

## The Equality Act 2010: employment implications for the NHS

The Equality Act 2010 came into effect from 1 October 2010. It will, for the first time, give the UK a single Act of Parliament, requiring equal treatment in access to employment as well as private and public services, regardless of age, disability, gender reassignment, marriage or civil partnership, maternity or pregnancy, race, religion or belief, sex and sexual orientation.

The Act comes with particular implications for employers and the NHS. This *Briefing* aims to give the latest position and understanding about the Equality Act from a human resources perspective. We will update the *Briefing* as new information, guidance and regulations become available.

**“The Government believes that there are many barriers to social mobility and equal opportunities in Britain today, with too many children held back because of their social background, and too many people of all ages held back because of their gender, race, religion or sexuality. We need concerted government action to tear down these barriers and help to build a fairer society.”**

*The Coalition: our programme for government. Fairness, freedom, responsibility, May 2010.*

The Equality Act aims to simplify the law by bringing together several pieces of anti-discrimination legislation. It replaces the following employment legislation:

- Equal Pay Act 1970
- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Employment Equality (Religion or Belief) Regulations 2003

- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Age) Regulations 2006
- Equality Act 2006, Part 2
- Equality Act (Sexual Orientation) Regulations 2007.

The Coalition Government has stated its intention to make sure that equality and fairness are at the centre of its overall approach and the Equality Act is a key means of achieving this.

## Timetable for implementation

On 1 October 2010 the following came into effect:

- The basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions.
- Changing the definition of gender reassignment, by removing the requirement for medical supervision.
- Levelling up protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic, so providing new protection for people like carers.
- Clearer protection for breastfeeding mothers.
- Applying the European definition of indirect discrimination to all protected characteristics.
- Extending protection from indirect discrimination to disability.
- Introducing a new concept of “discrimination arising from disability”, to replace protection under previous legislation lost as a result of a legal judgement.
- Applying the detriment model to victimisation protection (aligning with the approach in employment law).
- Harmonising the thresholds for the duty to make reasonable adjustments for disabled people.
- Extending protection from third party harassment to all protected characteristics.
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs, by restricting the circumstances in which employers can ask job applicants questions about disability or health.
- Allowing hypothetical comparators for direct gender pay discrimination.
- Making pay secrecy clauses unenforceable.
- Extending protection in private clubs to sex, religion or belief, pregnancy and maternity, and gender reassignment.
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce.
- Harmonising provisions allowing voluntary positive action.

The public sector Equality Duty will come into effect from April 2011. The service provisions relating to age discrimination will be phased in over a period of time from 2012 (not yet decided).

The employment law implications of the new Act are being considered by the NHS Staff Council, and any necessary changes will be reflected in the national terms and conditions handbook.

## Concepts and definitions used in the Equality Act

The Act changes and refines certain concepts and definitions:

**Association discrimination** means that you cannot directly discriminate against someone because they are associated with another person who possesses a protected characteristic. For example, you cannot refuse to employ someone because they have to care for an elderly relative or a disabled child. You should review your managing absence, flexible working, harassment and bullying and other appropriate procedures and policies to ensure that this concept is adequately and accurately reflected.

**Perception discrimination** means that you cannot directly discriminate against someone because others think that they possess a particular protected characteristic, even if the person does not actually possess that characteristic. For example, you cannot refuse to recruit somebody because you think they are Muslim (whether they are or not) or refuse to allocate a job to a person purely because you think they don't look old enough.

**Third party harassment** means that employers are potentially liable for harassment of their employees by people (third parties) who are not employees of their organisation, such as patients. You will only be liable when:

- harassment has occurred on at least two previous occasions
- you are aware that it has taken place, and have not taken reasonable steps to prevent it from happening again.

The Act changes the definitions of some terms:

**Direct discrimination** occurs when someone is treated less favourably than another person because of a protected characteristic they have or are thought to have (see 'Perception discrimination'), or because they associate with someone who has a protected characteristic (see 'Association discrimination').

**Harassment** is "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, humiliating or offensive environment for that individual". Employees are also protected from harassment because of perception and association.

**Victimisation** occurs when an employee is treated badly because they have made or supported a complaint or

raised a grievance under the Equality Act, or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint.

**Indirect discrimination** can occur when you have a condition, rule, policy or practice that applies to everyone but which particularly disadvantages people who share a protected characteristic. Indirect discrimination can be justified if you can show that your actions were a proportionate means of achieving a legitimate aim.

## Remaining provisions

The Government is considering several aspects of the Act, including:

- dual discrimination (which will allow someone to make a claim to an employment tribunal on the basis of two protected characteristics)
- gender pay gap information in respect of the private sector
- socio-economic duty on public authorities (which is the proposal that the new public sector Equality Duty includes a requirement on public bodies to take into account the impact of their strategies in terms of the socio-economic status of their employees)
- positive action in recruitment and promotion (in terms of extending the existing positive action provisions).

Ministers are considering how to implement these remaining provisions in the best way for business and for others with rights and responsibilities under the Act.

## Protected characteristics

The Act covers the same groups that were protected by existing equality legislation, but they are now referred to as 'protected characteristics'. These are:

- age
- disability
- gender reassignment
- marriage / civil partnership
- pregnancy / maternity
- race
- religion or belief
- sex
- sexual orientation.

The Act also extends protection to some protected characteristics which were not previously covered by legislation. Figure 1, produced by ACAS, gives a summary of the changes.

The existing duties for disability, gender and race remain in place until April 2011. It is essential that organisations continue to fulfil their commitments set out in their disability, gender and race equality schemes.

### Age

The Equality Act protects

people from discrimination in employment (aged 18 plus), but it is the only protected characteristic that will allow employers to justify direct discrimination. You can discriminate between, or in favour of, different age groups if you can demonstrate that it is a proportionate means of meeting a legitimate means.

Employers will need to review all job descriptions and person profiles to ensure that they do not contain any criteria that could directly or indirectly discriminate against someone, such as, a requirement to have a certain number of years' experience. You should also ensure that you are collecting and monitoring age-related data in respect of relevant policies and practices (such as recruitment, training, promotion and bullying and harassment) in order to pick up any patterns or trends.

Age is included under the public sector Equality Duty. From April 2011, employers will need to be proactive in making sure that they meet those requirements in respect of age. NHS Employers has a variety of [tools, checklists and guidance](#) relating to the ageing workforce which should help NHS organisations in this regard.

### Disability

Of all the protected characteristics, the law around disability has changed the most. The Act includes new provisions protecting people from both

direct and indirect discrimination arising from disability (unless these can be shown to be a legitimate means of achieving a legitimate aim). There are also significant changes about [what employers can ask](#) about a candidate's health before offering them work.

### Gender reassignment

The Act contains a new definition of gender reassignment which is much broader in that it does not require a person to be under medical supervision in order to be protected.

### Race

For the purposes of the Act, race includes colour, nationality and ethnic or national origins. A racial group can be made up of two or more different racial groups (for example, Black Britons). There are few changes in the Act in relation to race.

### Religion or belief

The Equality Act protects employees and jobseekers from discrimination in relation to their religion or belief. For the purposes of the Act, a religion must have a clear structure and belief system. A belief means any religious or philosophical belief or lack of belief. The Act also protects employees or jobseekers with no religious belief. Humanism is a protected philosophical belief but political beliefs would not be protected.

Some NHS organisations have found this area difficult to monitor. To fully carry out their

responsibilities under the public sector Equality Duty and robustly assess the impact of policies and services, they must be able to collect, collate and report data on the religion or belief of both staff and patients on a regular and systematic basis. See NHS Employers' [Briefing paper](#) on monitoring for more information.

**Sex**

There are few changes in respect of sex. The key area of focus is equal pay, with a new Code of Practice now in place. NHS organisations must make sure that they are carrying out regular pay audits and assessing whether there are any significant gender pay gaps which they need to address. There

is also a mandatory reporting requirement on the gender pay gap which organisations will need to comply with. NHS Employers' website includes more information about [equal pay](#).

**Sexual orientation**

The Equality Act protects lesbian, gay, bisexual and heterosexual

Figure 1. Equality Act 2010: what's new & what's changed: at a glance

	Age	Disability	Gender Reassignment	Race	Religion or Belief	Sex	Sexual Orientation	Marriage & Civil Partnership	Pregnancy & Maternity
<b>Direct discrimination</b> Someone is treated less favourably than another person because of a protected characteristic (PC)	Existing	Existing	Existing	Existing	Existing	Existing	Existing	Existing	Existing
<b>Associative discrimination</b> Direct discrimination against someone because they associate with another person who possesses a PC	Existing	New	New	Existing	Existing	New	Existing	Existing	Existing
<b>Discrimination by perception</b> Direct discrimination against someone because others think they possess a particular PC	Existing	New	New	Existing	Existing	New	Existing	Existing	Existing
<b>Indirect discrimination</b> Can occur when you have a rule or policy that applies to everyone but disadvantages a particular PC	Existing	New	New	Existing	Existing	Existing	Existing	Existing	Existing
<b>Harassment</b> Employees can now complain of behaviour they find offensive even if it is not directed at them	Changes	Changes	Changes	Changes	Changes	Existing	Changes	Existing	Existing
<b>Harassment by a third party</b> Employers are potentially liable for harassment of their staff by people they don't employ	New	New	New	New	New	Existing	New	Existing	Existing
<b>Victimisation</b> Someone is treated badly because they have made/supported a complaint or grievance under the Act	Changes	Changes	Changes	Changes	Changes	Changes	Changes	Changes	Changes

Source: ACAS

employees from discrimination, harassment and victimisation. This is another area in which organisations need good quality staff and patient information in order to fulfil their responsibilities under the public sector Equality Duty. You should review your current mechanisms for collecting, collating and reporting data on the sexual orientation of both staff and patients through to your board.

### Marriage and civil partnership

The Act protects employees who are married or in a civil partnership from discrimination. Single people are not protected.

### Pregnancy and maternity

Women are protected from discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and any statutory maternity leave to which she is entitled. Employers must not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment, and should ensure that there are appropriate mechanisms for separately recording such illnesses.

### The public sector Equality Duty

The Government Equalities Office is consulting on the public sector Equality Duty. The Duty will replace the three separate duties that require public bodies to take into account gender, race and disability equality both as employers and when making policy decisions and delivering

services. The duty simplifies this requirement and also extends it to fully cover age, religion and belief, sexual orientation and gender reassignment.

### Main draft proposals

A general duty upon public bodies:

- to eliminate unlawful discrimination, harassment and victimisation
- to advance equality of opportunity between different groups
- to foster good relations between different groups.

Table 1 is a summary of these duties and how they apply to each protected characteristic.

Specific duties are underpinned by the concept of transparency. Transparency requires public bodies to be open about the information on which they base their decisions, about what they are seeking to achieve and about their results. Under the specific duties, public bodies will be required to publish a range of equality data relating to both their workforce and to the services they provide, including:

- annual figures on the gender pay gap, the proportion of staff from ethnic minority communities and the distribution of disabled employees throughout an organisation's structure
- details of how the organisation

has engaged with people in fulfilling the aims of the duty

- equality outcome objectives (as part of the normal business planning process) which are specific, relevant, measurable and which will allow members of the public to make meaningful judgements about the extent to which the organisation is achieving what it set out to achieve.

### Conclusion

The Act will be implemented in the midst of major organisational and cultural change within the NHS. It is essential that employers ensure that these changes are properly assessed for their impact on equality and that any new structures, systems or processes incorporate the requirements of the Equality Act, for example, workforce planning, commissioning and the establishment of any new GP consortia (who will be required to comply with the public sector Equality Duty as well as the broader provisions of the Equality Act).

While the Equality Act is about less central prescription and more flexibility for employers in terms of how they meet their general and specific duties, there is a strong element and emphasis on public accountability which should not be underestimated. The greater

openness and transparency that the Act requires and the associated guidance means that NHS organisations could be held to account for their actions (or lack of them) in respect of equality and diversity at any time. You must have robust and reliable

systems and processes in place which embed equality and diversity. You must also be able to quickly and easily demonstrate what you are doing to eliminate unlawful discrimination, harassment and victimisation and advance equality of opportunity and

foster good relations between different groups.

For more information on issues covered in this *Briefing* please contact Paul Deemer, NHS Employers equality and diversity team, at [paul.deemer@nhsemployers.org](mailto:paul.deemer@nhsemployers.org)

Table 1

Characteristic	To eliminate unlawful discrimination, harassment and victimisation	To advance equality of opportunity between different groups	To foster good relations between different groups
Age	√	√	√
Disability	√	√	√
Sex	√	√	√
Race	√	√	√
Religion	√	√	√
Sexual orientation	√	√	√
Gender reassignment	√	√	√
Marriage / civil partnership	√	X	X
Pregnancy / maternity	√	√	√

### What you will need to do from October 2010

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- Begin planning for the changes in April 2011 by briefing and training your boards, managers and staff now on the implications of the Act.
- Revise your pre-employment checking procedures in line with the [advice](#) issued by NHS Employers.
- Review your induction and training materials to ensure that they reflect all of the protected characteristics covered by the Act.
- Work with your internal communications team to plan how you will inform staff about the Act.
- Review and update all of your corporate literature and your website to ensure that they reflect both the new protected characteristics and also the additional duties under the public sector Equality Duty.
- Review and update all of your recruitment policies and materials.
- Review and update all of your induction and training policies and materials.
- Review and update all of your associated HR policies (such as managing absence, flexible working, harassment and bullying) so that they read across and complement your recruitment, induction and training policies and reflect the new protected characteristics in the Equality Act.
- Identify local and national organisations, groups and bodies that you might use as part of your consultation and involvement strategy.
- Review your internal consultation and involvement processes and mechanisms and assess the role and demand for groups working on protected characteristics, such as black and minority ethnic (BME) forums, disabled staff groups, faith forums and lesbian, gay, bisexual and transgender (LGBT) forums.
- Review your equality impact assessment processes and protocols and assess whether additional training or guidance is required to advise staff of the changes in the Act.
- Review your organisational protocols and systems for monitoring and ensure that they will provide your board with the necessary data and information for them to carry out their duties under the public sector Equality Duty.
- Take the opportunity, with the introduction of the Act, to review whether there is any scope for your organisation to consider some positive action measures to address any under representation or imbalances in the make up of your workforce.
- Initiate a clean-up of the workforce data that you hold to ensure that it is as accurate as it can be.

## Top tips

- Use the 'COUNT' principle established within local government (Count Once Use Numerous Times), for the collection of data and information.
- Alert your information technology colleagues to the Transparency Board's Public Data Principles as referred to in the public sector Equality Duty [consultation document](#).
- Think about your recruitment processes in terms of the 'applicant experience'. Put yourself in the place of someone applying for a vacancy in your organisation and imagine every possible scenario (for example, a visually impaired applicant, a lesbian, gay or bisexual applicant or an applicant from a minority community within your local area). Think about the literature that they might receive in terms of both the language and the imagery used and assess your processes in terms of whether they might represent a barrier to that person pursuing their application.
- Avoid claims being made against your organisation under this Act by fostering a culture of inclusion. Encourage managers to take the approach that everyone is included and their needs respected.
- Work with your staff side colleagues by using the monitoring data that you have to identify potential problem areas within your organisation. Also work with staff side colleagues to engage and consult with staff on how things could be improved.
- Read across from the Equality Act to other relevant legislation. In particular, refer to the white paper (*Equality and excellence: liberating the NHS*) and the reference on page 30 to the Equality Act and the proposed responsibilities of the NHS Commissioning Board. Also note the emphasis in the white paper on increasing the involvement of communities in health and then utilise this to link in with the proposed public sector Equality Duty in the Equality Act.

## Further advice and resources

The Government Equalities Office website includes useful information about the Act. Its web page [Equality Act 2010: What do I need to know?](#) contains quick start guides to help people understand the key measures.

The Equality and Human Rights Commission's website includes guidance and good practice to help you understand and use Equality Act law. There is [guidance for employers, workers, service users and service providers](#).

The Equality and Human Rights Commission's website also contains the draft Codes of Practice for [Employment, Equal Pay, Services, Public Functions and Associations](#).

The ACAS website includes [a quick start guide for employers](#) on the Equality Act.

The Care Quality Commission's website includes guidance about compliance 'Essential standards of [quality and safety](#)'

The [Business Link website](#) includes useful information on the Equality Act

The Equality Act text is available from the [Office of Public Sector Information's \(OPSI\) website](#)

## NHS Employers

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NHS Employers represents trusts in England on workforce issues and helps employers to ensure the NHS is a place where people want to work. The NHS workforce is at the heart of quality patient care and we believe that employers must drive the workforce agenda. We work with employers to reflect their views and act on their behalf in four priority areas:

- pay and negotiations
- recruitment and planning the workforce
- healthy and productive workplaces
- employment policy and practice.

NHS Employers is part of the NHS Confederation.

## Contact us

For more information on how to become involved in our work, email [getinvolved@nhsemployers.org](mailto:getinvolved@nhsemployers.org)

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