

# **EQUALITY BILL**

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## **EXPLANATORY NOTES ON LORDS AMENDMENTS**

### **INTRODUCTION**

1. These explanatory notes relate to the Lords Amendments to the Equality Bill as brought from the House of Lords on 23 March 2010. They have been prepared by the Government Equalities Office to assist the reader of the Bill and the Lords amendments and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These notes, like the Lords amendments themselves, refer to the HL Bill 20, the Bill as first printed for the Lords.
3. These notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords amendments.
4. All the Lords amendments were in the name of the Minister, except for amendments 93 to 95, which were opposed by the Government, and amendments 1, 2, 15, 23, 28, 33, 34, 38, 39, 41, 42, 47 to 50, 81, 83 to 85, 87, 88, 97, 99, 100, 103 and 108 which were supported by the Government. Amendment 51 was a non-Government amendment on which there was a free vote. (In the following commentary an asterisk appears in the heading of each of the paragraphs dealing with an amendment which was opposed by the Government.)

### **COMMENTARY ON LORDS AMENDMENTS**

#### ***Lords amendment 1***

5. This amendment would amend clause 9 of the Bill, which defines the protected characteristic of race. It would provide a power for a Minister of the Crown to insert caste as a subset of the definition of race and to make exceptions, and

consequential amendments to other provisions in the Bill (when enacted), regarding caste. The power would be exercisable by order subject to the affirmative procedure. The effect of its exercise would, subject to any exceptions considered to be necessary, be to prohibit caste discrimination and harassment in Great Britain, in the fields covered by the Bill.

***Lords amendments 2 and 29***

6. The combined effect of these two amendments would be to extend protection against pregnancy and maternity discrimination to pupils in schools. Amendment 29 would remove the provision at clause 84(c) which disapplies Chapter 1 (schools) of Part 6 (education) in respect of pregnancy and maternity. Amendment 2 is consequential on amendment 29, and ensures that the cross-reference at clause 17(1)(c) accurately reflects the position, as amended.

***Lords amendment 3***

7. Clause 20 sets out the three requirements of the duty to make reasonable adjustments for disabled people. This amendment would make explicit that compliance with the duty includes providing the information in an accessible format. It does so by referring specifically to the first and third requirements (i.e. those which could involve the communication of information).

***Lords amendment 4***

8. This amendment would make clear that a person required to make reasonable adjustments cannot in general require any particular disabled person to pay for them. The Bill does not provide for costs to be passed on except where expressly provided.

***Lords amendment 5***

9. Clause 20(4) imposes a requirement to take reasonable steps to avoid a substantial disadvantage caused by a physical feature. This amendment sets out steps which might be taken to avoid the substantial disadvantage.

***Lords amendments 6 to 13, 39 and 110.***

10. Clause 60 limits the extent to which prospective employers may ask questions about health during their recruitment processes. Amendment 6 to clause 60 and Amendment 110 (to Schedule 26) would make it an unlawful act under the Equality Act 2006 to ask such questions except in prescribed circumstances. Amendment 6 would also make clear that asking a question which is not permitted would not be, of itself, discrimination against an individual job applicant unless there is discriminatory conduct reliant on the information obtained. It would also extend the period during which only permitted enquiries can be made up to the stage of making a job offer, whether conditional or unconditional; or selection to a pool of successful candidates. Amendments 7 to 9 would add permitted questions that may be asked of candidates prior to recruitment. Amendment 10 would make clarifying and consequential amendments to the provision.

11. Amendment 39 (to clause 119) and 110 (to Schedule 26) would ensure, that only the Equality and Human Rights Commission can enforce the unlawful acts described in clause 60(1), or contraventions which relate to them. They do so by removing them from the jurisdiction of the employment tribunals and adding them to the unlawful acts to which section 24A of the Equality Act 2006 (which deals with supplemental enforcement powers) applies.

***Lords amendments 14 to 16 and 25 to 28***

12. These amendments relate to those with whom pay can be compared for equal pay purposes. Together they would make clear that the effect of existing case law is preserved so that a “comparator” includes a person who previously occupied the same job.

***Lords amendments 17 to 19***

13. These amendments to clause 69 relate to the defence whereby an employer can refer to a “material factor” as justification for differentiation between the pay of a man and a woman. Their effect would be to ensure that, as at present, if the material factor is itself indirectly discriminatory, it must be objectively justified. Thus for example, if an employer introduces a bonus payment to encourage staff doing the same work to work a new night shift to maximise production, it may be that only a small number of female staff can work at night and the bonus payments go almost entirely to male employees. The Tribunal would consider whether, despite the disparate effect on the female employees, the employer’s aim is legitimate and the payment of a bonus to night workers is a proportionate way of achieving it.

***Lords amendments 20 to 24***

14. Clause 77 (discussions with colleagues) ensures that employers cannot stop employees discussing their pay with one another to find out if there is a connection between pay and a protected characteristic. The amendments would ensure that protection is afforded not only for such discussions between colleagues who are in the same employment, but also for any disclosure of information about pay which the employee can show had the purpose of finding out whether there was a connection between pay and a protected characteristic. The effect would be, for example, to protect disclosures to trade union representatives who are not also fellow employees.

***Lords amendments 30 to 32***

15. The effect of these three amendments to clause 91 would be to replicate existing provisions in the Disability Discrimination Act 1995. They would ensure that further and higher education institutions which confer qualifications on disabled people who are not students of the institution (and who are thus not protected by the provisions for its students) are prohibited from discriminating against, victimising or harassing them because of their disability.

***Lords amendment 33***

16. This amendment changes the opening wording used in paragraph (a) of clause 96(8) so it is the same as that for paragraphs (b) and (c) of subsection (8). This is to make it clear that each of the criteria set out in clause 96(8) are of equal importance when regulators are deciding what parts of a general qualification cannot be adjusted for the benefit of disabled people.

***Lords amendments 34 to 36***

17. Amendments 34 and 35 to clause 104 would add a proportionality test for positive action taken in the selection of candidates for relevant elections (except for women only shortlists), to make clear that only action which is a proportionate means of achieving the objective of reducing inequality in the party's representation is permitted. Amendment 36 makes an amendment to clause 105 which is consequential on amendments 34 and 35 and is to ensure that the repeal of section 104(7) at the end of 2030 or subsequently would not then leave any extraneous references.

***Lords amendments 37 and 38, 63, 106 and 111***

18. Amendment 37 would insert a new clause that would give a Minister of the Crown power to make regulations requiring registered political parties to publish data relating to the diversity of party candidates seeking selection. The power to make regulations would be subject to the affirmative procedure. It could be used to prescribe, among other things, the political parties to which the duty to publish will apply, what data should be published, and when. The requirement to publish could apply to diversity data related to some or all of the protected characteristics of age, disability, gender reassignment, race, sex, sexual orientation and religion or belief.

19. Amendment 38 to clause 113, together with amendment 111 to Schedule 26, would enable the Equality and Human Rights Commission alone to enforce non-compliance with the publication requirement.

20. The effect of amendment 63 would be to make regulations under the clause subject to the affirmative resolution procedure.

21. Amendment 106 would ensure that the harmonisation provisions in clause 196 do not apply to this clause (see paragraph 49 below for an explanation of this power).

***Lords amendments 40 and 41***

22. The effect of these amendments to clause 148 (public sector equality duty) would be to ensure that public bodies, in having due regard to the need to advance equality of opportunity, must give consideration to the fact that meeting the needs of disabled people may, in particular, involve taking steps to take into account their disabilities.

***Lords amendments 42, 62, 68 and 69, 71 and 72, 74 to 76, 78 and 79, 81 and 105***

23. These amendments relate to the power to make exceptions to the public sector equality duty or the power to amend the list of bodies subject to the duty. Amendment

42 would limit the power in clause 150(1) for a Minister to amend Schedule 19 (the list of bodies subject to the duty) so that it could not be used to add the judicial and parliamentary bodies excluded from the duty by virtue of Schedule 18.

24. The effect of amendment 62 would be that use of the power in clause 150 to remove bodies from the list in Schedule 19 because they have ceased to exist or changed their names is not subject to the affirmative resolution procedure. Amendment 72 would make equivalent provision as regards the power of the Welsh Ministers and amendment 79 as regards the power of the Scottish Ministers.

25. Amendments 71 and 78 would provide that the use of the power to add entries to Schedule 19 by the Welsh Ministers or the Scottish Ministers is also subject to the affirmative resolution procedure.

26. Amendment 105 would limit the power in paragraph 5 of Schedule 18 for a Minister of the Crown to add, limit or omit the exceptions in Schedule 18 so that it could not be used to remove or limit the exceptions provided for judicial functions, or those relating to Parliament, the Scottish Parliament, the National Assembly for Wales and the General Synod.

27. Amendments 68, 69, 74 to 76 and 81 make consequential drafting changes.

***Lords amendment 43***

28. This amendment to clause 158 (positive action: recruitment and promotion) would make it explicit that any positive action measure taken in recruitment and promotion has to be a proportionate means of achieving the aims set out in subsection (2), that is helping people overcome a disadvantage or participate in an activity.

***Lords amendment 44***

29. Amendment 44 would insert a new clause which would ensure that a taxi licensing authority in England and Wales (i.e. a local authority) could not refuse to issue a licence for a wheelchair accessible taxi on the grounds of controlling taxi numbers, if the proportion of wheelchair accessible taxis in the authority's area was less than that prescribed by the Secretary of State in regulations. The new clause would also provide the Secretary of State with a regulation making power to prescribe the size of wheelchair that a wheelchair-accessible taxi must be capable of carrying. Regulations both under this power and under the power to prescribe the proportion of accessible taxis would be subject to the negative parliamentary procedure.

***Lords amendments 45 to 47***

30. These amendments relate to the designation of wheelchair-accessible taxis and private hire vehicles by Scottish licensing authorities. Clause 165 currently allows Scottish licensing authorities to designate as wheelchair accessible only taxis and private hire vehicles which have a special licence to provide a local bus service. Welsh and English authorities can also designate those taxi and private hire vehicles they regard as wheelchair accessible which are being operated conventionally i.e.

plying for hire in the case of a taxi or fulfilling a booking in the case of a private hire vehicle. The effect of the amendments would be to make the position the same for England, Wales and Scotland. Licensing authorities in each jurisdiction would be able to designate as wheelchair-accessible taxis and private hire vehicles which are being operated conventionally as well as or are being used to provide a local bus service. Drivers of vehicles designated as accessible and appearing on a list maintained by the local authority will be subject to the duties contained in clause 163.

***Lords amendments 48 and 60***

31. Clause 195(1) provides a power for a Minister by order (subject to the affirmative procedure) to make exceptions from the ban on age discrimination, including in the provision of services or in the exercise of public functions. Clause 199(3)(a) allows such an order, among other things, to confer a power to issue guidance on a Minister of the Crown or the Treasury.

32. Amendment 48 would mean that guidance issued under a power contained in an order under clause 195 would only come into force at a date specified in a further order subject to the negative procedure. Parliament would therefore have the opportunity to consider each use of the power to issue guidance.

33. Amendment 60 is consequential and would ensure that the provisions in clause 200 for making orders and regulations under the Bill apply to those made by the Treasury as well as those made by a Minister of the Crown.

***Lords amendments 49 to 52, 88, 107 and 115***

34. These amendments would remove various rules of family property law which treat husbands and wives unequally and also make equivalent provision in respect of housekeeping allowances for civil partners to that which exists for husband and wives. These amendments, which would enable the UK, should it choose to do so, to ratify the Seventh Protocol to the European Convention on Human Rights.

35. Amendment 49 would insert a new clause which would abolish the common law duty for a husband to maintain his wife. There is no common law duty for a wife to maintain her husband.

36. Amendment 50 would insert a new clause which would abolish the presumption of advancement. This is the presumption that in certain circumstances, where there is no evidence to the contrary, a husband or father is presumed to be making a gift when he transfers property to his wife or child. This presumption does not apply when a wife transfers property to her husband or a mother to her child, so her husband or child is treated as holding the property in trust for her.

37. Amendment 51 inserts a new clause which would amend section 1 of the Married Women's Property Act 1964 so that money and property derived from a housekeeping allowance would, in the absence of an agreement to the contrary, be

owned by the husband and wife in equal shares regardless of who paid or received the allowance.

38. Amendment 52 would insert a new section 70A into the Civil Partnership Act 2004 to mirror the effect of amendment 51 for civil partners.

39. Amendment 86 would provide a power for the Lord Chancellor to commence these provisions.

40. Amendment 87 would amend clause 209 so that the four new clauses would form part of the law of Scotland.

41. Amendment 88 would amend clause 209 so that the new clause inserted by amendment 50 would form part of the law of Northern Ireland.

42. Amendment 107 would ensure that the harmonisation power in clause 196 would not apply to these clauses (see paragraph 49 below for an explanation of this power).

43. Amendment 115 would amend the Bill's title to reflect the inclusion of these amendments.

***Lords amendments 53, 85 and 112***

44. Amendment 53 would amend the Civil Partnership Act 2004, by removing the express prohibition on civil partnerships taking place in religious premises in England and Wales.

45. It would do so by repealing section 6(1)(b) of the Civil Partnership Act 2004, which states that civil partnership registrations must not take place in religious premises, and section 6(2) of that Act which defines religious premises.

46. This amendment would also amend section 6(3A) of the Civil Partnership Act 2004, which contains a power to make regulations about the approval of premises for the registration of civil partnerships, by adding that such regulations may provide for different premises to be approved for registration of civil partnerships from those approved for registration of civil marriages.

47. Finally, it would insert provision into the Civil Partnership Act 2004 to the effect that nothing in that Act would oblige any religious organisation to host civil partnerships if they do not wish to do so.

48. Amendment 85 would have the effect that the new clause comes into force on a day appointed by the Minister of the Crown, amendment 112 makes consequential changes to the schedule of repeals.

***Lords amendments 54 to 58***

49. Clause 196 enables a Minister of the Crown by order to amend the Bill as enacted and the Equality Act 2006 to ensure consistency across the legislation where changes required by European law would otherwise result in inconsistent provision because of the limits on section 2(2) of the European Communities Act 1972.

50. These amendments would provide additional safeguards relating to the use of the power. Amendment 55 would add to the existing requirement for consultation prior to use of the power, by requiring a further consultation if the Minister thinks it appropriate to change all or part of the proposal in the light of that consultation. The effect of this amendment would also be to remove the exception which would allow the Minister to forego or shorten consultation if the matter is urgent. Amendments 56 and 57 would reduce the frequency of Ministerial reporting to Parliament from five to two years. The new clause inserted by amendment 58 would add further conditions in relation to the draft order, including that when laid it must be accompanied by an explanatory document setting out particular information including details of representations made in responses to the consultation and why it is thought to appropriate for the order to be made. The new clause also provides protection against disclosure for information in representations provided on a confidential basis.

***Lords amendments 59, 64, 73 and 80***

51. These amendments concern parliamentary control of orders and regulations. Amendment 59 to clause 199 would provide a negative parliamentary procedure for Orders in Council under clause 82 (offshore work). Currently no procedure is specified.

52. Subsection (2) of clause 200 provides that orders or regulations which amend primary legislation are subject to the affirmative procedure, but subsection (3) disapplies this rule in certain circumstances. Subsection (4) provides that other specified orders and regulations are also subject to the affirmative procedure although they do not amend primary legislation. Amendment 64 to clause 200 would clarify that statutory instruments, including those listed in subsection (3), which are not subject to the affirmative procedure because of subsections (2) and (4), are subject to the negative procedure. Amendment 73 and 80 would likewise clarify that instruments made by Welsh and Scottish Ministers which are not subject to the affirmative procedure because of clauses 201(2) and 202(2) are subject to the negative procedure.

***Lords amendments 61, 70 and 77***

53. Clause 2 provides powers for a Minister of the Crown and for Scottish and Welsh Ministers to add a public authority to or to remove it from those covered by the public sector duty regarding socio-economic inequalities established by clause 1; to apply the duty only in respect of certain functions of a particular authority and to remove or alter any such restriction. Currently the powers are subject to the negative

parliamentary procedure. These amendments to clauses 200(3), 201(3) would make them subject to the affirmative procedure.

***Lords amendments 65 and 66***

54. Clause 199(7) enables provisions that are consequential upon the commencement of the Bill to be contained in more than one instrument. These would not be subject to parliamentary procedure unless they contained consequential amendments to primary legislation (in which case they would be subject to the affirmative procedure). Amendments 65 and 66 to clause 200 would ensure that if a consequential order were made under clause 199(7) in a separate instrument from one which commences provisions in the Bill, it would be subject to the negative procedure.

***Lords amendment 67***

55. Clause 200(10) disapplies the hybrid instruments procedure for affirmative instruments under the Bill. This amendment would narrow this provision so that it only applies to an order under clause 2 (power to add bodies to be covered by the socio-economic duty) or regulations under clause 150 (power to specify public authorities), clause 152 (power to impose specific duties), clause 153(2) (power to impose specific duties on cross-border authorities) or clause 154(5) (power to modify or remove duties that have already been imposed). Some affirmative statutory instruments are ruled to be hybrid instruments because they affect some members of a group differently than others in the same group. They are subject to a special procedure which gives those individuals or private bodies who are especially affected by them the opportunity to present their arguments against them

***Lords amendments 82 and 84***

56. These amendments to the meaning of “detriment” in clause 204 would clarify that, where harassment is not specifically prohibited, protection would be available if conduct amounted to a detriment for the purposes of the prohibitions on direct discrimination. For example, if unwanted conduct relating to sexual orientation in the provision of goods or services (where the Bill does not prohibit harassment) had the effect of violating a person’s dignity or creating an offensive environment for him or her, the effect of such conduct would amount to a detriment. This amendment would make it clear that the victim could bring a claim for direct discrimination as a result of suffering that detriment.

***Lords amendment 83 and 113***

Amendment 83 would define “substantial” as meaning more than minor or trivial. “Substantial” is used in the definition of disability in clause 6 where an impairment has to have a “substantial” long term adverse effect; and in the “substantial” disadvantage trigger for the three reasonable adjustment requirements in clause 20. The definition is already used in statutory codes and guidance. Amendment 113 adds a corresponding entry to the index of defined terms.

***Lords amendments 89, 96, 99 and 101***

57. These amendments to Schedule 3 (services and public functions: exceptions) and Schedule 13 (education: reasonable adjustments) relate to auxiliary aids (e.g. special equipment) and services (e.g. provision of a British Sign Language assistant) for disabled pupils in schools. Their combined effect would be to remove the exception in the Bill whereby a local authority or a school is not required to provide such auxiliary aids. Amendment 89 would place a duty on local authorities in relation to their education functions, as set out in Schedule 3, to comply with the third reasonable adjustment requirement, as set out in clause 20, to consider auxiliary aids. Amendments 96, 99 and 101 would do the same for schools in Schedule 13.

***Lords amendments 90 and 108***

58. Amendment 90 would insert provisions in Schedule 3 (services and public functions: exceptions) so that clergy and others will not be subject to claims under discrimination law if they decline to solemnise or permit the solemnisation of a religious marriage if they reasonably believe that one of the parties has undergone gender re-assignment. It applies to Anglican clergy in England and Wales, as well as celebrants in Scotland. It also applies to those of other faiths in England and Wales whose consent is required for marriages to be solemnised in registered buildings and to others who may solemnise marriages.

59. Amendment 108 would, by listing these provisions in Schedule 24 (harmonisation: exceptions) ensure that the harmonisation power in clause 196 would not apply to these provisions (see paragraph 49 above for an explanation of this power).

***Lords amendments 91 and 109***

60. Amendment 91, which inserts a new paragraph in Schedule 3 (services and public functions: exceptions), would provide an exception for broadcasting from provisions in clause 29 which prohibit discrimination in the provision of services and exercise of public functions etc. The effect would be to make it clear that claims for discrimination, harassment and victimisation could not be brought in relation to the broadcasting and distribution of content as defined in the Communications Act 2003. For example, this would mean that claims cannot be brought regarding editorial decisions made about which programmes to commission; on what day a specific programme should be shown; or who should appear in a particular programme. This covers programmes that are broadcast on television or on-line.

***Lords amendment 92***

61. This amendment would limit the power in Schedule 3 to add to, vary or omit the exceptions to clause 29 (prohibiting discrimination in the provision of services and exercise of public functions etc.) so as not to allow the exceptions relating to the functions of Parliament and the judiciary in paragraphs 1 to 3 of Schedule 3 to be omitted or reduced in scope. The effect would therefore be that any such omission or reduction could only be achieved through primary legislation.

***Lords amendments \* 93 to 95***

62. These amendments relate to Schedule 9, paragraph 2 which provides an exception for occupational requirements where employment is for the purposes of an organised religion.

63. Amendments 93 and 94 would remove the explicit proportionality test for applying such requirements. Amendment 95 would remove the definition of employment “for the purposes of an organised religion.” The combined effect of these amendments would be to leave the law on such exceptions as it is. This means the proportionality test would be implicit. Further, the range of posts which are “for the purposes of an organised religion” (and therefore fall within the exception in paragraph 2) would remain as it is at present.

***Lords amendments 97, 98, 100, 102 and 103***

64. These amendments to Schedule 13 would make it clear that reasonable adjustments in education are anticipatory. The effect would be that a school would have to consider providing special equipment and facilities for disabled pupils in advance of any such pupils being admitted to the school.

***Lords amendment 104***

65. This amendment would ensure consistency between Schedule 15 (associations: reasonable adjustments) and Schedule 2 (services and public functions: reasonable adjustments) concerning the second requirement of the reasonable adjustment duty. It makes it clear that an association should consider a reasonable alternative method of affording access to a benefit, facility or service etc. where it is not reasonably possible to avoid the substantial disadvantage caused by a physical feature.

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