



Equality Act 2010

AFSA

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The Equality Act 2010



We will look at:

- The background to the Act
- Key provisions
- Public sector duties
- Recent case law

The Equality Act - background



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- Largest piece of anti-discrimination legislation
 - Harmonises and strengthens primary and secondary legislation
 - Applies to the provision of goods and services and public procurement, as well as employment
 - Royal Assent was **8 April 2010**
 - Most of the Act will come into force in **October 2010**
 - Combined discrimination (dual characteristics) and some specific public sector duties likely **April 2011**
 - Regulations on gender pay gap information – probably not until **April 2013**
 - Not clear when positive action provisions will be implemented

The Equality Act - key provisions



We will look at the following key provisions:

- a) General concepts
- b) Disability discrimination
- c) Pre-employment health questions
- d) Pregnancy and maternity
- e) Third party harassment
- f) Equal pay
- g) Tribunal recommendations

a) General concepts - harmonisation



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- Harmonisation of the law across all nine protected characteristics for simplification.
 - No change in protected characteristics:
 - Age
 - Disability
 - Gender
 - Race
 - Religion or belief
 - Sexual orientation
 - And...

a) General concepts - definitions



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- Direct discrimination - “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”
 - Covers discrimination by “**association**” and “**perception**” in all strands except marriage/civil partnership.
 - Some unexpected consequences of the wider test
 - Still some differences across some protected characteristics

a) General concepts - combined claims



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- From April 2011?
 - Direct discrimination may be brought on a “combination” of two grounds.
 - “A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.”
 - Estimated that 7.5% of existing claims would include multiple discrimination and may increase claims by 10%
 - Not applicable to marriage/civil partnership or pregnancy/maternity

b) Disability discrimination



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- Concept of indirect discrimination – re: “persons who have the same disability” - how will this be defined?
 - New concept of “reason relating to” - “A person (A) discriminates against a disabled person (B) if
 - (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.
 - A comparator will not be necessary.
 - Employer's knowledge of disability is required.
 - No change to reasonable adjustments claims

c) Pre-employment health questions



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- Employers will be unable to ask questions about health or disability before making a job offer.
 - There are a few exceptions.
 - This is not a freestanding right but will affect the burden of proof in direct discrimination cases.
 - EHRC can investigate; only EHRC can enforce
 - Questions about past levels of sick leave are likely to be unlawful.

c) Pre-employment health questions



Can ask questions necessary for:

- Arrangements for interviews
- Carrying out functions *intrinsic to the work concerned*
- Monitoring diversity
- For taking positive action (limited exception)
- Where disability is a GOR

d) Pregnancy and Maternity



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- “A person (A) discriminates against a woman if, in the protected period relating to a pregnancy of hers, A treats her unfavourably because of:
 - (a) the pregnancy,
 - (b) illness suffered by her as a result of it,
 - (c) the fact that she is on compulsory maternity leave
 - (d) the fact that she is seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.”

 - “unfavourably” rather than “less favourable” treatment

 - No comparator needed

e) Third Party Harassment



- Protection from harassment in employment
- Most protected characteristics, exceptions (s26(5))
 - Pregnancy and maternity
 - Marriage and civil partnerships
- Extended to harassment based on perception and association
- 3rd Party Harassment – e/er fails to act – occurs on
 - At least two occasions
 - Involve three incidents by different third parties
- What this means in practice / what practical steps can be taken that are ‘reasonably practicable?’

f) Equal Pay



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- The material factor defence is more clearly defined.
 - It defines when objective justification is needed
 - There is no ban on secrecy regarding pay levels, only during discussions concerning possible discrimination. Current law on victimisation is likely to cover this so is there any practical change?
 - Hypothetical comparators: Not generally – still need opposite sex comparator unless direct discrimination and equality clause doesn't “bite” or dual discrimination

g) Tribunal Recommendations



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- The Tribunal will have a power, once they have found discrimination, to make a recommendation “that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate – (a) on the complainant; (b) on any other person”.
 - Current limited power to make recommendations but rarely made. Will the wider power lead to an increase?
 - Tribunal cannot enforce, but can increase compensation if there is a failure without reasonable excuse to comply.

The Equality Act - all change?



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- Positive action in recruitment or promotion – section 159 – must be “as qualified”, not treated more favourably, and proportionate; v narrow
 - Socio- economic duty – section 1(1) – public sector bodies to have regard to inequalities outcomes when making decisions of a strategic nature in exercise of functions
 - Government considering “how to implement” the above

The Equality Act - public sector duties



We will look at:

- The single equality duty (replaces current “due regard” duties which apply to race, sex and disability) – requires equality plans
- The socio-economic duty (re: strategic functions) – requires impact assessments
- Equality Impact Assessments

Public sector single equality duty



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- One single duty for eight areas
 - Not marriage and civil partnerships
 - General duties
 - (a) Eliminate discrimination, harassment and victimisation;
 - (b) Advance equality of opportunity;
 - removing or reducing disadvantage, meeting different needs, encouraging participation in public life
 - (c) Foster good relations, tackle prejudice and promote understanding;
 - Does not create individual legal rights

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- Equality Impact Assessments
 - Demonstrate how evidence of equality impact in the design of policy and service delivery initiatives has been used and the difference that this has made.
 - Specific duties
 - Aim to be more flexible, move to an outcome focus;
 - Identifying equality objectives based on evidence, consultation and relevance;
 - No requirement to produce a 'scheme' but need to produce a plan, state objectives, report annually and review every 3 years.

Public sector single equality duty



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- Workforce data, requirement to publish annually
 - Where organisations employ more than 150 people
 - Gender pay gap
 - Ethnicity employment rates
 - Disability employment rate

 - Reporting
 - Equality issues in relation to protected characteristics

 - Consultation closes November 2010

Socio-economic duty

- How does what we are doing impact on health inequalities?
 - how policies practices and procedures impact upon the equality categories
 - if there is an adverse impact, consider alternatives to promote equality of opportunity
 - Government considering how to implement

Public Sector Duties

Equality & Diversity checklist



1. Does what we are considering engage our equality and diversity duties?
2. If so, have we done an Impact Assessment?
3. If so
 - what is the action plan?
 - has it been followed?
 - what is the evidence?



Equality in Practice – Some Important Recent Cases



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- Ladele v London Borough of Islington and Liberty (intervener) [2010] IRLR 211 (CA)
 - Macfarlane v Relate 2010 IRLR 196 (EAT)
 - Woodcock v Cumbria PCT - heard by EAT in June 2010 – awaiting judgment
 - Eweida v British Airways PLC [2010] IRLR 322 (CA)

Questions and answers

