

Briefing

The Equality Act 2010

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Briefing from the National Housing Federation

The Equality Act 2010 received Royal Assent at the very end of the last Parliament. The Act has two main aims. The first is to harmonise the law on tackling discrimination. The second is to strengthen and extend the law in a number of respects.

1.0 Executive summary

This briefing sets out the main elements in the Equality Act 2010, highlighting those which are of particular relevance to the work of housing associations and other social housing providers.

At the time of writing it is not clear whether the new Government will implement every element of the new Equality Act. While the Conservative Party generally supported the Act, it raised concerns about three aspects.

These were the new proposals on positive action, the duty to tackle socio-economic inequalities and to report on the gender pay gap. These elements are due to come into force from 2011 onwards but the new Government may decide not to implement them.

2.0 Background

The first Act designed to tackle unlawful discrimination was passed in 1944. Since then a number of Acts of Parliament have been passed, each focussing on a different aspect of discrimination, supported by a plethora of codes of practice and statutory instruments. The Government Equalities Office's publication 'A Fairer Future' (2009), described all this as a 'thicket of legislation' which the new Equality Act replaces, for example by consolidating the various definitions of unlawful discrimination into a common framework.

The Act also strengthens the law in a number of areas, including:

- extending the circumstances in which a person is protected against discrimination by allowing people to make a claim if they are directly discriminated against because of a combination of two relevant protected characteristics;
- creating a duty on listed public bodies when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to promote equality;
- allowing an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic;
- amending family property law to remove discriminatory provisions and provides additional statutory property rights for civil partners in England and Wales.

The main elements of the Act which are relevant to housing associations and other social housing providers are

- the 'Protected Characteristics'
- the definitions of unlawful discrimination
- the disability related aspects

- the provision of goods, facilities and services
- positive action and the genuine occupational requirements
- employment related matters and pay reviews
- the duties to advance equality
- tackling socio-economic inequalities and
- procurement.

3.0 The protected characteristics

The Equality Act seeks to outlaw unlawful discrimination against a person or group of people because of:

- age
- disability
- gender re-assignment
- marriage and civil partnerships
- pregnancy and maternity
- race
- religion
- sex, and
- sexual orientation.

These are known as the 'Protected Characteristics', all of which were covered to varying degrees by previous legislation. The Act strengthens the existing provisions relating to gender re-assignment. For example it will be unlawful to discriminate against a person who is in the process of changing from one gender to another as well as people who have completed the transition.

In addition, the Act recognises that unlawful discrimination can occur because of a combination of protected characteristics and so people will be able to make a claim because they are both female and disabled or black and gay, for example.

The Act also includes the power to address caste discrimination in the future, should the government consider that there is a need. The National Institute of Economic and Social Research is due to study the extent of caste discrimination in the UK and publish its findings this August. The Equality and Human Rights Commission will be producing more guidance on this in due course.

Housing associations and other social housing providers will need to review their commitments to promote equality and their related policies and procedures to ensure that all of the Protected Characteristics are covered. This includes data collection and monitoring, customer profiling and work on Equality Impact Assessments (EqIAs).

4.0 Definitions of unlawful discrimination

The Act defines unlawful discrimination in four main ways:

- Direct discrimination
- Indirect discrimination
- Harassment and

- Victimisation.

Housing Associations and other social housing providers will need to ensure that board members, staff and contractors are fully aware of the different ways in which unlawful discrimination can occur and to take the necessary steps to ensure that their policies, procedures and practices do not lead to unlawful discrimination.

- **Direct discrimination** occurs when a person is treated less favourably than others are or would be treated, and the treatment is because of a protected characteristic.

An example might be refusing to provide housing advice to someone because of the person's sexual orientation.

- **Indirect discrimination** occurs when a service provider applies to a person a provision, criterion or practice, which on the face of it has nothing to do with that person's protected characteristic, and applies (or would apply) that provision, criterion or practice equally to everyone, but it:
 - puts, or would put, people who share the person's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic; and
 - puts, or would put, the person at that disadvantage, and
 - cannot be justified by the service provider as a 'proportionate means of achieving a legitimate aim'.

An example might be not letting properties to people under a certain age because it is believed such people generally act in an anti social manner

- **Harassment** related to a protected characteristic occurs when a person engages in unwanted conduct which is related to a protected characteristic, and which has the **purpose** or the **effect** of:
 - violating the dignity of another person, or
 - creating for that person an intimidating, hostile, degrading, humiliating or offensive environment.

An example might be displaying a topless calendar in a canteen, where this makes the workplace an offensive place to work for any employee.

- **Victimisation** occurs when someone faces discrimination because she or he has made an allegation of unlawful discrimination or because of assisting or supporting a complainant.

An example might be refusing to consider someone for a promotion because they gave evidence on behalf of a colleague who made a complaint of unlawful race discrimination.

In addition, it is unlawful to put pressure on another person to carry out an unlawful act of discrimination. An example might be asking an employment agency not to send any men as a temporary replacement for a receptionist.

5.0 Disability related aspects

The Equality Act has retained a number of important aspects from previous legislation which aimed to outlaw discrimination on the grounds of a person's disability. These include the provisions to allow service providers to treat disabled people more favourably than people who are not disabled. For example a housing association could give priority to disabled people when carrying out repairs.

The Equality Act also maintains the duty to make 'reasonable adjustments' which was first introduced in the Disability Discrimination Act, 1995. The duty was introduced to enable disabled people to take up or continue to work for an organisation or to gain access to the services an organisation provides. It comprises three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison to non-disabled people.

The first requirement covers changing the way things are done (such as changing a practice), the second covers making changes to the built environment (such as providing access to a building), and the third covers providing auxiliary aids and services (such as providing special computer software or providing a different service). For the second requirement, taking steps to avoid the disadvantage would include removing or altering the physical feature where it would be reasonable to do so. If it is not reasonable to remove or alter a physical feature, an alternative way of providing access would need to be found provided that the alternative is practicable.

The Act makes clear that where the first or third requirements involves the way in which information is provided, a reasonable step includes providing that information in an accessible format, for example in large print or via sign language.

An example might be that a visually-impaired prospective tenant asks a housing association to provide a copy of a tenancy agreement in large print. The association refuses even though the document is held on computer and could easily be printed in a larger font. This is likely to be an unlawful failure to make a reasonable adjustment which would constitute discrimination.

5.1 Communal areas

The Act places a duty on landlords and managers of premises to ensure that communal areas are made accessible, where reasonable. Housing associations should ensure that this duty is taken into account, especially when they modernise or refurbish their premises or estates. This is a new requirement. Schedule 4 of the Act makes it clear that a landlord is not required to remove or alter a physical feature which limits or prevents a disabled person gaining access to communal areas but that the landlord should find a reasonable alternative in discussion with the disabled person concerned. An example might be providing a ramp to provide access while still leaving in place the steps which a disabled person cannot use.

5.2 Discrimination arising from disability

In addition, the Act introduces the concept of discrimination arising from disability. This is defined as treatment of a disabled person amounting to discrimination where:

- a service provider treats the disabled person unfavourably and
- this treatment is because of something arising in consequence of the disabled person's disability, and the service provider cannot show that this treatment is a proportionate means of achieving a legitimate aim.

Discrimination arising from disability has been included in the Act as a result of the House of Lords decision in *LB Lewisham v Malcolm*. In this case the Law Lords decided that the treatment of a disabled person did not amount to discrimination on the grounds of disability as a non disabled person would not have been treated more favourably in similar circumstances. The Government's view was that this decision shifted protection under the Disability Discrimination Act away from the original policy intention, making it

difficult to claim for less favourable treatment related to disability. The new provisions remove this barrier.

Discrimination arising from disability aims to re-establish an appropriate balance between enabling a disabled person to make a case for experiencing a detriment which arises because of his or her disability and providing the opportunity for an employer or other person to defend the treatment.

The position when the Equality Act comes into force in October 2010 will be that it is unlawful discrimination to treat a disabled person unfavourably not because of the person's disability itself but because of something arising from, or in consequence of, his or her disability, such as the need to take a period of disability-related absence.

It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. This includes eviction. Discrimination arising from disability can only be claimed when an employer or other person (or agency / organisation) knows, or reasonably could be expected to know, that the disabled person has a disability. A housing association will need to show that it has explored every avenue before eviction, that at all times it communicated with the disabled person in appropriate ways, liaised with relevant support workers or provided an advocate where necessary for example, to avoid unlawful discrimination arising from disability.

6.0 Service provision

The Equality Act makes it unlawful to discriminate against or harass a person because of a protected characteristic, or victimise someone when providing services (which includes goods and facilities). The person is protected both when requesting a service and during the course of being provided with a service. The Act extends protection in this area on the grounds of a person's age for the first time, provided the person is over 18.

An example might be restricting eligibility for a handyperson service to people aged over 60 when there are people under 60 who are also not able to carry out basic tasks around the house.

Another example might be a repairs service that responds to requests for maintenance issues more slowly or less favourably for one tenant than similar requests from other tenants, because the tenant has a learning disability.

7.0 Premises

The provisions on premises broadly reflect the position in the previous legislation, which gave protection from discrimination in the disposal and management of premises across all the protected characteristics with the exception of age and marriage and civil partnership. People with these characteristics are now protected under the new Act.

It is unlawful for a person who has the authority to dispose of premises (for example, by selling, letting or subletting a property) to discriminate against or victimise someone else in a number of ways including by offering the premises to them on less favourable terms, by not letting or selling the premises to them or by treating them less favourably. An example might be charging a higher rent to a Muslim.

It is unlawful for a person who manages premises to discriminate against or victimise someone who occupies the property in the way he or she allows the person to use a benefit or facility associated with the property, by evicting the person or by otherwise treating the person unfavourably.

It also makes it unlawful for a person who manages a property to harass a person who occupies or applies to occupy that property.

An example might be failing to take effective action to support someone facing harassment on the grounds of their race or colour.

8.0 Positive action

The Equality Act retains the positive action elements from the previous legislation and also seeks to enhance them. The existing positive action elements that are retained allow housing associations and other housing providers to:

- Encourage applications for Board members and staff from suitably qualified or experienced people from groups which are currently under-represented on the Board or workforce. Examples might include encouraging women to apply to be Board members if women are under-represented on the Board or men to apply to be sheltered scheme managers if men are under-represented in this area of work.
- Setting up training courses or mentoring projects for people from a particular group which are designed to equip staff with the necessary qualifications or expertise that will enable them to compete for jobs within an organisation where people from this group are currently under-represented. An example might be a training course for ethnic minority to equip them to compete for middle and senior management posts where ethnic minority people are currently under-represented at that level in the workforce.
- Providing housing or support for a specific group where there is evidence that the current provision available is not adequately meeting the group's needs. An example might be running household maintenance classes aimed at young women if there is a clear need or providing a sheltered scheme for Chinese people.

It is important to stress that positive action initiatives can only be adopted where a housing association can demonstrate that the group which will benefit is currently under-represented on its Board, in its workforce or with regard to a service it provides. In addition, the positive action initiative should stop when the under-representation has been addressed. An Association should not carry on specifically encouraging women to apply to be Board members when they are as equally represented as men on the Board.

It is also important to stress that the positive action is designed to help create a level playing field. When it comes to selecting a new senior manager, applicants who have attended a positive action training course should be treated in the same way as other applicants. They should not receive any special favours just because they have been on a positive action training course.

However, the Equality Act expands the way positive action can be used so that employers can pick someone for a job from an under-represented group when they have the choice between two or more candidates who are equally suitable, provided they do not have a general policy of doing so in every case.

This has been portrayed in some parts of the media as ‘positive discrimination’ but the Government makes it clear that positive discrimination – employing or promoting people just because they are from an under-represented group, even if they are less suitable than another candidate – remains unlawful. Housing Associations and other housing providers should therefore ensure that staff involved in recruitment and selection are aware of these positive action elements but do not confuse them with unlawful positive discrimination. All of the positive action elements in the Equality Act are discretionary. Housing Associations do not have to adopt them, although many include a commitment to use them where appropriate, in their equality and diversity policies and strategies.

9.0 Genuine occupational requirements

The Equality Act recognises that to have a ‘protected characteristic’ may, in some limited circumstances, be a real asset for some jobs. If a housing association decides to use this part of the Act it must show that the employee concerned will be providing intensive one to one support to people with the same protected characteristic. Possible examples include:

- An Association for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a support worker for other deaf people whose first or preferred language is BSL.
- A hostel worker working with female victims of domestic abuse might have to be female in order to avoid causing them further distress.

If a post is covered by the genuine occupational requirement, this must be stated in the advert to make it clear that only applicants with the specific protected characteristic in question will be considered. The genuine occupational requirement cannot be invoked once applications have been received.

Some housing providers have customer service standards that state that services will be provided by a person of the same sex or race as a resident, if the resident requests this. This is almost certainly unlawful, unless the services in questions are ones that involve intensive one to one support to people of the same protected group.

10.0 Employment

The Equality Act makes it unlawful for an employer to discriminate against or victimise employees and people seeking work. This includes unlawful harassment. The employment provisions in the Act apply where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person’s employment. It also imposes the reasonable adjustments duty set out above on employers in respect of disabled employees and applicants.

An example might be an employer which enforces a ‘no beards’ policy by asking staff to shave. This could be indirect discrimination, because it would have a particular impact on Muslims or Orthodox Jews.

10.1 Enquiries about disability or health

Except in the situations specified below, an employer must not ask about a job applicant’s health until that person has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful

candidates to be offered a job when a suitable position arises. The specified situations where health related enquiries can be made are for the purposes of:

- finding out whether a job applicant would be able to participate in an assessment to test their suitability for the work;
- making reasonable adjustments to enable a disabled person to participate in the recruitment process;
- finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
- monitoring diversity in applications for jobs;
- supporting positive action in employment for disabled people, for example linked to the 'Positive About Disabled people' scheme; and
- enabling an employer to identify suitable candidates for a job where there is a genuine occupational requirement for the person to be disabled.

10.2 Gender pay reviews and equality reports

The equal pay provisions in the Act largely mirror the existing arrangements brought in by the Equal Pay Act in 1970. The Act will, however, seek to concentrate employers' minds on this issue by requiring reporting on the gender pay gap by all employers with 250 or more employees. However the Government has committed not to use this power before 2013 and it will only be used if sufficient progress on reporting has not been made.

The Act also includes powers for Ministers to require public authorities to report on equality issues. There will be consultation on the precise details in the summer but it is anticipated that public bodies with over 150 employees will be required to publish annual details of:

- the gender pay gap;
- the ethnic minority employment rate; and
- the disability employment rate.

Some housing associations and other social housing providers already produce reports covering the last two and publish these on websites. A considerable number have also have carried out Equal Pay Reviews, either independently or as part of Local Authority wide reviews.

Housing providers are often significant employers in a locality. They should therefore carry out an equal pay review if they have not already done so. Tackling the gender pay gap is not just about rates of pay. It is also about encouraging men and women to apply for non-traditional jobs and about ensuring that the so-called 'glass ceiling' is removed.

10.3 Liability

An employer is liable for alleged acts of unlawful discrimination carried out by their employees unless they can show they have taken all reasonable and practical steps to ensure that employees knew their actions were unlawful. In order to discharge this liability an employer would need to be able to show that

- Job descriptions note that employees must carry out their duties in line with the Equality Act and the organisation's equality and diversity policy;
- Staff had been trained within the past 2-3 years on the relevant legal duties;

- Staff were regularly reminded of the need to act in line with the Equality Act and the organisation's equality and diversity policy e.g. at team meetings, supervision sessions;
- The staff handbook and key policies and procedures highlighted the need for employees must carry out their duties in line with the Equality Act and the organisation's equality and diversity policy.

This liability would not be discharged simply by asking employees to sign a statement that they will not commit acts of unlawful discrimination.

11.0 The duty to advance equality

The Equality Act replaces the current duties to promote equality on the grounds of Disability, Gender and Race with the new duty to advance equality covering all of the protected characteristics. This comprises a general duty on all organisations, when carrying out a public function, which requires them to seek to:

- Eliminate unlawful discrimination
- Advance equality of opportunity and
- Foster good relations, tackle prejudice and promote understanding

This general duty applies to organisations that exercise public functions, but only in respect of their public functions as defined by the Human Rights Act 1998. It therefore applies to ALMOs and may also apply to housing associations in the light of the *Weaver vs. London and Quadrant* case. The case arose out of the attempted eviction of Susan Weaver from a flat where she had lived as an assured tenant since 1993. The London and Quadrant Housing Trust alleged that Mrs Weaver had failed to pay her rent for eight weeks and sought an order to repossess her property.

While the High Court found the Trust had not breached her human rights, it did find that its role in allocating, managing and terminating social housing was a public function as defined by the Human Rights Act, thereby making the Trust a public authority for those purposes and so subject to obligations under the Human Rights Act.

Even if housing associations are not legally required to comply with the general duty to advance equality, they will need to act as if they are in order to meet the TSA's Standards and the current Diversity Key Lines of Enquiry. For example, the TSA requires housing providers to

- Treat all tenants with fairness and respect and
- Demonstrate that they understand the different needs of their tenants, including in relation to the seven equality strands and tenants with additional support needs

In addition, designated public authorities which include local authorities, police authorities, health authorities, the HCA and the TSA will also have more specific duties to advance equality. The final details of these specific duties have yet to be finalised but they are likely to require them to:

- Set out equality objectives in an Equality Scheme
- Report on their progress in meeting these objectives
- Use EqIAs to assess the impact of their work in advancing equality
- Pay particular attention to how they involve and consult service users

- Pay particular attention to how they procure services from outside organisations

Many social housing providers, whether housing association, local authorities or ALMOs, have drawn up Race, Disability and Gender Equality Schemes and/or Action Plans. A number have already drawn up Single Equality Schemes, in anticipation of the Equality Act and to enhance their own equality policy aims.

The Audit Commission's current advice is that if a social landlord has separate equality schemes, there is no immediate need to adopt a Single Equality Scheme. Care should be taken, however, to ensure that the separate schemes mesh together, are not contradictory and that common points have been identified.

12.0 Socio-economic inequalities

The Equality Act places a new duty on Government Ministers, departments and key public bodies such as local authorities to consider what action they can take to reduce the socio-economic inequalities people face. This duty will affect how public bodies make strategic decisions about spending and service delivery, highlighting the public sector's role in reducing disadvantage.

A local authority housing department might, for example, discover that people from the most deprived areas were under-represented among the successful bidders for properties under the local Choice Based Lettings Scheme. It might therefore decide to target publicity about the scheme and assistance with registering and bidding in those areas.

The duty applies only to strategic decisions and it is important that providers take socio-economic inequalities into account when developing their strategic direction.

The duty does not apply to front line decisions taken by service providers which relate to individuals. For example, it would not require a Customer Services Officer to prioritise a repairs request from a tenant in a disadvantaged area over a similar request from a tenant in a less disadvantaged area.

This duty does not apply to housing associations but if it is introduced, it will apply to local authorities. They in turn will be expected to take into account in their strategic work, for example through their local housing and other strategic partnerships. The duty might therefore have an impact on housing associations. Indeed, many associations are already take socio-economic inequalities into account, in their initiatives to tackle worklessness and to promote community cohesion, for example.

13.0 Procurement

Under the Equality Act, designated public authorities will be expected to include equality and diversity related factors when they procure services from contractors, provided that these factors are relevant and proportionate. This means incorporating equality and diversity related factors in key stages of the procurement process, for example in:

- the procurement policy and procedures
- pre-procurement considerations including pre-qualification questionnaires
- drawing up contract specifications and inviting tenders

- selecting a contractor
- awarding the contract and contract conditions, and
- monitoring performance once the contract has been let.

Housing Associations are not designated public authorities and so are not covered by these sections of the Act. However, many Housing Associations state in their equality and diversity commitments that will seek to work with contractors and partners that share similar equality and diversity commitments. They may therefore find the above checklist useful.

14.0 Implementation timetable

All of the provisions set out in the Equality Act are due to come into force from October, 2010 with the following exceptions:

- The duties to advance equality come into effect from April 2011
- The socio-economic duty and public sector pay reporting requirements come into effect from April 2011
- The private and voluntary sector pay reporting requirements come into effect from April 2013.

In addition, a number of statutory codes of practice and non statutory codes of guidance are due to be issued on the Equality Act. This will set out in more detail key areas including

- Tackling socio-economic inequalities
- Employment
- Service provision

There are also plans to issue a code of guidance on housing but this is unlikely to be issued in the near future.