

Welcome to the November edition of Fife Law News. This newsletter has been sent to you as a supporter of Fife Law Centre.

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### **Overview of Equality Act**

The Equality Act 2010 (which came into force on 1 October 2010) aims to simplify and bring together much of the existing discrimination law under one overarching piece of legislation. It also aims to fill any gaps in the pre-existing law. The Act does not however supersede such previous discrimination legislation automatically and employees who have complaints that are covered under both the existing laws will have to bring separate claims under both the old and the new law.



The objective of simplifying discrimination law in the UK is not likely to be realised until the Act is fully implemented and employment tribunals and lawyers will have to try and harmonise existing and new rules in discrimination cases.

The Act itself covers a hugely diverse area that cannot be simply covered in any one article alone however listed below are some points of note and considerations for employers.

### **Useful Points**

- Characteristics which are protected by the Act are age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation. The Act makes it unlawful to discriminate against, harass or victimise a person on account of one of these "protected characteristics".
- The Act does not change the concept of direct discrimination i.e. when 'someone is treated less favourably than another person because of a protected characteristic'. However in terms of indirect discrimination, employees will now be able to complain of harassment even if it is not directed at them, if they can demonstrate that it creates an offensive environment for them.

- Associative discrimination, i.e. direct discrimination against a person because they associate with someone possessing a protected characteristic (e.g. family member, colleague), has been extended by the Act to include age, disability, gender reassignment and sex.
- There is also a new definition and meaning of the term 'disability'. The 2010 Act has made it easier for a person to show that they are disabled and protected from disability discrimination. Under the Act, a person is disabled if they have "a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities".
- The Act places a new duty on certain public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions. It also requires public sector bodies to eliminate conduct that is prohibited under the Act and to advance equality of opportunity and good relations between those who share a relevant protected characteristic and those who do not.
- The Act contains provisions making it unlawful for schools, and institutions providing further and higher education to discriminate against, harass or victimise a pupil or student or applicant for a place.



### **Employer Considerations**

The Act now prohibit employers from asking candidates pre-employment health questionnaires other than in limited circumstances, one of which is to check a candidate can perform an 'intrinsic function' of the job.

- The Act also puts a duty on the employer to make reasonable adjustments for staff to help them overcome disadvantage resulting from an impairment.
- The Act allows an employer to take *positive action* so as to enable existing or potential employees to overcome or minimise a disadvantage arising from a protected characteristic.

The Government Equalities Office in partnership with the British Chambers of Commerce, Citizens Advice, ACAS and the Equality and Diversity Forum have produced a set of guidelines entitled 'What do I need to know' which are targeted at providing guidance to the public, employers, the voluntary sector and the business community. These guidelines are available on [Equality Act 2010 Guidelines](#).

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### ***New Offence Aims To Give Better Protection To Domestic Abuse Victims***

A newly created offence of "engaging in threatening of abusive behaviour" came into effect in October giving a greater degree of protection to victims of domestic abuse.

Prior to this newly created offence domestic abuse cases would often have been prosecuted under offences such as breach of the peace. This was the position until the appeal court decision last year in the case of *Harris v HMA 2009 S.L.T. 1078* where the accused was charged with the offence of "breach of the peace" after revealing that he "knew details about police officers and their families." His conviction was dismissed on appeal and, according to the ruling, this was due to the fact that his threatening behaviour did not "cause or threaten disturbance to the public peace." This meant that a "public element" was necessary for a conviction of breach of the peace.



This requirement for a full public element created a gap in the law and meant that victims of domestic abuse were not adequately protected from abuse happening as it was more difficult to convict perpetrators of domestic abuse which by its very nature tends to happen in private and behind closed doors. This has been illustrated by recent failed attempts at prosecuting alleged domestic abusers such as the case of *Hatcher v Procurator Fiscal [2010] HCJAC 92* where the defendant was accused of engaging in "unreasonable behaviour" towards his wife in the presence of their children. It was held that family members who witnessed the abusive act did not fulfil the necessary "public element" to secure a conviction.

In order to remedy these types of situation the Scottish Parliament have brought into force Section 38 of the Criminal Justice and Licensing Act 2010, which creates the offence of

"engaging in threatening and abusive behaviour." Prosecutors can utilise this to secure convictions for domestic abuse if someone acts in a way that is "likely to cause a reasonable person to suffer from fear or alarm" and without the need for any public element. Those convicted could be sentenced to up to five years in prison.

Commenting on the new offence Justice Secretary Kenny MacAskill said: "This will give victims greater legal protection, whilst ensuring prosecutors have the full range of powers available to them to bring about a conviction."

"We want to send out the message loud and clear that if you carry out this offence, there will be no escape, there will be no wriggle room to exploit, and you will be met with by the full force of law."

To view the relevant provision please see [s38 Criminal Justice and Licensing Act 2010](#)

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### ***Case of Wait and See for Effect of New Housing Act?***

The Home Owner and Debtors Protection (Scotland) Act 2010 was introduced in order to give greater protection to home owners who are faced with repossession. The Act provides that any repossession cases, except where people have voluntarily surrendered their home, should go through the courts. In accordance with the Act, lenders must also show that they have taken reasonable steps to come to an agreement in order to prevent repossession from happening and otherwise to show that it was reasonable to use such enforcement action.



Although the Act allows people greater protection there are concerns that, as a result of this, people may find it more difficult to get a mortgage in the first place. There is also a fear that any additional costs incurred by lenders to cover the court costs in repossession cases, may lead to an increase in mortgage repayments. This increase in mortgage payments and higher costs of lending and borrowing could potentially jeopardise the recovery of the Scottish housing market. A recent report from the Royal Institution of Chartered Surveyors (RICS) has suggested that uncertainty over forthcoming cuts has led to a downturn in the market generally. This contrasts with the position September when it was suggested that prices were recovering faster in Scotland than other parts of the UK.

However, the importance of having such provisions within the current economic climate was emphasised by the Housing and Communities Minister Alex Neil in a recent press release. Mr Neil said "Set against a backdrop of economic uncertainty, many Scots find themselves caught in a world of spiralling debt, putting family homes -and families - at risk." He went on to add that it is "vital that anyone in financial difficulties does not try to bury their head in the sand, but discuss matters at an early stage with their lender or an independent advice agency, before problems escalate."



The Home Owner and Debtors Protection (Scotland) Act 2010 has only been in force since 30 September. Only time will tell how the new provisions of the Act will affect those in a position to borrow or lend, and also what effect it will have on repossession actions going through the courts and the Scottish housing market in general.

To view the Act in full please see [Home Owner and Debtor Protection \(Scotland\) Act 2010](#)

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### ***Double Jeopardy (Scotland) Bill Introduced in the Scottish Parliament***



Double jeopardy is a principle which has been part of our common law system for 800 years. The rule prevents a person being tried more than once for the same offence once they have been brought to trial and acquitted. However, following the collapse of the case known as "Worlds End Murder" case the Justice Minister announced a review by the Scottish Law Commission (SLC) of aspects of Scots law, including the double jeopardy rule.

This well-known case concerned 2 teenage girls who were found murdered in East Lothian in 1977. They were both last seen at the Edinburgh pub after which the case came to be named. When the case finally came to trial in 2007 the prosecution fell through after the judge had decided that there was not enough evidence against the accused, even though there had been DNA evidence which allegedly linked the accused with the victims.

Due to recent advances in technology such as identification through DNA it has been suggested that this principle should be changed in order to incorporate such advances.

The proposals which had been made by the SLC suggested that the double jeopardy rule should be abolished in cases involving murder and rape, albeit not on a retrospective basis.

Recently, the Scottish Government introduced the Double Jeopardy (Scotland) Bill, which will restrict the application of the rule. As expected, the Bill goes further than the proposals made by the SLC. The Bill proposes that any restrictions to the rule will not only apply to murder and rape cases, but will also apply to offences of culpable homicide and serious sexual offences, including those against children. The Bill also differs from the SLC's proposals in that the changes *will* be retrospective.

In summary the Bill clarifies the double jeopardy principle; allows for a second trial where, after acquittal, compelling new evidence emerges and where the acquitted person has admitted committing the offence after acquittal; and to permit prosecution even where a victim has died after the original trial.



Justice Secretary Kenny MacAskill has stated that "people shouldn't be able to walk free from court and subsequently boast with impunity about their guilt" and went on to say that "Prosecutors should not have their hands tied, and this Bill will ensure that in such cases there will be no escape from justice".

English law has already been updated with regard to the issue. The law of England regarding double jeopardy was changed in 2003, with the relevant provisions coming into force in 2005; since then there have been cases which have returned to the courts. It looks like Scotland will also see changes in the near future to the law regarding double jeopardy.

To see the Bill which was launched by Mr MacAskill please see [Double Jeopardy \(Scotland\) Bill](#)