Adapting to change

Deborah Nathan explores how key provisions of the Equality Act will affect charities

The Equality Act 2010 (EA 2010) came into force on 1 October 2010, with the stated aim of harmonisation of the long list of previous Acts and regulations in this area. The Act also made some important changes that employers need to consider when recruiting and managing staff.

The new definition of discrimination now covers discrimination against an individual because they are perceived to have a protected characteristic (race, sex, disability, age, sexual orientation, marital/civil partnership status, religion or belief) or because they are associated with someone who has a protected characteristic, which will widen the scope for legal claims. EA 2010 applies to workers and employees and this will include casual and bank staff that might be used by the organisation.

Disability and health

The provision that has had the most immediate impact on employers generally has been s 60, EA 2010 which prohibits enquiries about disability and health before an offer of employment has been made. Such queries will only be lawful where the employer can show they were made for a permitted purpose:

- 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 EA 2010.

Questions about sickness absence or health on an application form are now unlawful unless they can be justified for one of these reasons. This new provision also received some publicity at the time of its introduction, ensuring that job applicants were well aware of it.

Discrimination arising from disability was a new claim under EA 2010. Now, 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 such consequences will include sickness absence, inability to carry out some or all duties or failures to comply with reporting or other procedures. As a result, decisions to commence capability or disciplinary proceedings on the basis of such consequences may amount to less favourable treatment on the grounds of disability in some cases. Employers must be able to show that the steps they wish to take are a proportionate means of achieving a legitimate aim to successfully defend against a discrimination claim.

Harassment by third parties

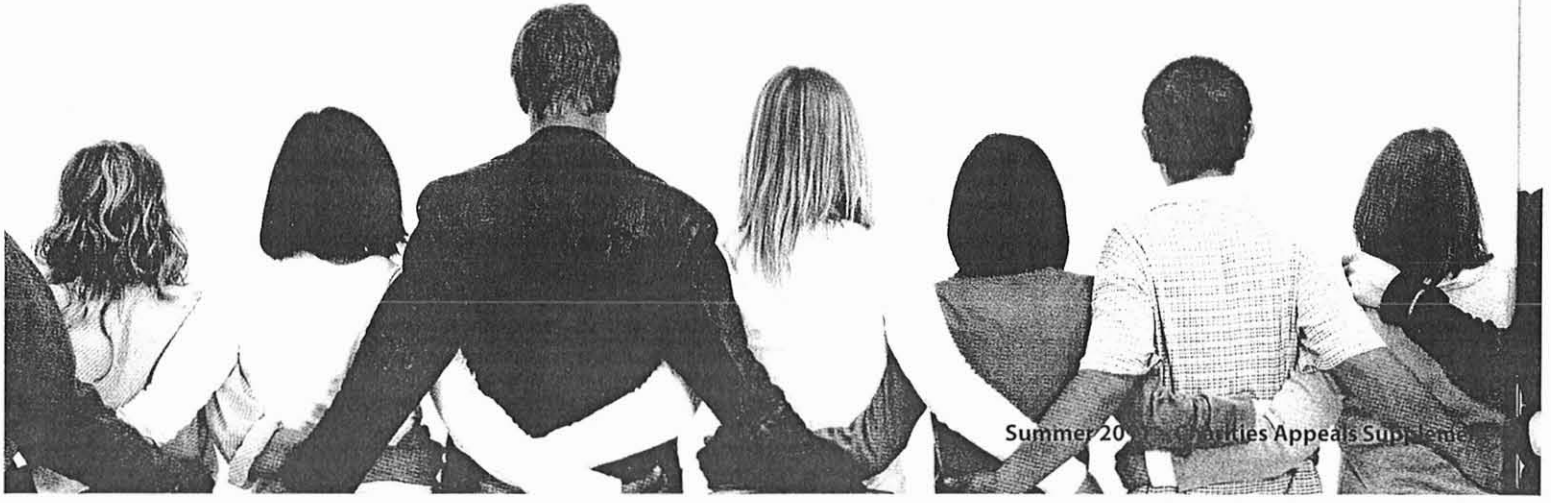
Harassment of employees by third parties because of any of the protected characteristics (listed above) can give rise to an employment claim so employers should ensure that grievances about harassment from clients, contractors or other third parties are handled carefully. In its Plan for Growth, the government has proposed the repeal of this provision as part of a parcel of reforms designed to reduce regulatory burdens.

The definition of harassment has also been widened so that there is no requirement that the claimant actually possess the protected characteristic in question. For example, an employee may make direct homophobic comments towards a colleague, without any belief that the victim is gay. Such comments would still amount to harassment related to sexual orientation. Organisations whose principal work comes from service contracts will need to treat complaints about the conduct of clients, funders or local government employees with particular care.

Compromise agreements

Section 147, EA 2010 was intended to replicate s 203 of the Employment Rights Acts 1996 (and other similar provisions in other legislation) and provide the same option for use of a compromise agreement to waive discrimination claims under EA 2010 in the same way. However, there is some ambiguity in the way s 147 has been drafted and some argue that the criteria set for the independent legal advice that must be given to the employee means that no one can carry out this role, effectively preventing employees from compromising any claims they may have under EA 2010.

The government does not accept this view and believes that s 147 simply replicates the old law and compromise agreements can be used as before. Charities are generally continuing to use compromise agreements as before and incorporating additional safeguards in the form of clawback provisions and warranties.



Age discrimination

EA 2010 originally preserved a specific exemption for retirement. Employers who followed the statutory retirement procedure correctly could retire employees over the age of 65 without the risk of challenges on the grounds of age discrimination or unfair dismissal. From 6 April, the default retirement age of 65 and the statutory retirement procedure was abolished.

This change is likely to have a significant impact on charities as most organisations in the voluntary and charitable sector have a retirement age. Charities should review this issue as a matter of urgency and for the vast majority of organisations, existing contractual retirement ages should be abandoned as it is unlikely that it will be justified as a proportionate means of achieving a legitimate aim, which is the new statutory test that must be met to justify a retirement age.

The government is now considering whether the prohibition on age discrimination in the provision of goods and services in EA 2010 should be brought into force and is currently consulting on the exceptions that should be included. The consultation closes on 25 May 2011.

The charities exemption

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 compensates for 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. In addition to this provision, specific exemptions in certain areas have been maintained.

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.

> For the vast majority of organisations, existing contractual retirement ages should be abandoned

Fundraising events that are restricted to one sex only can rely on a specific exemption under EA 2010. This allows charities to restrict events that promote or support the charity to one sex.

Voluntary positive action

One of the most publicised elements of EA 2010 only came into force on 6 April 2011. This provision gives employers faced with two equally qualified candidates the option of favouring a candidate who has a protected characteristic and is underrepresented in that particular workplace or profession.

There has been some criticism of the drafting and the ambiguity around the meaning of "equally qualified". While some employers may shy away from the use of positive action, fearful of the risk of a discrimination claim if they fail to meet the right criteria, many charities, which are often keen to promote diversity and work with clients from a variety of backgrounds, will be interested to explore this option.

Deborah Nathan is a solicitor at Russell Cooke LLP: Deborah.Nathan@russell-cooke.co.uk