



Better Health, Better Lives

Staff Briefing - the Equality Act 2010

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Introduction

The Equality Act 2010 brings together the key provisions of the raft of anti-discrimination legislation, introduced between 1970 and 2008, including the public equality duties (over 100 pieces of legislation!). The Act recognises and in general, gives equal protection to the different characteristics that define our identities and requires anyone carrying out public functions to build the advancement of equality into all of those functions.

The Equality Act 2010 uses the term “protected characteristics” to describe the characteristics we previously referred to as ‘equality strands’.

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*

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2. Key changes

Protection against discrimination

For most of the nine protected characteristics the Act prohibits direct discrimination, indirect discrimination, combined discrimination, harassment and victimisation. This protection applies to all aspects of employment and the provision of goods, facilities and services.

For **disability** the Act also prohibits discrimination arising from disability and failure to make reasonable adjustments.

Association and perception

Protection against direct discrimination or harassment by association or perception now extends across all the protected characteristics. This has particular implications with respect to disability (e.g. primary carers of disabled dependants).

Combined discrimination

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.

This has particular implications to health and social services. Our response to this should be a considered approach to equality impact assessment of services.

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.

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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.

Harassment by third parties

Currently the prohibition on harassment by third parties such as customers applies only to sex discrimination. The Act extends this to the other protected characteristics (other than pregnancy/maternity and marriage/civil partnership). So if a service user harasses an employee on the grounds of, for example their race, the employer would be liable if it fails to take reasonable steps to prevent the harassment. However, before liability arises, the employer must know that the employee has been harassed in the course of employment on at least two other occasions – though not necessarily by the same customer.

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.

Pre-employment Health Questions

This new provision means that employers cannot ask candidate health questions until they have received a conditional offer of employment or been selected as the successful candidate.

Health questions are permitted in assessing whether an employee is able to carry out a function intrinsic to the job (this must be objectively justified), in monitoring for diversity and in providing reasonable adjustments at interview.

Positive action

The Act enables NHS Rotherham as an employer and commissioner to take steps to help particular groups overcome disadvantage, meet needs that are different from the needs of other groups or increase participation,

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:

1. We must reasonably think that the group in question suffers a disadvantage, has different needs, or has disproportionately low level of participation
2. We take 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 the action is a proportionate means of achieving that aim - that is, that the action is both appropriate and necessary to achieve the aim.
3. Action that involves different treatment that does not meet all three conditions is likely to be unlawful.

Public Sector Equality Duty General Duties

The Public Sector Equality Duty applies to all the protected characteristics outlined in 1 above, with the exception of marriage and civil partnership.

The general equality duty requires public authorities, in the exercise of their functions, to have due regards 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 duty applies NHS Rotherham as a PCT listed in Schedule 19 of the Act. In terms of the new commissioning arrangements, it is significant that these duties will apply to Clinical Commissioning Groups and the national Commissioning Boards. In terms of Cluster development, NHS South Yorkshire & Bassetlaw Cluster will have a key role to play in ensuring that NHS Rotherham meets its statutory duties.

Specific Duties

The specific duties to deliver against the general public duties of promoting

equality, eliminating discrimination and harassment and promoting good relationships have been set out in the Equality Act 2010 (Statutory Duties) Regulations 2011. They include requirements to:

- *Publish information to show compliance with duties and inform objectives by 31st January 2012.*
- *Set equality objectives by April 2012. Before setting objectives, NHS Rotherham will need to gather evidence through consultation and involvement of people from equality groups. However, there will be no requirement on NHS Rotherham to set objectives for each of the protected characteristics.*
- *Show how we 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. This is also referred to as ‘paying due regard to equality’ and is particularly important to evidence in any changes that impact on staff and or service users.*

The primary requirement 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 - NHS Rotherham must review all of our functions to identify and prioritise those that are most relevant to advancing equality. NHS Rotherham will also need to evidence how we have assessed the equality impact of decisions, policies adopted or practices changed, and make appropriate, reasonable and proportionate changes, based on consultation with those that will be affected by these decisions.

The emphasis in the specific duties is on outcomes rather than process.

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Timeline

The timetable for commencement of the provisions of the Equality Act is:

1. **October 2010**
 - main provisions.
2. **April 2011**
 - public sector equality duty
3. **31st January 2012**
 - publishing equality information to meet Public Sector Equality Duties.
4. **April 2012**
 - Public sector organisations to publish equality objectives
5. **April 2012**
 - ban on age discrimination in provision of services and public functions.
6. **April 2013**
 - private and third sector gender pay reporting and political parties (tba).

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Further Guidance

More advice and guidance on the Equality Act is available from:

- *The Equality and Human Rights Commission Codes of Practice (available on the EHRC website or through the Equality & Diversity Project Officer).*
- *Acas Employer Guides*
- *The Government Equalities Office*
- *Various reference sources available through the Equality & Diversity Project Officer.*

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References

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3. A review of pre-employment health
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5. National Equality Partnership Equality
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