Equality Act 2010 Briefing

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;

The Equality Act received Royal Assent on 8 April 2010 and its core provisions are in force from 1 October 2010. The coalition government has indicated that the public sector equality duty will be effective from April 2011 and that the provision relating to gender pay reporting will come into force in 2013.

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
**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 the NHS & local authorities to use procurement to encourage equality more consistently.

**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.
Enabling legislation has now confirmed that whilst section 158 will come into force on 1 October 2010, section 159 is still under consideration by ministers.

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.

Key changes

- The headings of age, disability (which includes mental health and people diagnosed as clinically obese), race, religion or belief, sex, sexual orientation, gender reassignment (people who are having or who have had a sex change, transvestites and transgender people), marriage and civil partnership, and pregnancy and maternity are now to be known as ‘protected characteristics’.

- There are now seven different types of discrimination:
  - **Direct discrimination**: discrimination because of a protected characteristic.
  - **Associative discrimination**: direct discrimination against someone because they are associated with another person with a protected characteristic. (This includes carers of disabled people and elderly relatives, who can claim they were treated unfairly because of duties that had to carry out at home relating to their care work. It also covers discrimination against someone because, for example, their partner is from another country.)
  - **Indirect discrimination**: when you have a rule or policy that applies to everyone but disadvantages a person with a protected characteristic.
  - **Harassment**: behaviour deemed offensive by the recipient. Employees can claim they find something offensive even when it's not directed at them.
  - **Harassment by a third party**: employers are potentially liable for the harassment of staff or customers by people they don't directly employ, such as a contractor.
- **Victimisation**: discrimination against someone because they made or supported a complaint under Equality Act legislation.
- **Discrimination by perception**: direct discrimination against someone because others think they have a protected characteristic (even if they don't).

- **You can no longer ask a prospective employee about their health before offering them work**, unless you can prove you're doing so to check whether the employee can carry out an essential task (such as heavy lifting for a removals company) or to monitor diversity. You can screen health once you've made a job offer - but then of course you're opening a whole new can of worms if you rescind your job offer on the grounds of a disability, as you are then liable to be taken to tribunal too. 'Health' means physical disabilities and mental health problems. This also means you can't ask how much time an employee has taken off work in their previous jobs in an interview.
- **You can't treat someone unfavourably because of something connected to a disability**. The standard example going round here is spelling mistakes because of dyslexia.
- **Disabled people** can now claim a particular rule or requirement disadvantages people with a certain disability.
- You can't discriminate against someone who is or has changed their gender (the 'gender reassignment' protected characteristic) - for example, if they take time off work for the process.
- **Mothers are allowed to breastfeed in public** (on premises) - they can't be asked to go to a more private place.
- **Age** is still the only protected characteristic by which you can justify direct discrimination, because you can argue that treating someone differently because of their age is allowed as long as it means you're doing it to meet a legitimate aim. You can also still have a default retirement age of 65 (unless/until the retirement age legislation changes, which it may do in the coming years).