

## The Equality Act 2010: Implications for charities

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The main provisions of the Equality Act 2010 came into force on 1 October. Jane Klauber highlights some of the consequences for charities

### Harmonisation

The various prohibited grounds of discrimination under previous legislation are now drawn together into a single list of “protected characteristics” (age, disability, gender, gender reassignment, race, religion, belief, sexual orientation, marriage and civil partnership and pregnancy and maternity.) There will now be a more consistent test for discrimination in all of these areas.

The scope for discrimination claims will increase. The new definition of direct discrimination now covers discrimination against an individual because they are perceived to have a protected characteristic or they are associated with someone who has a protected characteristic. This expanded definition is likely to give rise to new claims from carers. For example, claims of age discrimination may arise from employees caring for elderly relatives or those caring for disabled children.

While generally the new Act reflects current law, there are a number of important changes relating to disability discrimination.

### The duty to make reasonable adjustments

This duty remains largely unchanged but with a new subsection on provision of auxiliary aids (additional pieces of technology or equipment). Where the lack of such aids places a disabled employee at a substantial disadvantage, the employer must take reasonable steps to provide these, and where the aid required relates to the provision of information, reasonable steps must be taken to provide such information in a reasonable format.

### Pre-offer disability and health questions

Enquiries about disability or a job applicant’s health will be unlawful unless the employer can show that they are for a permitted purpose. The permissible reasons are:

- Assessment of the duty to make reasonable adjustments
- Establishing whether the applicant can carry out a function that is intrinsic to the job concerned
- Monitoring diversity
- Where there is an occupational requirement to have a particular disability
- For the purposes of taking positive action permitted under other provisions of the Act

Use of pre-offer health questions is likely to give rise to more legal challenges in the future and organisations should review their recruitment procedures without delay.

### Discrimination arising from disability

This is a new complaint which replaces the claim of disability-related discrimination under the Disability Discrimination Act 1995. It means that less favourable treatment

because of something that arises in consequence of an individual's disability will amount to discrimination unless the employer can justify their actions as a proportionate means of achieving a legitimate aim. Examples of possible consequences of a disability will include sickness absence, inability to carry out some or all duties or failures to comply with reporting or other procedures. Decisions to commence capability or disciplinary proceedings are likely to amount to less favourable treatment.

### **Pay secrecy clauses**

Any contractual provision that prohibits an employee from disclosing his or her pay will be unenforceable if the disclosure is made to establish whether differentials are based on one of the protected characteristics such as sex. Such clauses are not common in the sector but where they are found, staff may be more likely to complain about pay disparities in the confidence that disclosure of pay among colleagues is unlikely to be prohibited.

### **Harassment**

The definition has been amended to ensure consistency across all protected characteristics. Now, harassment of employees by third parties on any of the prohibited grounds can give rise to claims. The definition of harassment has also been widened: the unwanted conduct simply needs to be related to a protected characteristic and does not depend on the claimant actually possessing a protected characteristic. This would cover for example, an employee directing homophobic comments towards a colleague, without any belief that the victim is gay.

Grievance and harassment procedures need to be reviewed to ensure they focus on the nature of the comments made rather than the victim. To address the risk of harassment by third parties notices, contracts and other information should include appropriate prohibitions.

### **Memoranda and articles of association**

Charities can only restrict the provision of a benefit or service to those with a particular protected characteristic if:

- They are acting in pursuance of their charitable objects as set out in their governing document; and
- The restriction is a proportionate means of achieving a legitimate aim or for the purpose of preventing or compensating a disadvantage linked to the protected characteristic.

The complete prohibition on limiting beneficiaries on the grounds of colour remains. If a charity has such a restriction, their governing document should be read as defining the class of beneficiaries as people generally. Previously, different exemptions were available in different areas. Notably, a wider exemption was available for charities restricting the provision of a benefit to persons of a particular religion.

Charities that currently restrict benefits to members of a particular religion may be able to rely on a separate exemption. If a charity makes acceptance of a religion or belief a condition of membership and access to any benefit, facility or service, the charity may maintain this rule as long as it first imposed the restriction before 18 May 2005 and has continuously applied this rule since that date.

### **Private clubs and associations**

Associations and private clubs will for the first time be prohibited from discriminating against potential members and members because of any protected characteristic. In particular, this will mean that the duty to make reasonable adjustments will apply.

### **The future**

Some key provisions of the Act have not yet been implemented and are still being considered and have no implementation date. These include the socio-economic duty on public authorities, dual discrimination and the duty on private sector organisations with more than 250 employees to report gender pay information. It remains to be seen whether the coalition government will have the appetite to extend protection in this manner.

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