

Equality Act 2010 – an overview

The Equality Act became law on 1 October 2010. As an employer, our obligations remain largely the same. The Act harmonises and replaces previous legislation (such as the Race Relations Act 1976 and the Disability Discrimination Act 1995) and ensures consistency in what we need to do to make the University of Cumbria a fair working and studying environment and to comply with the law.

The Equality Act covers the same groups that were protected by existing equality legislation – age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now called ‘protected characteristics’. The Act extends some protections to characteristics that were not previously covered, and also strengthens particular aspects of equality law, such as socio-economic background (N.B. the HE provision of the University is exempt from this characteristic, however the FE provision is not exempt). As a result, the University may need to review and change some policies and practices, such as equality impact measures for FE reporting and some HR practices (particularly around recruitment activities).

1. Types of discrimination - definitions

The definitions of the types of discrimination have also changed. *Appendix A refers.*

2. The Protected Characteristics: key points

2.1 Age - no change

The Act protects people of all ages. However, different treatment because of age is not unlawful direct or indirect discrimination if it can be justified i.e. the Act still allows employers to have a default retirement age of 65.

2.2 Disability (new definition and changes)

The Act has made it easier for a person to show that they are disabled and protected from disability discrimination. Under the Act, a person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, which would include using a telephone, reading a book or using public transport.

As before, the Act puts a duty on the University to make reasonable adjustments for our staff to help them overcome disadvantage resulting from an impairment (e.g. by providing assistive technologies to help visually impaired staff use computers effectively). The Act 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. a 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 could reasonably be expected to know, that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is a proportionate means of achieving a legitimate aim. Additionally, indirect discrimination now covers disabled people. This means that a job applicant or employee could claim that a particular rule or requirement the University has in place disadvantages people with the same disability. Unless we can justify this, it would be unlawful. The Act also includes a new provision which makes it unlawful, except in certain circumstances, for employers to ask about a candidate's health before offering them work.

Appendix B contains further information on disability related amendments within the Act.

2.3 Gender reassignment (new definition)

The Act provides protection for transsexual people. A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender. The Act no longer requires a person to be under medical supervision to be protected – so a woman who decides to live permanently as a man but does not undergo any medical procedures would be covered. Transgender people such as cross dressers, who are not transsexual because they do not intend to live permanently in the gender opposite to their birth sex, are not protected by the Act. It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured. Medical procedures for gender reassignment such as hormone treatment, should not be treated as a ‘lifestyle’ choice.

2.4 Marriage and civil partnership (no change)

The Act protects employees who are married or in a civil partnership against discrimination. Single people are not protected.

2.5 Pregnancy and maternity (no change)

A woman is protected against discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and any statutory maternity leave to which she is entitled. During this period, pregnancy and maternity discrimination cannot be treated as sex discrimination. The University may not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment.

2.6 Race (no change)

For the purposes of the Act 'race' includes colour, nationality and ethnic or national origins. A racial group can be made up of two or more different racial groups (e.g. Black Britons).

2.7 Religion or belief (or a lack of belief) (no change)

In the Equality Act, religion includes any religion. It also includes a lack of religion, in other words employees or jobseekers are protected if they do not follow a certain religion or have no religion at all. Additionally, a religion must have a clear structure and belief system. Belief means any religious or philosophical belief or a lack of such belief. To be protected, a belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour. Denominations or sects within a religion can be considered a protected religion or religious belief. Humanism is a protected philosophical belief but political beliefs would not be protected.

Discrimination because of religion or belief can occur even where both the discriminator and recipient are of the same religion or belief.

2.8 Sex (no change)

Both men and women are protected under the Act.

2.9 Socio-economic background

This is a new characteristic and is aimed at monitoring the access to and use of services and provisions from local government, third sector and further education.

2.10 Sexual orientation (no change)

The Act protects bisexual, gay, heterosexual and lesbian people.

3. Equality Act – implications for University

3.1 Pre-employment health-related checks

The Equality Act limits the circumstances when the University can ask health-related questions before a job offer is made to an individual. The Act will only allow for such questions, as short listing stage, if the role has a requirement of a particular level of sensory and physical demands to carry out an essential function of the role.

For roles, which are not required to have a sensory or physical demand, medical questionnaires will be requested at offer stage only.

In addition, and dependant upon the candidate and the role, individual questions may be asked to support the candidate, as follows:

- To find out if reasonable adjustments are required for the selection process;
- To take positive action to assist disabled people
- To assure the University that a candidate has a disability where the role genuinely requires the role holder to be disabled

3.2 Extension of employment tribunal powers

Under previous legislation, an employment tribunal could make a recommendation that an employer must eliminate or reduce the effect on the claimant of any discrimination. The Act extends this power so that it will now be possible for a tribunal to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not only on the claimant. For example, the

tribunal might specify that an employer needs to train all staff about the organisation's bullying and harassment policy. This power does not apply to equal pay cases.

3.3 Equal pay – direct discrimination

The Equality Act retains the framework that was previously in place. This means that in most circumstances a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment. However, a change in the Equality Act allows a claim of direct pay discrimination to be made, even if no real person comparator can be found. This means that a claimant who can show evidence that they would have received better remuneration from their employer if they were of a different sex may have a claim, even if there is no-one of the opposite sex doing equal work in the organisation. This would be a claim under sex discrimination. It is important to note that the HERA Job Evaluation scheme is in place to offer a transparent comparison of roles and mitigate any such equal pay claims. Roles need to be monitored to ensure that there is no "grade drift" (namely roles being asked to operate at a level (upwards or downwards) outside of the grade parameters).

3.4 Pay secrecy

The Act makes it unlawful for any employer to prevent or restrict employees from having a discussion to establish if differences in pay exist that are related to protected characteristics. It also makes terms of the contract of employment that require pay secrecy unenforceable because of these discussions. An employer can require their employees to keep pay rates confidential from some people outside the workplace.

Equality Act 2010 –changes in definitions of discrimination

There have been a number of changes in the definitions of discrimination as a result of the Equality Act. The changes in the definitions are highlighted in *italic*.

a. Direct discrimination

Direct discrimination occurs when someone is treated less favourably than another person because of a protected characteristic they have *or are thought to have* (see perceptive discrimination below), *or because they associate with someone who has a protected characteristic* (see associative discrimination below).

b. Associative discrimination

Already applies to race, religion or belief and sexual orientation. *Now extended to cover age, disability, gender reassignment and sex*. This is direct discrimination against someone because they associate with another person who possesses a protected characteristic.

c. Perceptive discrimination

Already applies to age, race, religion or belief and sexual orientation. *Now extended to cover disability, gender reassignment and sex*. This is direct discrimination against an individual because others think they possess a particular protected characteristic. It applies even if the person does not actually possess that characteristic.

d. Indirect discrimination

Already applies to age, race, religion or belief, sex, sexual orientation and marriage and civil partnership. *Now extended to cover disability and gender reassignment*. Indirect discrimination can occur when an employer has a condition, rule, policy or even a practice in your company that applies to everyone but particularly disadvantages people who share a protected characteristic. Indirect discrimination can be justified if you can show that you acted reasonably in managing your business, ie that it is 'a proportionate means of achieving a legitimate aim'. A *legitimate aim* might be any lawful decision we make in running the University, but if there is a discriminatory effect, the sole aim of reducing costs is likely to be unlawful. Being proportionate really means being fair and reasonable, including showing that you've looked at 'less discriminatory' alternatives to any decision you make.

e. Harassment

Harassment is "unwanted 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". Harassment applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnership. *Employees will now be able to complain of behaviour that they find offensive even if it is not directed at them, and the complainant need not possess*

the relevant characteristic themselves. Employees are also protected from harassment because of perception and association.

f. Third party harassment

Already applies to sex. *Now extended to cover age, disability, gender reassignment, race, religion or belief and sexual orientation.* The Equality Act makes the University potentially liable for harassment of our employees by people (third parties) who are not employees of the University, such as customers or clients. The University will only be liable when harassment has occurred on at least two previous occasions, we are aware that it has taken place, and we have not taken reasonable steps to prevent it from happening again.

g. Victimization

Victimization occurs when an employee is treated badly because they have made or supported a complaint or raised a grievance under the Equality Act; or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint. *There is no longer a need to compare treatment of a complainant with that of a person who has not made or supported a complaint under the Act.*

Equality Act 2010 – changes to definition of disability

1. The new definition of direct discrimination – less favourable treatment “because of” the protected characteristic of disability – is wide enough to cover discrimination by association. So, for example, if an employee was refused a job because he or she had a disabled child, this would be direct discrimination. The employer's treatment of the claimant would be "because of" the protected characteristic of disability, albeit the child's rather than the claimant's.
2. The Act introduces a new form of disability discrimination – discrimination “arising from” a disability. This dispenses with any need for a comparator. It simply requires that the claimant has been treated "unfavourably because of something arising in consequence" of his or her disability. For this type of discrimination to occur, the employer has to know, or reasonably be expected to know, that the employee has the disability in question. An example of a disabled employee who, because of his or her disability, has to take more time off than other employees. If the employer treats the employee less favourably because of this, this will be unfavourable treatment because of something – the absence – arising in consequence of the employee's disability.
3. At present, to receive protection from disability discrimination, individuals must show that they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. An impairment is taken as having such an effect only if it affects one of eight capacities: mobility; manual dexterity; physical coordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; and perception of the risk of physical danger.

This list of capacities is removed under the Equality Act, leaving it to Employment Tribunals to make a common-sense decision about whether or not a particular impairment has a substantial effect on day-to-day activities. The Government Equalities Office guidance states that this will make it “easier for someone to show that they have difficulty carrying out their day-to-day activities, and therefore that they come under the definition of ‘disabled person’”.

4. The Act makes it unlawful for an employer (or any recruitment agency or consultant) to "ask about the health" of a job applicant before offering work to, or shortlisting, the applicant. If the employer asks an unlawful question about health during the recruitment process, and the applicant does not get the job, in any subsequent disability discrimination claim the burden of proof will be on the employer to show that there was no discrimination.

Both written and oral questions are outlawed by the provision, so those conducting job interviews will have to be careful to avoid the subject of health or fitness. And the provision is not limited to questions directed at the job applicant. A request for a reference sent before a job offer is made must also avoid asking questions that contravene the provision.

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Equality Act – Implementation Action Plan

Key aspect	Key changes	Action required
<p>Update policies and procedures</p> <p>Communication</p>	<p>Ensure the key changes are reflected in current policies and procedures.</p> <p>Update references to previous legislation (for example DDA, SENDA, SDA, RRAA, Equality Act 2006) but note that some parts of previous legislation will still be in force.</p> <p>Assess which training sessions and materials need to be reviewed and updated in line with the key changes.</p> <p>Revise University's statement of commitment to tackle all forms of discrimination to include all protected characteristics and prohibited conduct.</p> <p>Produce a plan for identifying and meeting the information needs of governors, committees, managers, staff and students, trade unions and students' unions in line with the key changes</p> <p>Review present arrangements for informing staff, students and visitors of their equality rights and responsibilities in light of the key changes.</p> <p>Revise relevant university documentation (hard copy or web-based) to ensure that it covers the changes in the legislation.</p>	<p>Review and amend policies and procedures.</p> <p>Ensure effective communication activities.</p>
<p>Breastfeeding now explicitly protected</p>	<p>A woman who is breastfeeding is now explicitly protected from unfavourable treatment in the areas of education and provision of services.</p> <p>This covers unfavourable treatment within a period of 26 weeks from when she has given birth.</p> <p>Outside of this 26-week period, a breastfeeding woman may be protected by the sex discrimination provisions.</p>	<p>Ensure facilities are available</p> <p>Communication of rights and responsibilities</p>
<p>Protection on the grounds of pregnancy and maternity</p>	<p>From 1 October 2010, a student who is pregnant, or has given birth within the last 26 weeks, is now explicitly protected from unfavourable treatment.</p>	<p>Communication and ensure appropriate facilities</p>

Key aspect	Key changes	Action required
extended to students		
<p>New limitations on asking health related questions during staff recruitment and selection</p>	<p>The new provisions make it unlawful for an employer to ask about the health of a job applicant:</p> <ul style="list-style-type: none"> • before offering work to an applicant • before including an applicant in a pool of shortlisted candidates from which the employer intends to select a person to offer work to <p>Notes: It will not be permissible to ask questions that aim to establish how many days of sickness absence an applicant has accrued during previous employment prior to the candidate being made a conditional or unconditional offer of work.</p> <p>It is important to highlight that asking about an applicant's health does not in itself contravene the Act, but rather the way in which such information is used may be a contravention.</p> <p>Employers will still be able to ask questions that are for the purposes of supporting disabled applicants during recruitment exercises, such as:</p> <p>Establishing whether any reasonable adjustments will be required to ensure that the applicant can participate in interviews and other forms of assessment</p> <p>Establishing whether the applicant will be able to carry out a function that is intrinsic to the work concerned (e.g. if the job involves driving there may be a requirement to have a particular level of eye sight)</p> <p>Monitoring diversity in the range of people applying for employment - useful in identifying and prioritising actions to tackle barriers to employment</p> <p>If the vacancy has a requirement for applicants to have a specific impairment.</p>	<p>Ensure existing pre-employment health questionnaires and other forms used during the recruitment process are reviewed.</p> <p>Questions relating to health should be removed or revised as appropriate so there is no risk of them forming part of the selection process.</p> <p>Ensure that applicants are still able to request reasonable adjustments during the application and selection process</p> <p>Continue to collect and use data to monitor equality in recruitment and selection</p>
New protection from third party	<p>The Equality Act 2010 makes the employer liable in the case of harassment of its employees by third parties unless the employer has taken reasonable steps to prevent</p>	<p>Ensure third parties are aware of the institution's duty to tackle this form of</p>

Key aspect	Key changes	Action required
harassment	<p>the third party from doing so.</p> <p>Third parties could include:</p> <ul style="list-style-type: none"> • Students • Contractors over whom the institution does not have direct control (for example maintenance contractors) <p>This only applies if the employer knows that the employee has been harassed on at least two previous occasions. The employee does not need to have been harassed by the same person on each occasion.</p>	<p>harassment through:</p> <p>Revising student codes of conduct, student induction and programme handbooks so that they are aware of their rights and responsibilities not to harass others, including staff</p> <p>Revising terms and conditions of contractors to ensure that they make their employees aware that harassment of the institution's staff will not be tolerated</p> <p>Revising information and signage for visitors and for events outlining unacceptable behaviour.</p> <p>Include details of third-party harassment when gathering evidence around staff experiences of harassment and discrimination (for example, as part of satisfaction surveys)</p>
Removal of secrecy clause in discussing pay	<p>The Equality Act 2010 introduces protection for people from victimisation by their employer if they discuss their pay with colleagues with a view to establishing differences in pay that may exist because of a protected characteristic.</p> <p>Employers will not be able to enforce any terms of employment or appointment that prevent or restrict discussions relating to pay.</p>	<p>Ensure that employees' terms of employment or appointment do not restrict discussions relating to pay</p>
Extended protection for disabled people	<p>Protection for disabled people has been extended:</p> <ul style="list-style-type: none"> • Indirect discrimination protection will be extended to disability. • A new protection for discrimination arising from disability will be introduced. <p>The duty to make reasonable adjustments for disabled people has been extended to when a disabled person experiences a 'substantial disadvantage'. The previous duty applied when it was 'impossible or unreasonably difficult' for a disabled person to work, study or use a service</p>	<p>Ensure that the extended protection is reflected policies and procedures, particularly those that are applied mandatorily across the institution. For example, graduation ceremonies are sometimes held in more historic, but less accessible buildings on campus. A blanket policy on the venue for ceremonies could impact on students or guests with mobility impairments.</p>

Key aspect	Key changes	Action required
Change to the definition of specific protected characteristics	The definition of disability will be extended to cover people who have had a disability in the past.	
Gender re-assignment	The definition of gender re-assignment has been extended to cover people who have proposed, started or completed a process to change their sex but are not under medical supervision	

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