

Wales Council for Voluntary Action

Supporting charities, volunteers and communities

2. Running your organisation

2.9 Equal opportunities



The general position

The Equality Act 2010 consolidates a number of discrimination statutes into a single statute. In addition, many employers wish to have equal opportunities policies that cover groups not specifically protected by legislation. UK laws cover discrimination on the basis of nine protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

Many of these are now underpinned by European Union laws, which may in certain circumstances offer stronger protection than UK statutes.

It is important for employers to have a clear understanding of discrimination law, as the damages that can be awarded to employees who have suffered discrimination are unlimited, and it is no defence for employers to show that they had no intention to discriminate. Equal opportunities and the possibility of discrimination are issues that need to be considered in all areas of employment practice.

This information sheet will give an introduction to some of the legal aspects of discrimination, before discussing what good practice means in this area, and considering some of the issues that will need to be addressed in order to ensure that equal opportunities policies are meaningful.

Policy development

Information on discrimination law is essential when developing an equal opportunities policy. However, we strongly recommend that it be incorporated into other areas of employment policy.

Some of the more obvious examples are listed below:

- Recruitment is a common source of discrimination and recruitment policies should be closely linked to equal opportunities.
- Pay and benefits are commonly structured in a way that discriminates indirectly and they should be reviewed periodically from an equality perspective.
- Terms and conditions in the contract of employment are another common source of indirect discrimination.
- Grievance and disciplinary procedures are two of the more direct management tools for dealing with discrimination, particularly in the form of bullying and harassment. Disciplinary procedures should outline the organisation's response to harassment on grounds of age, disability, gender reassignment, race, sex, sexual orientation, religion or belief.
- Health and safety has links to equal opportunities through special maternity provisions and the control of bullying and harassment as workplace hazards.
- The role of management committee members - it is important that this group have a tangible commitment to equality if others in the organisation are to be expected to adhere to any equal opportunities policy.
- Although there is no direct legal obligation to integrate equality measures into performance management inequalities in access to training and education are a common source of discrimination. Policy on training and development is one area where an organisation's pro-active commitment to equality can enable employees to gain better access to training and educational opportunities, and possibly to promotion.
- The scope of legal obligations towards volunteers can be unclear, but it is commonly accepted as good practice to integrate volunteers into the equal opportunities policy.
- Redundancy and dismissal procedures must be non-discriminatory.

Decision making

Some organisations ignore equality issues, others fear decision making and treat discrimination issues with kid gloves. However, where decision making is guided by sound policies of good practice, there should not be a major problem. It is better to assess each decision making option from a discrimination point of view before making a final choice. For example, an instruction to attend an evening fund-raising event may at first sight, appear to be non-discriminatory, but the reality is that it may be harder for women to comply with this type of instruction, as they are more likely to have caring responsibilities. Such a decision could be amended to a request for attendance rather than an instruction, or the organisation might offer to meet childcare costs.

What is discrimination?

At a very basic level, discrimination means treating a person less favourably because that person belongs (or is believed to belong) to a particular group. Often this less favourable treatment is based on assumptions about the person's characteristics because of their membership of the group, and stereotypical views about the characteristics of people in that group.

An obvious example is where an employer refuses to employ a woman in a warehouse because the job involves heavy lifting, and the employer assumes that, as a woman, she is unable to perform the work. What makes the decision offensive, and unlawful, is that the employer makes a decision based on beliefs about the capabilities of people in the group (in this case, women) without making any attempt to check whether the actual woman is or is not capable of performing the necessary tasks. This type of discrimination is often referred to as direct discrimination. This refers to the practice of treating a person less favourably because of their membership of a particular group.

One of the tests used by courts to decide whether or not direct discrimination exists (particularly in sex discrimination cases) is known as the 'but for' test. The courts look at whether the person would be treated more favourably but for their membership of the group. In the example already given, the courts would therefore look at whether the woman would be treated more favourably, but for her sex. Obviously, the answer here is yes, and therefore the employer's actions constitute direct discrimination. The significance of this test is that the motive or purpose of the employer's actions (however 'honourable') is irrelevant. If an employer's actions are identified as involving direct discrimination, they cannot be justified and will therefore be unlawful (unless a specific exception in the legislation applies).

Indirect discrimination is a more difficult form of discrimination to identify. This occurs where a provision, criteria or practice is applied to various people, but it has a disproportionate impact on members of a particular group (e.g. women).

The important difference between direct and indirect discrimination is that while direct discrimination is almost always unlawful (unless there is a statutory exemption), indirect discrimination can be justified (and is therefore not unlawful) if the employer satisfies two tests. First, the employer must show that there was a good reason for the discriminatory requirement or condition, and second the employer must show that the reason was unrelated to the sex (or race, religion, disability or sexual orientation) of the employee.

The Equality Act 2010 also prohibits associative and perceptive direct discrimination and harassment in respect of sex, age and disability in addition to race, religion and sexual orientation where legislation already covered this.

Forms of discrimination

Certain forms of discrimination are unlawful, while others, although not unlawful, should be regarded as bad employment practice. The following forms of discrimination are generally covered by equal opportunities policies: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In addition, there are groups of people who do not at first glance fall clearly into any of these categories but who nonetheless experience discrimination, for example travelling people and homeless people. The former may fall under race and the latter may fall under disability.

Sex discrimination

The Equality Act 2010 prohibits discrimination in relation to sex. In addition, sex discrimination in employment is covered by EC law. Where British law offers an employee less protection than EC law, it is sometimes possible for employees to rely upon the European law in courts and tribunals. Well-known examples include the cases where part-time workers have received pension rights, and where women dismissed from the armed forces because they were pregnant, received large sums in compensation.

Because of the influence of EC law, sex discrimination law tends to be interpreted quite broadly to incorporate situations that might not have been covered in the past. For example, any discrimination on the basis of pregnancy is direct sex discrimination, and equally, sexual harassment is classified as direct sex discrimination.

It is important to remember that sex discrimination laws protect both men and women. The only significant exceptions to the sex discrimination laws are where sex is a genuine occupational qualification. These exceptions are set out in the Sex Discrimination Act, and only apply to access to the job, not to any terms and conditions offered. It is important to note that they are interpreted strictly.

The exceptions most relevant to the voluntary sector are:

- where considerations of decency or privacy require that the job is done by a woman (or man);
- where the job involves the employee living or working in a private home;
- where it is necessary for the employee to live in the employer's premises and the only available premises do not have facilities for both sexes;
- where the job is in a single-sex establishment for persons requiring special care, supervision or attention;
- where the employee provides individuals with personal services promoting their welfare or education and these can best be provided by a woman (or man); and,
- where the job is one of two to be held by a married couple.

Marital or family status

The Equality Act 2010 prohibits discrimination against married people, but not against single people. However, the EC Equal Treatment Directive prohibits sex discrimination based on marital or family status. This seems to offer broader protection in certain circumstances.

It is good practice not to discriminate on the basis of an employee's marital or family status. In practice, the implication are that any benefits that relate to partners should be given to cohabiting partners as well as married ones. However, for pension rights, this may be a decision that only the trustees of the pension scheme can make.

Single Equality Duty

The single equality duty requires public authorities to promote gender equality and eliminate discrimination. Since April 2011 it includes duties in relation to gender reassignment, age, sexual orientation and religion or belief, in addition to race, disability and gender.

Race, colour, nationality, and ethnic or national origin

The law prohibiting discrimination on racial grounds is contained in the Equality Act 2010. Racial harassment is regarded as direct discrimination.

The protection under the Act extends to all racial groups, and so white people enjoy the same legal protection as black or Asian people. Case law determined by this Act has decided that the protection offered by the Act extends to certain religious groups, namely Jews and Sikhs, as well as to Gypsies. Discrimination against people because they are Irish, English or Scottish is also unlawful.

It is important to consider whether policies will have an impact that is indirectly discriminatory. For example, certain dress codes may be indirectly discriminatory, such as a requirement that staff do not wear any headgear (indirect discrimination against Sikhs and Jews).

Disability

The Equality Act 2010 makes it unlawful to discriminate against disabled people. Since October 2004 the concept of direct discrimination was introduced into legislation, with it becoming unlawful to discriminate against a person because of their disability, and possibility of justifying such treatment is removed. The Act also requires employers to make reasonable adjustments. It is important to note that these adjustments are not restricted to physical adaptations to the workplace. Work processes may also need to be adapted. A recent case has made clear that if an employee becomes disabled and is unable to continue to perform their current job, even with reasonable adjustments, their employer must offer them any other available job within the organisation that they have the skills to do even if at a more senior level than their current job.

Generally, employers must consider what reasonable adjustments they could make, both in relation to recruitment, and for existing staff. The adjustments must relate to the needs of particular individuals.

It is therefore important to consult with disabled employees in order to decide what adjustments would be appropriate. Making reasonable adjustments may mean making physical adjustments to premises, providing a reader or interpreter, reallocating some work to other employees, appointing the disabled employee to another job, or altering working hours, patterns of work or place of work. In deciding what it is reasonable for an employer to do, cost can be taken into account, but employers are expected to seek financial assistance with costs where it is available, such as through the Access to Work Scheme. The financial resources that an organisation is expected to devote to making adjustments will depend upon that organisation's overall financial position. In practice many adjustments involve little or no cost, and result in greater productivity from the employee.

The Equality Act 2010 includes a new protection from discrimination arising from disability. This states that it is discrimination to treat a disabled person unfavourably because of something connected with their disability (e.g. the tendency to make spelling mistakes arising from dyslexia). This type of discrimination is unlawful where the employer or other person acting for the employer knows or ought to know that the person has a disability. This type of discrimination can only be justified if an employer can show that this is a proportionate means of achieving a legitimate aim (i.e. a defence).

In addition, the Equality Act 2010 also extended the indirect discrimination provisions to include disability. However, in practice most situations are likely to be covered by discrimination arising from disability or the duty to make reasonable adjustments.

Pre Employment Health Questions

Except in very restricted circumstances or very restricted purposes the Equality Act aims to prevent employers from asking any job applicant about their health or any disability before the person has been offered a job (subject to statutory references/health check) or has been included in a pool of successful candidates to be offered a job when a position becomes available.

This effectively means the end of standard pre-employment health questionnaires.

In certain circumstances pre employment health questions are still permissible such as monitoring purposes or in order to find out if any applicant needs reasonable adjustments to be made for the recruitment process.

A Code of Practice on Employment and Occupation has been produced by the Disability Rights Commission (DRC) which gives detailed information about the new duties.

Disability Equality Duty (DED)

The Disability Equality Duty for the public sector came into force on 4 December 2006. It is not about making changes to buildings or providing alternative formats, these aspects are already covered by the DDA 1995/EA 2010. Instead this positive duty requires all public bodies to pay due regard to actively promoting disability equality.

Religion

Since December 2003, it has been unlawful to discriminate based on a person's religion or belief. The law covers direct and indirect discrimination, harassment and victimisation. They cover discrimination on the basis of perceived religion or belief as well as on the basis of a person's actual religion or belief, and also cover discrimination because a person associates with people of a particular religion or belief.

There are limited exemptions to the legislation for jobs where being of a particular religion is a genuine occupational requirement. Generally to claim that being of a particular religion is a genuine occupational requirement, an employer will have to be able to show that being of that religion is a decisive factor in being able to do that job. The exemption cannot be used to maintain quotas of a certain number of people of a particular religion within the organisation.

Employers with a religious ethos are able to claim a genuine occupational requirement for a broader range of jobs, but must still show that the job has a profile that affects the overall ethos of the organisation. The way in which the job is done must therefore contribute to the ethos of the organisation.

It is always a good idea to take legal advice before advertising a post as having a genuine occupational requirement.

Transsexuality

Transsexuals have the right to be protected from discrimination under the Equality Act 2010. Dismissing an employee because they intend to undertake or are undertaking gender reassignment is unlawful discrimination. It is important that any absence associated with gender reassignment is treated in the way that absence due to sickness or injury is treated.

Sexual orientation

Legislation outlawing discrimination based on sexual orientation came into force in December 2003. This makes it unlawful to discriminate against employees or prospective employees because of their sexual orientation. This protects employees whether they are heterosexual, lesbian, gay or bisexual and also protects people from discrimination because they are assumed to be gay or because they associate with people who are gay. Both direct and indirect discrimination is unlawful, as is harassment and victimisation.

There are limited exemptions for jobs where being of a particular sexual orientation is a genuine and determining occupational qualification. Before considering taking advantage of the exemptions, it would be important to take legal advice as it is likely that the scope of these exemptions will be further clarified by case law.

Employers should check that their grievance policies would be effective at dealing with complaints from staff of discriminatory treatment. It is also important to check that harassment policies cover harassment of lesbian, gay and bisexual staff.

It is important that employers ensure that none of their terms and conditions adversely affects lesbians, bisexuals and gay men. Where there is most likely to be discrimination is in the provision of partnership benefits, for example, leave to take care of a partner who is ill, or bereavement leave for partners or family members of partners. It is important also to recognise same-sex partners in pension schemes and to offer pension rights that are at least equivalent to those offered to unmarried opposite-sex partners. Laws to allow same-sex partners to register as civil partners has given many state benefits and responsibilities equivalent to marriage. It has also required employers to treat civil partners in the same way that they would treat spouses for the purpose of any work-related benefit.

Age

The Equality Act 2010 make it illegal for employers to discriminate against employees, trainees or job seekers because of their age and ensure that all workers, regardless of age, have the same rights in terms of training and promotion. For example, a recruitment policy whereby only graduates under the age of 35 were to be employed would be discriminatory. Fewer women than men would be able to comply with such a condition, as a significant number of women graduate beyond the age of 35 having taken time out of work to look after children. This is a clear illustration of indirect discrimination. Men and women would experience the same treatment under this rule. The discrimination would stem from the fact that women would be disadvantaged in a disproportionately larger number.

Organisations should be thinking about how they can eliminate any age discrimination. In particular, job advertisements should not specify age limits.

The default retirement age of 65 is abolished on 1 October 2011, retirement procedures should be scrapped and all staff should be treated the same regardless of their age.

Age discrimination in the provision of goods and services is not yet included in the Equality Act 2010, but it would be good practice to include it in your policy, unless there is a good reason to specifically target your services at a particular age group such as a youth group only for young people).

Equal opportunities policies

It is good practice for employers to have an equal opportunity policy to show their commitment to promote and sustain equal opportunity and diversity amongst its staff.

Equal opportunity policies that are robust and properly implemented can help in avoiding costly, difficult and time consuming litigation.

Implementing and monitoring the policy

It is vital that an organisation's commitment to equal opportunities does not end once the equal opportunities policy is written. If the organisation is creating a new equal opportunities policy or changing the policy, it is important to involve all staff. This may be done by distributing the draft policy for comment, and arranging informal meetings to discuss it. The final policy should also be distributed to all staff, volunteers and trustees and given to all job applicants. In addition, staff and volunteers need to be involved in ensuring that all other policies and practices of the organisation comply with the equal opportunities policy. Clearly this is an on-going process, and one that all managers need to be aware of and support.

Many organisations designate an equal opportunities role to one of their staff. It is important, however, that equal opportunities are not seen as being the responsibility of only one person. On the other hand, it is appropriate in all organisations that there is a named person or people whom staff can approach if they have concerns about equal opportunities. This may be the person or persons to whom staff can bring reports of incidents of harassment.

It is important to monitor the effectiveness of the organisation's equal opportunities policy. This may be done in various ways, and the method chosen may depend on the size of the organisation. In larger organisations particularly, it may be appropriate to maintain statistics about the composition of staff by sex, race and ability to ensure that legal obligations are being met.

This should involve monitoring not just the overall numbers of staff in each group but also the numbers of staff at different levels in the organisation and at different pay rates.

If the composition of the staff differs dramatically from the composition of the local community or the community that the organisation serves, the organisation should consider how its recruitment, training and promotion policies might be changed to ensure that the organisation genuinely offers equal opportunities.

Harassment

In order to ensure the existence of genuine equal opportunities within an organisation, it is necessary also to ensure that members of disadvantaged groups are not treated badly by co-workers. Employers are legally liable for the harassment of employees by other employees and even by clients if the employer is in a position to do something about it. There are now specific laws that protect employees from harassment on grounds of age, race, sex, disability, sexual orientation, gender reassignment and

religion and belief. Harassment provisions do not extend to marriage and civil partnership or pregnancy and maternity. In certain cases, harassment may include situations where there is a hostile working environment. This may include a working environment where there are pin-ups of nude or semi-nude women (or men), or where derogatory jokes are made, or where sexually explicit comments or offensive and derogatory language is used.

It is easy for people who are not discriminated against to trivialise or underestimate the impact of a hostile atmosphere. It is therefore important for employers to set out clear expectations in their policies of what is and is not acceptable behaviour.

Extended liability

This concept is similar to the general legal concept of vicarious liability. In an employment situation the issue is to determine the circumstances in which an employer can be held liable for the discriminatory behaviour of another party. There are two ways in which an employer's liability for discriminatory acts can be extended. The first is secondary liability for the actions of employees, and the second is liability for the acts of a third party such as a client. Secondary liability is similar to, but broader than vicarious liability. It covers discriminatory acts performed by employees against their colleagues and service users. There is a defence for conscientious employers who can show that they took specific steps to prevent such incidents occurring. It is not enough for the employer to claim that they were unaware of the discriminatory conduct of the employee.

The rules on liability for the acts of third parties are easy to remember. An employer will be liable for the discriminatory actions of a third party where a situation is so much under the control of the employer that they could, by the application of good employment practice, have prevented the discrimination, or reduced the extent of it. These rules have particular relevance to the harassment of staff by clients and service users.

Further information

Equality and Human Rights Commission
www.equalityhumanrights.com

Disclaimer

The information provided in this sheet is intended for guidance only. It is not a substitute for professional advice and we cannot accept any responsibility for loss occasioned as a result of any person acting or refraining from acting upon it.

For further information contact

Wales Council for Voluntary Action

Baltic House, Mount Stuart Square, Cardiff Bay, Cardiff, CF10 5FH

Registered Charity: 218093

Tel: 0300 111 0124

help@wcva.org.uk

Fax: 029 2043 1701

www.wcva.org.uk

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Tel: 0300 111 0124
www.wcva.org.uk