating an "intimidating, hostile, degrading, humiliating or offensive environment."
Principle 13: Accommodating differences - public and private sector to accommodate different capabilities for "individuals related to one or more prohibited grounds" as long as no undue burden resulted for the provider.	S 36: Reasonable adjustments across various sectors.
Principle 14: Measures against poverty	S 1: Public sector duty regarding socio-economic inequalities.
Principle 17: Education on equality - "States have a duty to raise public awareness and provide suitable education about equality as a fundamental right."	Not directly stated but comes in through s 149's Public Sector Equality Duty, and promotion of equality and diversity is in mandatory Relationship, Sex and Health Education. This despite s 89, in the chapter on Schools, saying that "Nothing in this Chapter applies to anything done in connection with the content of the curriculum."
Principle 18: Access to justice - there should be no prohibitory financial obstacles or restrictions "on the representation of victims" in equality/discrimination cases.	Fees for Employment Tribunal cases were scrapped in 2017. There is no cap on damages in discrimination cases but there is a formula (Vento Bands) for compensation where injury to feelings has been determined.
Principle 19: Victimisation - law to protect adverse treatment of whistleblowers RE: equality provisions	S 27: Victimisation. Similar provisions but with an exception for where allegation are made in "bad faith."
Principle 21: Evidence and proof - "Legal rules related to evidence and proof must be adapted to ensure that victims are not unduly inhibited in obtaining rederess". *Prima facie* facts require reverse burden of proof.	S 136 Burden of proof: similar provision. In "the absence of any other explanation", a court must hold the contravention occurred.
Principle 22: Remedies and sanctions	See Principle 18 and fees.
Principle 23: Specialised bodies "to coordinate protection and promotion of the right to equality."	Equality and Human Rights Commission (EHRC) set up under Equality Act in 2006.
Principle 24: Duty to gather information. "To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality," but not breach human rights	This obligation is implied, and often justified by bodies, under PSED with the "due regard to eliminate discrimination" (e.g. Workplace Race Equality Standard in NHS).
Principle 25: Dissemination of Information - see Principle 24	See above

In total 20 out of 27 Declaration principles are present, explicitly or inferentially, in the EA 2010. The following principles are absent from the EA 2010: 1, 4, 15, 16, 20, 26 and 27. Principle 7 is not in the EA 2010 but is in other legislation.

Appendix 2

This table is taken from the independent report submitted in the *Next* case, which was used to compare sales consultant and warehouse operative roles, and ultimately to conclude that the two constituted "equal work".

It shows the definition, factor levels and modifier criteria for one sample factor, "Physical Skills", required in the two different roles being compared.

3.5.9 Physical Skills

Considers the job holder's need to exercise particular manual skills or dexterity in the use of tools and equipment.	
Proportion of working time spent at the skill level indicated. More than 75% = '+'. Less than 25% = '-'.	
Level	**Level Description**
A	The work requires specific, trained skills requiring a very high degree of dexterity, eye-hand coordination AND/OR sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are learnt by lengthy formal training with certification required before employees can commence tasks. Precision and speed in execution are always required.
B	The work requires specific, trained skills requiring a high degree of dexterity, eye-hand coordination AND/OR sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are learnt by formal training with certification required before employees can commence tasks. Precision and speed in execution are always required.
C	The work requires specific, trained skills requiring dexterity AND/OR eye-hand coordination AND/OR sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are generally learnt by formal training which may be learned under supervision whilst carrying out duties. Precision AND/OR speed in execution is usually required.
D	The work requires some physical dexterity and coordination in order to manipulate goods, machinery, tools, electrical equipment or hand-held devices. Such skills are generally learnt by informal demonstration or very short formal tuition. Some precision AND/OR speed in execution is required.
E	No particular dexterity and hand-eye coordination skills are required in the course of normal working.

Level	Description	Modified "-"	Standard	Modified "+"
A	High	65	70	75
B	Moderately High	50	55	60
C	Moderate	35	40	45
D	Moderately Low	20	25	30
E	Low	5	10	15

Appendix 3

This table shows the scoring summary for Helen Cherry, a female sales consultant, in the independent report in the *Next* case.

SCORING SUMMARY

Helen Cherry 1 (Up to Dec 2019)

Sales Consultant

1	Knowledge	C=	40
2	Planning And Organising	D+	30
3	Responsibility For Assets	B+	60
4	Responsibility For Health And Safety	C=	40
5	Communication And Customer Service	B+	60
6	Training And Mentoring	C=	40
7	Mental Demands	C=	40
8	Problem Solving And Decision Making	C=	40
9	Physical Skills	C=	40
10	Physical Demands	B=	55
11	Working Conditions	D+	30
		Total Score	**475**

Appendix 4

This shows the scoring summary for a male comparator in the *Next* case, warehouse operative Calvin Hazlehurst.

SCORING SUMMARY

Calvin Hazelhurst

Warehouse Operative

1	Knowledge	D-	25
2	Planning And Organising	E-	10
3	Responsibility For Assets	D-	25
4	Responsibility For Health And Safety	C-	40
5	Communication And Customer Service	E-	10
6	Training And Mentoring	E-	10
7	Mental Demands	D+	30
8	Problem Solving And Decision Making	E+	15
9	Physical Skills	C+	45
10	Physical Demands	A-	70
11	Working Conditions	B+	60
		Total Score	**340**

Appendix 5

This distils two scoring summaries between the claimant in the *Next* case and her male comparator into a single table, on the basis of which a conclusion is drawn as to the equal value of the two roles, using three tests.

11.1 Comparison of the work of:

Claimant: Helen Cherry 1 (Up to Dec 2019) and Comparator: Calvin Hazelhurst

Factor	Claimant Level	Claimant Score	Comparator Level	Comparator Score	Level Compared To Comparator	Above/Below
Knowledge	C-	40	D-	25	Equal or higher	1
Planning And Organising	D+	30	E-	10	Equal or higher	1
Responsibility For Assets	B+	60	D-	25	Equal or higher	2
Responsibility For Health And Safety	C-	40	C-	40	Equal or higher	0
Communication And Customer Service	B+	60	E-	10	Equal or higher	3
Training And Mentoring	C-	40	E-	10	Equal or higher	2
Mental Demands	C-	40	D+	30	Equal or higher	1
Problem Solving And Decision Making	C-	40	E+	15	Equal or higher	2
Physical Skills	C-	40	C+	45	Equal or higher	0
Physical Demands	B-	55	A-	70	Lower	-1
Working Conditions	D+	30	B+	60	Lower	-2
TOTAL SCORE		475		340		
% AGAINST MAX		57.6%		41.2%	9	9

TEST ONE

The Claimant's points total as a percentage of the maximum 825 available is **57.6%.**
The Comparator's points total as a percentage of the maximum 825 available is **41.2%.**
The difference of **16.4%** exceeds the **-3.0%** lower threshold held to indicate the presumption of Equal Value.

TEST TWO

The Claimant has been assessed as either equal to or higher than the Comparator in **9** of the **11** factors, exceeding the threshold of **6** held to indicate the presumption of Equal Value.

TEST THREE

The net factor level difference of the Claimant/Comparator is **9**, exceeding the threshold of **0**, held to indicate the presumption of Equal Value.

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PROSPERITY INSTITUTE

11 Charles Street
London W1J 5DW
United Kingdom
t: +44 (0) 20 7148 5400 | www.prosperity.com

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