

United Kingdom: The Equality Act 2010

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Much of this Act will come into force across the United Kingdom on 1 October 2010. It will change, consolidate, innovate and extend the currently existing discrimination legislation and case law. The Act was passed through Parliament in the final days of the outgoing Labour Government so that its implementation is now the responsibility of the new Coalition government.

UK law on discrimination is a blend of European law and UK national law.

Groups currently protected – on grounds of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage or civil partnership, pregnancy and maternity – will continue to be so and sometimes with extended protection, but other groups will also become protected for the first time.

In this short article, we will refer to the protected characteristics of a person as “PC”. We will seek to give a short summary of the key changes brought about by this legislation primarily from an employer point of view. Those readers who are more concerned from the point of view of being a supplier of goods or services to the public will still, we hope, pick up some useful pointers to help them protect their business and their brand reputation.

Just before we look at the extension of the ambit of the discrimination laws, we will have a brief look at the alterations made to the PC types, since some of those have changed:

- PC areas of no change:
 - *Age*: noting especially that an employer default retirement age of 65 still applies
 - *Marriage and civil partnership*
 - *Pregnancy and maternity*
 - *Race and nationality*
 - *Religion of belief*
 - *Sexual orientation*
- PC areas with changes:
 - *Disability*: Case law had reduced what was perceived to be the scope of protection¹ but this has been restored. The Act now ensures that it protects problems connected or arising from the disability and not just the disability per se. Therefore, an employee who makes spelling mistakes arising from dyslexia is restored to the scope of protection. Further, it is not now generally permissible to submit, say, health questionnaires, to





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employee candidates prior to the making of a job offer unless, for instance, the object of the question is to make reasonable adjustment to the selection process, or to establish suitability for intrinsic or essential job functions.

- *Gender reassignment*: It is discrimination to treat transsexuals less favourably as a result of time off work when proposing, undertaking or having undergone, gender reassignment. Note that the protection is given to transsexuals and not to transgender people (such as cross dressers). The requirement for the transsexual to be under medical supervision is removed.

Direct Discrimination

This occurs where a person is less favourably treated than another, directly because of their protected characteristic (PC). There is very little change here. In passing, the reader might note that of all the PC's, the only one where direct discrimination can (not "will be") be justified is that of treatment by virtue of age. Justification requires the employer to show that there is proof of using a proportionate means to achieve a legitimate aim.

Indirect Discrimination

Previously applied to all PC's save disability and gender reassignment, but now extended to cover these latter two also.

Indirect discrimination continues to be the adoption of a condition, rule, policy or practice which applies to all in a group but has the consequence that it particularly disadvantages a person who has a particular protected characteristic and which operates to their detriment.

It can be justified if it is a "*proportionate means of achieving a legitimate aim.*" That remains unchanged.

Associative Discrimination

The coverage of this type of discrimination has been extended. It currently applies to race, religion, belief and sexual orientation. It is extended to cover age, disability, gender reassignment and sex.

Therefore, an example is this²: June is looking forward to promised promotion. She tells her boss that her mother has had a stroke. The boss withdraws the promotion because

it is felt she will not be able to concentrate on her new job if she has to look after her mother. This is discrimination against June by virtue of association with her mother.

Perceptive Discrimination

The current and extended scope is the same as for Associative Discrimination above. Take this problem: Jim is a 45 year old lawyer. Many people assume he is in his mid 20's. He looks 25. He is not allowed to attend the ACC Annual Meeting because his crusty Managing Partner thinks he is too young. Jim has been discriminated against because of a perception of a Protected Characteristic (age).

Harassment

This is "*unwarranted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual*". The principle is well settled for sex cases, but is now extended to all PC's save for civil partnership, marriage, pregnancy or maternity, although much adverse behaviour so directed might well be caught out under a different PC such as sex or sexual orientation. Also, such adverse behaviours might now also be caught by the rules against associative or perceptive discrimination.

Therefore, take a disabled employee Bob who is constantly being humiliated by his boss over his disability. Bob shares an office with Jim. Jim is offended and humiliated by the boss' behaviour. That will be harassment for Jim as well as Bob.

Third Party Harassment

These principles we have seen will easily be identified concerning the behaviour of the employer or its fellow employees for whom the employer is liable. So far as liability for fellow employee behaviour is concerned the employer has a defence if it can show that it took all reasonable steps to prevent the behaviour complained of (for instance, by way of effective policy, communication, training, discipline and so on).

In addition, the Act now extends the scope of employer liability to include the behaviour of third parties such as customers or clients who are not employees. This new extension now covers all PC's save marriage and civil partnership, pregnancy and maternity.



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To establish employer liability, it must be shown:

- the harassment has occurred on at least 2 previous occasions
- the employer was aware or made aware of those occurrences
- the employer failed to take reasonable steps to prevent its recurrence

The defence is not the same as for the defence in respect of fellow employees.

Victimisation

This occurs where an employee is treated to their detriment because they have (or are suspected to have) made or supported a complaint or grievance within the scope of the Act (in respect of any PC). This protection does not apply where they have maliciously made or supported an untrue complaint.

General

The Act permits positive action to be taken to reduce disproportionate representation of certain groups in the workforce.

Public body employers are given a specific duty to promote equality, but this provision is on hold and is yet to be implemented. Unusually, this part of the Act is out for

consultation as to methods of implementation, despite the provision having been enacted.

There are still plenty of other provisions in the Act which will not be implemented on 1st October and the date for which is still to be announced:

- dual discrimination
- gender pay gap information (the duty of employers to publish individual pay and remuneration details – this is one of the most controversial parts of the legislation)
- diversity reporting by political parties
- positive action in recruitment and promotion
- prohibition on age discrimination in services and public functions
- family property
- civil partnerships on religious premises
- specialised issues in schools, taxi services, and certain types of premises in Scotland

¹ London Borough of Newham v Malcolm [2008] IRLR 700

² We have taken our examples primarily from guidance published by ACAS (Advisory, Conciliation and Arbitration Service – a public body promoting good employment and labour relations) at acas.org.uk .