

THE EQUALITY ACT 2010



October 1st 2010 saw many of the provisions attained within the Equality Act, which gained Royal Assent on the 8th April 2010, come into force. The following summary has been put together by the CWU Equality Department. The information has been sourced from the Law Society and anyone wishing to go to the link should visit:

www.lawsociety.org.uk/productsandservices/practicenotes/equalityact/4556.article#ea1_2

The Equality Act provides a new legislative framework to protect the rights of individuals and advance equality of opportunity for all. The Act simplifies and brings into one act existing discrimination law including:

- the Equal Pay Act 1970;
- the Sex Discrimination Act 1975;
- the Race Relations Act 1976;
- the Disability Discrimination Act 1995;
- the Equality Act 2006, part 2
- the Employment Equality (Religion or Belief) Regulations 2003;
- the Employment Equality (Sexual Orientation) Regulations 2003;
- the Employment Equality (Age) Regulations 2006;
- and the Equality Act (Sexual Orientation) Regulations 2007).

THE EQUALITY ACT: KEY CONCEPTS

3.1 Forms of Discrimination

The Act defines the various kinds of discrimination with reference to the characteristics which are protected under the Act (see section 3.2 below for more detail).

Whilst these types of discrimination largely replicate those found in previous legislation there are some important changes which materially alter the scope of protection.

3.1.1 Direct Discrimination (Section 13)

Direct Discrimination occurs when someone is treated less favourably than another person because:

- they have a protected characteristic,
- they are thought to have a protected characteristic or
- they associate with someone who has a protected characteristic.

Direct Discrimination under the Act is defined as follows:

'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.'

This definition of direct discrimination applies to all protected characteristics. In relation to the protected characteristic of age, direct discrimination can be justified if it is a proportionate means of achieving a legitimate aim. Separate provisions exist in respect of discrimination against a woman on the grounds of pregnancy or maternity (sections 17 and 18).

3.1.1.1 Association and Perception

The new definition of direct discrimination also covers a situation where someone is treated less favourably than another person because they are thought to have a protected characteristic (discrimination by perception) or because they associate with someone who has a protected characteristic (discrimination by association).

3.1.2 Indirect Discrimination (section 19)

Indirect Discrimination occurs when a policy or practice that applies to everyone particularly disadvantages people who share a protected characteristic. Indirect discrimination under the Act is defined as follows:

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.

Indirect Discrimination can only be justified if you can show that the policy or practice is a proportionate means of achieving a legitimate aim. Indirect Discrimination had already applied to age, race, religion or belief, sex, sexual orientation and marriage and civil partnership. It has now been extended to cover disability and gender re-assignment. It does not apply to pregnancy or maternity.

3.1.3 Discrimination arising from Disability (Section 15)

This is a new provision. Under Section 15 a person discriminates against a disabled person if he/she treats them unfavourably because of something arising in consequence of their disability, and this treatment cannot be justified as a proportionate means of achieving a legitimate aim.

If you are acting as either an employer or service provider and did not know and could not reasonably have been expected to know of the disabled person's disability, then the unfavourable treatment will not amount to discrimination. However, you must do all you can reasonably be expected to do to find out if a person has a disability.

Unlike direct and indirect discrimination, this form of discrimination does not require the use of a comparator to establish less favourable treatment.

3.1.4 Duty to make Adjustments (Section 20)

The Act consolidates and extends existing duties upon employers and suppliers of goods and services from the Disability Discrimination Act 1995 to make reasonable adjustments for disabled persons.

The duty is three fold:

- Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the person to whom the duty applies must take reasonable steps to avoid the disadvantage.
- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the person to whom the duty applies must take reasonable steps to avoid the disadvantage.
- Where a disabled person would, but for the provision of an auxiliary aid, be at a substantial disadvantage in comparison with persons who are not disabled, the person to whom the duty applies must take reasonable steps to provide the auxiliary aid.

In relation to requirements where the provision, criterion or practice in question or the auxiliary aid required relates to the provision of information, 'reasonable steps' include making sure that the information is in an accessible format.

The duty referring to the provision of auxiliary aids only previously applied to premises and goods and services, but has now been extended to employment.

More details about how the duty operates in the goods and services and employment contexts can be found in Schedules 2 and 8 of the Act.

3.1.5 Harassment (Section 26)

Harassment is defined in the Act as:

‘unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual’.

Harassment applies to all protected characteristics except for pregnancy and maternity, and marriage and civil partnership.

The Act specifically prohibits three types of harassment:

- Harassment related to a ‘relevant protected characteristic’
- Sexual harassment; and
- Less favourable treatment of a service user because they submit to or reject sexual harassment related to sex or gender reassignment.

For harassment related to a protected characteristic, ‘related to’ includes where the employee or client being harassed has a protected characteristic or where there is any connection with a protected characteristic. ‘Any connection’ includes a situation where the employee or client being harassed has an association with someone who has a protected characteristic or where they are perceived wrongly as having a particular protected characteristic. If you are an employer you may now also be found liable for harassment by third parties who are not your employees (e.g. clients or contractors). This has been extended to cover age, disability, gender reassignment, race, religion or belief and sexual orientation.

The following must be shown for liability to be established:

1. the prohibited conduct has occurred with your knowledge on at least two occasions, and
2. you have not taken reasonable steps to prevent it.

A statutory defence is available to employers and principals (as service providers) who can avoid liability for harassment carried out by their employees or agents if they take all reasonable steps to prevent harassment occurring.

3.1.6 Victimisation (Section 27)

Victimisation occurs when an employer or service provider subjects a person to a detriment because the person has carried out (or you believe they have or may carry out) what is referred to as a ‘protected act’.

A protected act is any of the following (Section 27(2)):

- bringing proceedings under the Act
- giving evidence or information in proceedings brought under the Act
- doing anything which is related to the provisions of the Act
- making an allegation that another person has done something in breach of the Act

The term ‘detriment’ has not been defined under the Act but it can be reasonably inferred that if an action has the effect of putting a person at a disadvantage or if it makes their position worse, such treatment will amount to a detriment. The victim need not have a protected characteristic in order to be protected from victimisation under the Act; for example they could have been supporting a person with a protected characteristic who is making a claim. Claims for victimisation can only be brought by individuals and not groups.

The Protected Characteristics (Section 4)

In order to harmonise the various discrimination strands that have developed under previous legislation the new Act has collectively termed them as the 'protected characteristics'. The protected characteristics under the Act are:

- Age
- Disability
- Gender reassignment
- Marriage and Civil Partnership
- Pregnancy and maternity
- Race
- Religion or Belief
- Sex
- Sexual orientation

Full definitions of each characteristic can be found in sections 5-12 of the Act.

You should be aware that amendments have been made to the definitions of individual characteristics and these are discussed below.

Age (Section 5)

The Act protects people of all ages from unlawful discrimination. It is important to note that this is the only protected characteristic where direct discrimination may be justified, but employers may only be able to justify differential treatment on the grounds of age if they can demonstrate that the different treatment is a proportionate means of achieving a legitimate aim.

With regard to the provision of goods and services the protected characteristic of age is not expected to come into force until 2012 and will only protect those aged 18 or above.

Disability (Section 6 and Schedule 1)

The definition of disability is essentially the same as that in the Disability Discrimination Act 1995. A person has a disability if they:

- have a physical or mental impairment, and
- the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Importantly, it is no longer necessary to consider the list of eight capacities when considering whether or not a person is disabled.

The meaning of the term 'substantial effect' is now defined in the Act as one that is greater than the effect which would be produced by the sort of physical or mental conditions experienced by many people which have only 'minor' or 'trivial' effects (section 212(1)).

Further detail as to the definition of the term 'disability' can be found at Schedule 1 of the Act. Please note that the Government is presently consulting on the guidance to be taken into account in determining questions in relation to the definition of disability and this should shortly be available.

Gender Reassignment (Section 7)

The definition of 'transsexual' has been altered for the purposes of the Act.

The Act defines a transsexual person as someone, who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning a person's sex.

Importantly, the Act no longer requires a person to be under medical supervision to be protected.

Marriage and Civil Partnership (Section 8)

Discrimination on grounds of marriage or civil partnership is prohibited under the Act. The prohibition applies only in relation to employment and not the provision of goods and services.

Pregnancy and Maternity (Section 9)

Discrimination of women on the grounds of pregnancy or maternity during pregnancy and any maternity period is prohibited under the Act. There are different provisions covering the work and non-work context.

Race (Section 10)

The position on 'race' remains unchanged under the Act. It is unlawful to discriminate on grounds of colour, nationality or ethnic/national origins.

Sex (Section 11)

Men and women are protected under the Act and there has been no change to the substantive law.

Sexual Orientation (Section 12)

Heterosexual, bisexual, gay and lesbian people remain protected under the Act. There has been no change to the substantive law.

Public Sector Equality Duty (Section 149)

The previous public sector equality duty only applied to race, disability and gender.

The new single equality duty requires public bodies to have due regard to the need to:

- 1. eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act**
- 2. advance equality of opportunity and foster good relations across all the protected characteristics with the exception of marriage and civil partnership.**

Ministers are also empowered under s.153 to impose specific duties upon public authorities for the purpose of enabling better performance of the general duty contained in S.149.

Additionally, S.155 empowers ministers to impose specific duties on a public authority 'in connection with its public procurement functions'. This power is designed to encourage local authorities to use procurement to encourage equality more consistently. The significance of the equality

impact assessment should always be considered in any large scale exercise which is likely to impact on equality. One of the most high profile uses or links to this has been the Fawcett Society's request for a judicial review of the coalition government [2010] emergency budget, which was deemed to have a disproportionate impact on women.

Positive Action (sections 158 and 159)

To assist people who share a protected characteristic and suffer disadvantage or the consequences of past or present discrimination, the Act contains provisions which enable service providers, public bodies and other associations to take action to achieve more effective equality outcomes.

Positive action can involve treating members of a group who share a protected characteristic more favourably than other groups. This will be lawful if:

1. One or more of the following conditions is met (section 158 (1)):
 - Disadvantages of a particular group are recognised
 - Particular needs of the group are met
 - Participation of the group is increased
2. The proposed action is a proportionate means of achieving one of the specified aims (section 158 (2) The specified aims are contained within section 158 (2) of the Act and are as follows:
 - enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage
 - meeting those needs
 - enabling or encouraging persons who share the protected characteristic to participate in that activity

Examples of positive action could include providing additional or bespoke services, separate facilities, accelerated access to services or the targeting of resources. As long as the action taken is within the parameters set out by the Act and meets the test of proportionality it will not amount to discrimination under the Act.

Section 159 of the Act relates specifically to the use of positive action in recruitment and promotion. If you are an employer you will be able to use positive action in specified circumstances to address needs or disadvantages shared by members of a protected group in relation to recruitment and promotion.

S.159 provides that the option is only available where:

- the person in question is 'as qualified as' other applicants to be recruited or promoted;
- the employer does not have a policy of treating persons of the particular under-represented or disadvantaged group more favourably in connection with recruitment or promotion than persons who do not share the relevant protected characteristic; and
- the more favourable treatment is a proportionate means of achieving the aim of overcoming or minimising the disadvantage, or encouraging participation. You should note that the use of positive action generally is entirely voluntary.

The Act also maintains the existing approach with regard to education and training which encourages employers to direct training at, and applications from, groups considered to be under-represented.

Pre-Employment Health Related Checks

Prior to offering a job you may only ask a candidate about health-related issues in order to help you:

- decide whether you need to make any reasonable adjustments for the individual in the selection process;

- decide whether an applicant can carry out a function that is essential to the job;
- monitor diversity in the range of applicants;
- take positive action to assist disabled people;
- assure your firm that the candidate has a disability where the position genuinely requires the holder to do so.

Equal Pay

The existing framework on equal pay has been largely retained under the Equality Act. Men and women are entitled to equal pay for work of equal value, like work or work rated as equivalent. The existing mechanisms for enforcing equal pay on an individual basis will stay the same under the Act. However, there will be changes to the way gender pay gap reporting is carried out and to the provisions relating to pay secrecy.

Pay Secrecy (Section 77)

Section 77 of the Act renders unenforceable any contractual term that aims to prevent or restrict a person from disclosing relevant information about the terms of their contract. A 'relevant pay disclosure' is defined in s.77(3) as one made for the purpose of finding out whether or to what extent there is a link between pay and a particular protected characteristic, eg to find out if pay is connected to his/her gender.

Accordingly, there is no general prohibition on clauses that hinder pay discussions but only those that hinder pay discussions aimed at establishing the existence of discrimination.

Gender Pay Reporting (Section 78)

Section 78 creates a power to make regulations requiring private sector employers with 250 or more employees to publish differences in pay between their male and female employees. Regulations to empower section 78 are not expected to come into force until April 2013.

Default Retirement Age

The Act retains the existing default retirement age although the Government are currently consulting on its future removal from statute. This is likely to occur in April 2011.

Employment Tribunal power to make recommendations (Section 124)

Previously, Employment Tribunals could make a recommendation that an employer must eliminate or reduce the effect of discrimination on a claimant.

Tribunals will now be able to recommend the steps that a business should take to reduce the adverse effect of discrimination in the workplace e.g by introducing an equal opportunities policy. Recommendations will not be binding, but the failure by a business to comply with a recommendation could be used as evidence to support subsequent similar discrimination claims. This power does not apply to equal pay claims.

Burden of Proof (Section 136)

The Equality Act harmonises the burden of proof provisions across all the protected characteristics. Under previous legislation, in most cases the burden of proof shifts to the respondent once the claimant has established a prima facie case except in the case of:

- race discrimination claims brought on grounds of nationality,
- claims of victimisation relating to race discrimination, and
- some other non-work discrimination claims.

The Equality Act reverses the burden of proof in all cases except those which relate to a criminal offence. Sections 136 (2) and (3) provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred unless A can show otherwise.

Where the allegation concerns a criminal offence the criminal burden of proof (beyond reasonable doubt) applies.

Transfer of Proceedings (Section 140)

Section 140 of the Act enables an employment tribunal to transfer jurisdiction in a case to a county court or vice versa in certain circumstances. The conditions to be met for transfer are that:

- the case is based on conduct which has given rise to two or more separate proceedings under the Act and;
- one of the claims relates to instructing, causing or inducing a person to discriminate against, harass or victimise another person contrary to section 111.

Time Limits

County Court proceedings should be commenced within:

- six months (minus a day) of the alleged unlawful act, or
- any longer period that the court finds to be just and equitable.

If the claim is referred to the EHRC for conciliation, the period within which the claim must be brought is extended to nine months or such other period which the court thinks is just and equitable.

Employment Tribunals (Section 123)

Where you are taking a claim under the Act within the jurisdiction of an Employment Tribunal different time limits apply. **Proceedings should be commenced within three months of the date of the act to which the complaint relates.** Again, the Employment Tribunal retains discretion to extend the time limit where it thinks it is just and equitable.

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