
Equality Act 2010: Briefing

June 2010

About this briefing

This briefing has been written by the National Equality Partnership (NEP) in collaboration with Barbara Cohen, Discrimination Law Consultant. The National Equality Partnership supports the third sector in equality and human rights. More information about NEP can be found at the end of this document.

This briefing contains the following sections:

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Introduction

The Equality Act¹ received Royal Assent on 8 April 2010, just before the General Election. For the first time we have a law that recognises and in general, gives equal protection to the different characteristics that define our identities. Also for the first time, we have a law that requires anyone carrying out public functions to build the advancement of equality into all of those functions.

The Act brings together into single concepts and definitions, the protections against discrimination which are now found in a collection of anti-discrimination acts and regulations introduced between 1970 and 2008 (each of which prohibited all or some forms of discrimination for particular grounds).

¹ http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf

The Equality Act uses the term “protected characteristics” in place of “grounds” and includes protection for nine protected characteristics. These are:

- age
- disability
- gender reassignment (with a wider definition than previously)
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

While many equalities organisations, trade unions and others campaigned for an even better law, the Equality Act, if it is well understood and vigorously enforced, could make a significant difference for individuals and groups that have long been excluded from full participation in employment, education and other aspects of public life.

The new government now takes responsibility for bringing the Act into force. During the parliamentary debates the Conservative party identified certain provisions which, if they formed the next government, they would not bring into force. However, no public statement has to date been made by the new government since the election to clarify their plans for the Act.

The timetable for commencement that was published before the General Election was:

- October 2010 - main provisions
- April 2011 - public sector equality duty, socio-economic duty and combined discrimination protection
- 2012 – ban on age discrimination in provision of services and public functions
- 2013 - private and third sector gender pay reporting and political parties publishing diversity data.

(It is important to note that the provisions for a socio-economic duty, private and third sector gender pay reporting and political parties publishing diversity data, may not be commenced under the new government).

What’s new: Public Sector Equality Duty

Potentially the most important part of the Equality Act is the new Public Sector Equality Duty, which is due to come into force in April 2011. The duty applies to 8 protected characteristics:

- age

- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

The existing separate disability, gender and race equality duties remain in force until the new single duty begins.

The duty applies to those public authorities listed in Schedule 19 of the Act in carrying out all of their functions. It also applies to other bodies, including voluntary sector organisations that carry out public functions. Their duty is to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and other conduct that is unlawful under the Act
- advance equality of opportunity between people who share a protected characteristic and those who do not
- foster good relations between persons who share a protected characteristic and those who do not.

The list of public authorities in Schedule 19 currently includes ministers and central government departments, local councils, police authorities, NHS trusts, primary care trusts, governing bodies of maintained schools and institutions of further and higher education, as well as parallel bodies in Wales and Scotland. This list will be expanded to include all of the bodies currently subject to the race equality duty.

The Act indicates that the 'need to advance equality of opportunity' includes the need to:

- remove or minimise disadvantage suffered by particular groups
- take steps to meet different needs of particular groups, and
- encourage participation by particular groups in areas of public life or other activity where they are under-represented.

The Act specifies that the 'need to foster good relations' includes the need to tackle prejudice and promote understanding.

Specific duties

As is true for the existing equality duties, the Act provides for regulations to add specific duties that public authorities will be expected to meet.

Last June, the Government Equalities Office (GEO) held a consultation on its policy proposals for the new specific duties entitled 'Equality Bill: Making It Work'². Following the consultation (you can read the NEP's consultation response at [www.wrc.org.uk/what we do/our projects/national equality partnership/nep consultations](http://www.wrc.org.uk/what_we_do/our_projects/national_equality_partnership/nep_consultations)), the GEO published a policy statement³ in January of this year, outlining its intentions.

It is expected that the specific duties will not be far different from the policy statement published and therefore it is likely that the specific duties would require public bodies to:

- Set equality objectives. Before setting objectives, public bodies will need to gather evidence through consultation and involvement of people from equality groups. However, there will be no requirement on public bodies to set objectives for each of the protected characteristics. There will also no longer be a requirement on public bodies to publish equality schemes or detailed action plans
- Show how they have taken into account evidence of the impact on equality in design of key policies and service delivery initiatives, and what difference this has made – demonstrating the outcome of equality impact assessment but not requiring equality impact assessments to be carried out
- Report on the gender pay gap and percentages of disabled and ethnic minority people in their workforce
- Include procurement in equality objectives and to consider using equality related criteria when awarding contracts and equality related contract conditions.

The emphasis in the specific duties is likely to be on outcomes rather than process. However, whatever the specific duties may require, the primary obligation is to meet the general duty (public sector equality duty) in the Act itself.

To meet the general duty - as well as demonstrate the outcomes in the specific duties - most public authorities will find it necessary to review all of their functions to identify and prioritise those that are most relevant to advancing equality. Public bodies are also likely to find it necessary before decisions are taken, policies adopted or practices changed, to ensure that they assess the equality impact of what they are proposing and make appropriate changes.

The draft specific duties are expected to be published by GEO during the coming summer with a further opportunity for consultation.

² <http://www.equalities.gov.uk/pdf/Specific%20Duties%20Consultation%20DocumentWEB.pdf>

³ http://sta.geo.useconnect.co.uk/staimm6geo/pdf/psdresp_GEO_MakingItWork_acc.pdf

What's new: Protection against discrimination

For most of the nine protected characteristics the Act prohibits direct discrimination, indirect discrimination, combined discrimination, harassment and victimisation. For disability the Act also prohibits discrimination arising from disability and failure to make reasonable adjustments.

For most of these characteristics the protection against discrimination and other unlawful conduct applies to all aspects of employment (including contract workers, public office, qualifications bodies and trade unions and equal pay between women and men), it applies to the provision of goods, facilities and services, carrying out public functions, education (including schools and further and higher education), disposal and management of housing and other types of premises, associations (including clubs and political parties). There are also special provisions regarding certain forms of transport for disabled people.

Association and perception

Although not written into the text of the Act, the government has made clear that protection against direct discrimination or harassment based on a particular protected characteristic, for example sexual orientation, applies *not only* to a person of a particular sexual orientation, such as a gay man or lesbian, but also to a person who is perceived wrongly to be gay and to anyone who is associated with homosexuality such as a family member or friend or who is otherwise identified with homosexuality, for example publicly known to be campaigning on behalf of lesbian and gay rights.

For example, the carer of a disabled person is protected against disability discrimination and harassment because of their association with a disabled person.

Combined discrimination

Combined discrimination was added to the Equality Act in response to strong and persistent lobbying by equality organisations.

Combined discrimination occurs when, because of a combination of two protected characteristics, a person is treated less favourably than others whose circumstances are the same but who do not share both characteristics.

For example, a Muslim man is refused a job for which he is suitably qualified. He knows that that company employs Muslim women so he has not been discriminated against because of his religion, and the company employs non-Muslim men so he has not been discriminated against because of his sex. He could claim discrimination because of the combination of religion and sex.

Protection against age discrimination

The new protection against age discrimination in areas other than employment and higher education, will apply only to ages 18 and above. This will not come into effect before 2012 and might be begun in stages, with protection against discrimination in public services such as health coming before private sector services such as insurance.

In both employment and services it will continue to be possible to justify different treatment for people of different ages, and it is likely that regulations will permit a range of benefits and concessions for older people.

Discrimination arising from disability

Discrimination arising from disability is intended to protect disabled people from unfavourable treatment because of something that arises as a consequence of their disability, which the employer or service provider knows or should have known. If the treatment can be justified as a proportionate means of achieving a legitimate aim, then it will not be unlawful.

For example, a disabled man is refused service and asked to leave a restaurant because he is slurring his words as a result of having cerebral palsy. The disabled man has been treated unfavourably because of a consequence of his disability.

Pregnancy and maternity

The Equality Act creates separate protection against discrimination for a woman because of pregnancy and maternity.

An employer must not treat a woman unfavourably because of pregnancy or illness associated with her pregnancy or because she is on statutory maternity leave. A public or private organisation providing services or carrying out public functions, must not treat a woman unfavourably because of her pregnancy or, in the 26 weeks of giving birth, because she has given birth including because she is breastfeeding. After the first 26 weeks a woman who is treated less favourably because she is breast feeding can claim direct sex discrimination. A man cannot claim sex discrimination when he is not given the same special treatment that is given to a woman in connection with pregnancy or maternity.

The Act also prohibits schools from discriminating against a girl because she is pregnant or a new mother.

What's new: positive action

The Act's new approach to positive action recognises that some equality groups are disadvantaged in some areas of life as a consequence of past or current discrimination and exclusion. The Act enables public, voluntary and private sector employers and providers of services to take steps to help particular groups overcome disadvantage, meet needs that are different from the needs of other groups or increase participation. Service providers include public authorities, schools and colleges, housing providers and associations.

Therefore the Act makes it lawful to take positive action measures that involve different treatment of different equality groups which would otherwise be unlawful.

However for positive action measures to be considered to be lawful three conditions must be satisfied:

- a) the employer or service provider must reasonably think that the group in question suffers a disadvantage, has different needs, or has disproportionately low level of participation
- b) the employer or service provider takes action with the aim of enabling or encouraging the group to overcome or minimise their disadvantage, meeting their needs, or enabling or encouraging participation, and
- c) the action is a proportionate means of achieving that aim - that is, that the action is both appropriate and necessary to achieve the aim.

Action that involves different treatment that does not meet all three conditions is likely to be unlawful.

For example, a voluntary organisation runs an early year's project. They are aware that although many Bangladeshi families live nearby very few Bangladeshi families bring their children to the project. The organisation considers possible action:

- Placing notices advertising the project in prominent places and on local schools' notice boards. Such action would always be lawful.
- Holding a special open day for Bangladeshi families to be publicised in all relevant languages and in different media. While this step involves more favourable treatment of one group, it is a one-off event so that the disadvantage experienced by other groups is likely to be outweighed by increased Bangladeshi participation.
- Giving Bangladeshi families a 15% introductory discount on fees. While this could also encourage increased Bangladeshi participation, the difference in treatment between Bangladeshis and other groups with similar financial circumstances is more significant. Therefore this action may not be proportionate and could be considered unlawful. Also there are less discriminatory ways to achieve their aim.

What's new: Employment

The Act makes it unlawful for an employer to ask job applicants questions about disability or health before making a job offer except in specified circumstances. Specified circumstances include to establish whether the person can carry out the job with reasonable adjustments, to take positive action or for diversity monitoring.

The Act makes minor progress towards tackling the gender pay gap by increasing the transparency of women's and men's pay. Public sector employers must report on the median pay of women and men. Private and voluntary sector employers are encouraged to do so voluntarily (and may, in 2013, have a statutory duty to do so).

The Act permits an employer or other person to treat a person from a disadvantaged or under-represented equality group more favourably in recruitment or promotion than a person not from that group with the aim of overcoming the disadvantage or increasing the representation of that group, but only if:

- that person is as qualified as the person not from that group
- the employer does not have a policy of always favouring people from the disadvantaged group
- treating that person more favourably is a proportionate means of achieving that aim.

Employment tribunals, if they uphold a complaint of discrimination, will be able to make a recommendation that the employer take certain action to avoid future breaches of the Act that would benefit not only the complainant but the workforce as a whole.

Exceptions to the prohibition of discrimination

The existing legislation contains a large number of exceptions that relate to particular characteristics. The Equality Act extends some existing exceptions to apply to all characteristics, modifies or merely restates other exceptions. The following are exceptions relevant to the work of third sector organisations:

- a) Separate services or single-sex services for men and women. Services are permitted where this can be shown to be the most effective way of providing those services or, in the case of single-sex services; the service is needed by one sex only. Only in very limited circumstances will it be lawful to exclude trans people.
- b) If an organisation normally provides services for one equality group only, it is lawful to continue to do so.

- c) The Act disallows discrimination by an association with 25 or more members that applies some form of selection of its members. A club or association may restrict their membership to one equality group only but cannot restrict membership to a group defined by colour. Under the Act an association could be only for retired women or only for retired Afro-Caribbean women, but it could not be an association for retired black women.
- d) A charity may provide benefits to one equality group, other than a group defined by colour, but only if this is within its charitable instrument and is:
- a proportionate means of achieving a legitimate aim or
 - for the purpose of preventing or compensating for a disadvantage linked to that equality group.

For example, a charity whose constitution states that it supports children of African ethnicity to develop their musical abilities is likely to meet the first test; an aim to increase the participation in the field of music for people of African ethnicity is lawful, non-discriminatory and objective, and supporting African children to develop their abilities is a proportionate way of achieving that aim.

A charity whose constitution specifies that it will benefit women victims of domestic violence or people with particular disabilities, as these are groups acknowledged to suffer disadvantage, providing any form of benefits to such groups is likely to meet the second test.

In contrast, a charity established to support the education of the sons of Oxford graduates is unlikely to meet either test and may need to consider amending its objects to enable it to provide benefits to both the sons and the daughters of Oxford graduates.

- e) Religion or belief organisations, other than those whose main purpose is commercial, may, subject to specified conditions, restrict who can be a member or who can participate in its activities based on a person's religion or belief or their sexual orientation. It is never lawful to impose restrictions based on sexual orientation where the religion or belief organisation is carrying out a contract with a public authority.
- f) In recruitment for a job, giving work to a contract worker or appointment to a public office, it will be lawful to require a person to have a particular protected characteristic if, having regard to the nature or the context of the work:
- to have that characteristic is an required to do that work, and
 - applying that requirement is appropriate and necessary.

For example, a centre supporting victims of rape could satisfy these conditions if they require that the post of counsellor is filled by a woman; on the other hand, as it is unlikely that these two conditions could be satisfied for the post of bookkeeper, that particular job could not be reserved for a woman.

What should third sector organisations do to prepare for the Equality Act?

Look inwards

It is important that your organisation considers reflects on its own policies and practice in preparation for the Equality Act. The types of actions you can take now are:

- introduce your staff and your management board to the new provisions
- bring your equality policy up to date to include at least all of the protected characteristics covered in the Equality Act
- in relation to employment and to the services you provide, provide formal or informal training
- consider whether there are groups that are not as well represented amongst your employees or your service users than they should be and consider how you might use the positive action provisions
- check that any restriction in your constitution meets the conditions in the Act.

Look outwards

As all public authorities and other bodies carrying out public functions will be subject to the public sector equality duty covering 8 characteristics, make representations now to public authorities and others as to what you think they will need to do in relation to the different characteristics, especially characteristics that will be part of their equality duty for the first time.

Make clear what equality groups will be entitled to expect of particular public authorities with specific powers, for example local authorities, schools and colleges, primary care trusts, NHS Trusts, police authorities.

Help public bodies to understand the disadvantages, different needs and exclusion of particular groups, as there is no reason why a public authority cannot begin now to prepare for the coming into force of this important new duty.

About the National Equality Partnership

The National Equality Partnership supports the third sector to challenge inequality and promote equality and human rights. It is a three year project (2008-11) funded by Capacitybuilders under the Improving Support Programme. Our national programme covers the whole of England.

We offer training, information and one-to-one support to umbrella organisations to help them challenge disablism, homophobia, racism, sexism and other forms of discrimination and human rights abuse. All of our work promotes collaboration and partnerships, sharing expertise and encouraging long-term relationships between equalities organisations and the wider third sector.

We believe that organisations run by people with direct experience of inequality and discrimination play a unique and vital role in creating lasting solutions to inequality. At NEP we ensure that all work to address equality, diversity and human rights in the third sector is done with close involvement of equalities organisations.

Our work is closely informed by our reference group encompassing all equalities sectors as well as generalist organisations. The partnership of NEP is made up of:

- Women's Resource Centre (WRC)
- Voice4Change England
- Consortium of Lesbian, Gay, Bisexual and Transgendered Voluntary and Community Organisations
- National Association for Voluntary and Community Action (NAVCA)

Women's Resource Centre is the lead partner with core staff based at our London office.

