

# Equality

## Introduction

**Trade unions and employers are dealing with an increasingly diverse workforce. There are higher proportions of women and people from black and minority ethnic (BME) communities in the workforce than ever before. The population is aging, with many people intending to stay in work for longer and many trying to juggle work with caring responsibilities. There is greater recognition that the barriers that disabled people have faced in accessing work should be broken down and lesbian, gay, bisexual and transgender people and the issues they face at work have become more visible.**

We now have a comprehensive legal framework that protects workers from unfair treatment because of age, disability, gender reassignment, married or civil partner status, pregnancy or maternity, race, religion or belief, sex or sexual orientation. All the discrimination laws were recently brought together into a single law – the Equality Act 2010. There are also specific rights in other laws that support progress on equality in the workplace such as the right to request flexible working and rights to maternity, paternity and parental leave.

Trade unions have long fought for equality and their memberships have become more diverse as the population and society have changed. TUC rules require affiliate unions to show a clear commitment to equality for all and to eliminating all forms of harassment, prejudice and unfair discrimination within their own structures and through all their activities. The TUC carries out equality audits of trade union membership, structures and collective bargaining activities every two years to check progress on equality. Many unions have similar rules and equality checks in place.

## Role of the union representative: equality

Union representatives have a key role to play in:

- promoting equal rights for all members, by seeking to negotiate with employers policies and procedures that advance equality and do not lead to one group being disproportionately disadvantaged

- creating a supportive atmosphere at work and in the union in which all members feel that they can participate and that their opinions are valued
- challenging instances of harassment and discrimination and ensuring complaints are dealt with effectively
- acting as a role model in treating everyone fairly.

Note that the Acas Code of Practice on time off for trade union duties and activities says that collective bargaining activities for which paid time off must be given may include equality and diversity.

## Equality representatives

Some unions have trained and made provision in their rule books for workplace equality representatives. Such representatives can act as the 'equality lens' in the workplace, helping to raise awareness of equality issues in collective bargaining and they can be a reassuring presence for colleagues who may face discrimination or harassment.

Although they lack the specific statutory rights for paid time off that other specialist representatives like union learning representatives and health and safety representatives are entitled to, you should negotiate with your employer to gain recognition and facilities time for equality representatives if you have them in your branch or workplace. You should emphasise the preventative role that such trained equality representatives can play. For example, they can help raise awareness of equality issues and ensure potential problems are spotted early and are dealt

with effectively in the workplace rather than through costly and time-consuming legal cases. They can help develop collective policies and practices that will enable the organisation to realise all the other benefits of being an equal opportunities employer such as having a more committed workforce, reduced turnover and reduced absenteeism, and a wider pool from which to recruit.

If you have someone in your branch who is interested in training to be an equality representative, the TUC runs regular courses around the country and some unions have established their own training.

Research for the TUC by Nottingham University Business School found that, where employers actively involve trade unions on equality issues, equal opportunities policies are much less likely to be 'empty shells'. For example, in such workplaces, recruitment and selection is more likely to be monitored and reviewed from an equality perspective and special procedures are more likely to be in place to encourage disabled people into work and to help women returning to work after having children. A survey of TUC-trained equality representatives found that the amount of time equality representatives get to spend on their duties has a corresponding impact on how effective they believe their efforts are in the workplace. However, more than a third of equality representatives feel they are not given nearly enough time to do the things their role requires them to do.

## The Equality Act 2010

From 1 October 2010, the **Equality Act 2010** replaced nine major pieces of legislation, including the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Religion or Belief Regulations 2003, Sexual Orientation Regulations 2003 and Age Regulations 2006. It makes equality law simpler, harmonising protection and definitions across the different groups where appropriate. As well as combining the old laws, the Equality Act includes some new provisions aimed at strengthening protection and advancing equality of opportunity.

## Protected characteristics

The Equality Act 2010 protects people from discrimination because of age, disability, gender reassignment, married or civil partner status, pregnancy or maternity, race, religion or belief, sex and sexual orientation.

## Direct discrimination

A person must not be treated less favourably than someone else is or would be treated in a similar situation because of one of the protected characteristics. For example, if a black worker fails to get a promotion when white colleagues with similar skills and experience and performance scores are promoted, this may suggest direct race discrimination. Or if a lesbian is discouraged from bringing her partner to a work social event when partners of heterosexual workers are invited this would imply direct sexual orientation discrimination.

Direct discrimination claims can also be brought by people who have been treated less favourably because they associate with someone who has one of the protected characteristics, for example a mother of a disabled child could bring a direct disability discrimination claim if she was treated less favourably and denied time off to care for her child when parents of non-disabled children had been granted time off in similar circumstances. Claims may also be brought by those who are wrongly perceived to have one of the protected characteristics and are unfairly treated because of it, for example a straight man is perceived to be gay by his colleagues and they refuse to allow him to get changed in the communal changing area with them.

If direct discrimination is found, an employer has no defence and cannot justify their actions – except if the case involves direct age discrimination. This is because there are sometimes age-based rules or practices for good reason. For example, if a 16-year-old was refused a job because it involved using dangerous machinery, the employer may be able to show that imposing a minimum age requirement was a proportionate means of achieving a legitimate aim, which was protecting the health and safety of young workers.

## Indirect discrimination

Indirect discrimination occurs when an employer has a provision, criterion or practice that appears to treat everyone the same but which actually

puts people who share a particular protected characteristic at a disadvantage. For example, a requirement that everyone has to work a rotating shift pattern may disadvantage some women in the workforce as women are more likely to have primary care responsibilities for young children and find it harder to meet that requirement, so this could be indirect sex discrimination.

An employer can defend an indirect discrimination claim by showing that the provision, criterion or practice (e.g. the requirement to work a rotating shift pattern) is a proportionate means of achieving a legitimate aim. The employer would have to show that the rotating shift pattern was appropriate and necessary for it to meet a business need such as providing 24/7 cover and that there was no less discriminatory way of it achieving that aim. If it could be shown that there was another feasible way of the business achieving 24/7 cover without requiring all employees to do the rotating shift pattern, then the employer's defence is unlikely to succeed.

### **Pregnancy and maternity discrimination**

If a woman is treated unfavourably because of her pregnancy or because she intends to take or is on maternity leave, this would be discrimination because of her pregnancy or maternity. There is no need to show she was or would have been treated less favourably than a non-pregnant person or someone who is not on maternity leave but is in a similar position.

As with direct discrimination, there is no defence for the employer. Refusing to give a job to a pregnant woman or retracting a job offer from a woman who the employer has just found out is pregnant would be discrimination and the employer could not justify their action, for example by claiming that they needed someone who was not going to be absent from work in the first year.

### **Harassment**

Harassment is when there is conduct in the workplace related to one of the protected characteristics that has the purpose or the effect of violating a person's dignity or creating an intimidating, hostile, or offensive environment for them. It is not necessary for the victim of the harassment to actually have the protected characteristic that the conduct relates to. For example, a young male Asian employee who is

not a Muslim may be the butt of 'jokes' about being an Islamic terrorist by colleagues. He could claim harassment related to religion or belief even though he is not a Muslim.

It is also not necessary for comments to be specifically targeted at an individual. For example, a woman working in a male-dominated environment who has to listen to women being talked about in a derogatory way could claim harassment if they created a hostile or offensive working environment for her, even though the comments were not about her or directed at her. In deciding whether or not there has been harassment in such a case, the perception of the victim must be considered, and all the circumstances of the case, and also whether or not it was reasonable for the victim to have that response to the comments she overheard.

Employers are liable for acts of harassment by their employees if they have failed to take all reasonable steps to prevent it happening, for example by failing to put in place adequate policies and provide training to staff that makes clear such behavior will not be tolerated.

### **Third party harassment**

The Equality Act 2010 makes employers liable for harassment of their employees by third parties such as customers, clients or service users in some circumstances. The employer becomes liable if the employee has been harassed on at least two previous occasions by a third party such as a customer or service user (it doesn't have to be the same third party on each occasion), the employer was made aware of those two previous occasions and it failed to take reasonable steps to prevent it happening again, such as displaying notices to the public that it will not tolerate harassment of its staff or may ban customers who had harassed staff previously.

In the 2011 Budget, the government announced that as part of its deregulation drive it would be consulting on whether to repeal this third party harassment protection. This consultation will take place in autumn 2011 so the protection could be repealed in 2012.

### **Victimisation**

Victimisation occurs when a worker is treated badly by their employer (or a prospective or previous employer) because they have made or supported a

complaint or raised a grievance under the Equality Act or because they are suspected of doing so. This legal provision is to ensure workers are not afraid of bringing complaints of discrimination under the Act and also that individuals such as trade union representatives that help them with their complaints or colleagues that provide information or evidence to support their claims are not targeted as a result.

An example of victimisation would be an employer providing a bad reference for an ex-employee because they had complained of discrimination. Note that the protection does not apply if a false allegation of discrimination or harassment was maliciously made or supported against an employer.

### **Equal pay**

Like the old Equal Pay Act, the Equality Act includes a right to equal pay with someone of the opposite sex who is doing equal work in the same employment. Equal work means the same or similar work, work that is rated as equivalent under a job evaluation scheme, or work that is different but of equal value in terms of the level of skill, responsibility or effort that it requires. It is often the case – given the structure of the labour market, the ongoing gender pay gap and the undervaluation of the kind of work that women do – that it is women who are paid less than men despite doing equal work to them.

An employer can defend an equal pay claim if there is a material reason for the difference in pay that is not related to the sex of the employees, for example if a man is paid more than a woman doing equal work in the same company but this is because he works in London and she does not and his higher pay reflects the higher living costs in London.

It is important to remember that the reason an employer gives for the difference in pay between a man and woman must not discriminate either directly or indirectly because of sex. For example, if the employer said a woman was paid less than a man because she had less service, this may be indirectly sex discriminatory as women will often find it harder to acquire long service as they are more likely to have breaks from the labour market to care for children. The employer would have to show that rewarding service in the way that it does was a proportionate means of achieving

a legitimate aim. It is likely to find this harder to do where there are very long service-related pay scales as, after an initial period in which length of service makes a real difference to ability to do the job, in most jobs the impact of length of service on performance tails off.

### **Equal pay audits**

You should ask your employer to carry out an equal pay audit of the whole workforce to establish where there are differences in pay between men and women doing equal work and to take action to close any gaps in pay that are not justified. The statutory Equality and Human Rights Commission (EHRC) Code of Practice on Equal Pay recommends equal pay audits as the most effective way of ensuring gender equality in pay. If you are negotiating in the public sector then you can also argue that the equality duty on public bodies requires them to consider the need to do an equal pay audit. The EHRC has an equal pay audit toolkit on its website that clearly sets out what an audit should involve. It also provides guidance on how to audit pay by other characteristics in addition to gender.

It is more likely that equal pay for work of equal value will be observed where there is a single transparent grading structure that is underpinned by a non-discriminatory analytical job evaluation scheme that applies to all jobs. If there is a job predominantly done by women that is paid less than a job predominantly done by men although the jobs are of equal value, this would suggest indirect sex discrimination. Simply saying that there is a difference in pay because there are different pay structures and collective bargaining arrangements for the women and men would be insufficient justification for the difference. This is why employers and unions have sought to negotiate pay structures and bargaining arrangements that cover all staff to address equal pay.

The EHRC has produced an equal pay in practice checklist. It has also produced checklists covering different kinds of ‘high risk’ pay practices such as market forces and pay, performance-related pay, pay protection and starting pay (see [www.equalitieshumanrights.com](http://www.equalitieshumanrights.com)).

### **Pay secrecy clauses in contracts**

The Equality Act makes confidentiality clauses in individuals’ contracts unenforceable in circumstances where employees have shared

**The EHRC checklist gives the following advice to employers: EHRC's top 10 tips for equal pay**

1. Make sure you understand equality law and pay and remember that, as well as equal pay claims that cover sex discrimination in pay, other discrimination claims can be brought on the other protected characteristics. And remember pensions are included in pay.
2. Make sure the pay system is transparent. Transparency means everyone (managers, employees and trade unions) should understand the pay system.
3. Have one pay system for all employees.
4. Keep your pay system simple as this will mean it's easier to understand and more likely to be transparent and objective.
5. Base your pay structure on an analytical job evaluation scheme and re-evaluate regularly.
6. Equality impact assess any proposed changes to your pay system. You should analyse the expected outcomes of the change to determine whether it is going to have a disparate impact on one gender or ethnic group, those with disabilities or those in different age groups. This is a legal requirement under the equality duty in the public sector.
7. Limit local managerial discretion over all elements of the pay package. The more discretion, the greater the risk of anomalies. You should also monitor the impact of managerial decisions, especially where these affect performance-related elements of the pay package.
8. Check salaries on entry to the organisation and on entry to grades. If men are starting on higher salaries than women, or white employees on higher salaries than Afro-Caribbean employees, then you may be importing discrimination into your pay system. Your responsibility is to provide equal pay, not match previous salaries.
9. Check rates of progression within and through grades.
10. Carry out regular checks to ensure that the various elements of your pay package still reward what they are intended to reward. Bonuses should fluctuate with performance. Market supplements should be paid only if you can demonstrate recruitment and retention difficulties.

information about how much they earn with colleagues to find out whether there has been discrimination in pay. This also applies to situations where the information was shared with trade union representatives or officers. The EHRC estimates that about a fifth of employers discourage staff from talking about their pay. As a union representative you should encourage openness about pay and you can remind members and your employer that the law supports the principle of transparency. Anyone who is disciplined for sharing or seeking information about pay to find out if there has been discrimination will be able to claim victimisation under the Equality Act 2010. Note that the EHRC Code of Practice on Equal Pay also states that where there is a lack of pay transparency there is a high risk that discrimination will be found.

**Disabled workers**

***The duty to make reasonable adjustments for a disabled person***

Under the Act, an employer has a duty to make reasonable adjustments to things like their premises, equipment, job tasks or employment policies to remove anything that places a disabled person at a substantial disadvantage. This recognises that often for disabled people things have to be done differently to give them the same access and opportunities to work as others have.

Employers are often good at considering changes to physical premises or equipment but may not think about some of the other less visible things that could be considered a reasonable adjustment. For example, allowing more time for completion

of a written test for a dyslexic candidate, allowing flexible working so that a disabled person does not have to travel during rush hour or work at a time of day when their impairment may be at its worst, or accepting lower levels of output from a disabled worker or transferring some tasks from the disabled worker to another person.

The reasonable adjustment duty applies only to people who can show they meet the definition of disability under the Act. It does not apply if the employer did not know and could not reasonably be expected to know that a disabled person was disabled and was likely to be placed at a disadvantage.

The employer cannot ask the disabled person to meet the costs of any adjustments. However, funding may be available to employers under Department for Work and Pensions (DWP) Access to Work scheme to help with any adjustments (see the DWP website [www.dwp.gov.uk](http://www.dwp.gov.uk) for more information about the funding). Whether an adjustment is reasonable for an employer to make should take into account this funding, if it is available to the employer.

### ***Discrimination arising from disability***

If a disabled person (who meets the definition of disability under the Act) is treated unfavourably because of something arising out of their disability then this could give rise to a complaint of discrimination. This applies only where the employer knows or could be reasonably expected to know that the worker is disabled. If a disabled

worker was absent from work because of their disability for a number of months and the employer knows of their disability but nevertheless disciplines them in accordance with the company's sickness absence policy, then they could complain of 'discrimination arising from disability'.

An employer can justify the treatment that has led to the discrimination complaint, for example in the situation of sickness absence, if they are able to show that the sickness absence policy and the disciplining of the worker was a proportionate means of achieving a legitimate aim. But the employer should have considered whether there was a reasonable adjustment that could have been made to the policy for the disabled worker such as not triggering the disciplinary procedure until a later stage.

One way of ensuring that disabled workers in your workplace are treated fairly in terms of sickness absence is to negotiate a policy of disability leave that would allow disabled workers some absence from work that is related to their disability and for this absence to be recorded separately from sickness absence.

The TUC has produced guidance for union representatives on sickness absence and disability discrimination which is available from [www.tuc.org.uk](http://www.tuc.org.uk).

### **Pre-employment health questions**

The Equality Act 2010 bans employers from asking questions about candidates' health before a job offer is made. This includes occupational health questionnaires and questions about a candidate's previous sickness absence record before a job offer is made. However, there are some exceptions to this. An employer can ask:

- whether a candidate needs a reasonable adjustment to the application or interview process
- questions about whether a candidate will be able to carry out a function that is intrinsic to the job (the EHRC's Statutory Code of Practice says 'intrinsic' means 'essential')
- whether a candidate is disabled as part of its equal opportunities monitoring
- whether a candidate has a disability that is an occupational requirement for the job (e.g. a mental health charity may require someone with experience of mental illness)

## **! Definition of disability**

A person is considered disabled under the Equality Act if they have a physical or mental impairment that substantially affects their ability to do normal day-to-day activities over the long term. The effect of the impairment is long term if it has lasted or is likely to last for at least 12 months or if it is likely to last for the rest of the life of the person affected. The Act makes clear that cancer, HIV infection and multiple sclerosis are considered disabilities, and progressive conditions that do not currently have a substantial adverse effect but are likely to have that result in time are covered.

- whether a candidate is disabled if it is seeking to take positive action to encourage disabled people to take up employment with them.

### **Checking recruitment procedures**

As the ban on pre-employment health questions is a new provision in the Equality Act you should ask your employer about their recruitment procedures. If they are asking questions about health before offering a job then they must stop unless the questioning fits into one of the categories given above. Remind them that they could face action by the EHRC, which has power to enforce the ban on such questions, and that they risk facing a disability discrimination claim if they ask such questions and a well-qualified disabled applicant then does not progress through the recruitment process. They may also face a discrimination claim if they ask health questions after a job offer has been made and the offer is subsequently withdrawn from a disabled person. Remember, as well, that they should consider a disabled person's suitability for a job once any reasonable adjustments are made, not prior to such adjustments being made.

### **Positive action**

The Equality Act allows organisations to do things differently or to target initiatives at particular groups if it is a proportionate way of them addressing under-representation, a disadvantage they reasonably think the group has suffered, or a different need they have. For example, an employer may decide to establish a mentoring scheme to help BME employees to progress into management roles where they have been under-represented, or an employer in a male-dominated industry may decide to hold women-only recruitment events to encourage more women to apply for jobs. However, there are limits to positive action and people cannot be guaranteed a fast-track through recruitment procedures or appointed to jobs simply because they have a protected characteristic.

A new provision in the Equality Act that came into effect from 6 April 2011 allows employers in a tie-break situation with two candidates who are 'as qualified as each other' to appoint the candidate with a protected characteristic that is under-represented or has a disadvantage associated with it if it is seeking to address that under-representation or disadvantage and making such an appointment is a proportionate way of doing that.

However, the employer must not have a general policy of treating people with that protected characteristic more favourably in all recruitment and promotion situations. The employer must always carefully consider the merits of both candidates in a tie-break situation before making such a decision.

### **Occupational requirements**

People can be appointed to jobs because they have a particular protected characteristic if there is an occupational requirement that someone with that characteristic must do the job. In practice, this will apply to a very narrow range of situations, for example a film company may require a black actor for a film about Martin Luther King or an organisation campaigning for LGB rights could require an LGB person when recruiting for the chief executive position.

### **Other exceptions**

There are a range of other specific exceptions in the Equality Act that apply to employment. For example:

- benefits that increase with service up to five years cannot be challenged as indirect age discrimination as they are exempt from challenge under the Act
- age-related pay bands that reflect the bands in the National Minimum Wage are exempt from challenge
- benefits that are available only to married partners and civil partners but not non-married or non-civil partners such as survivor benefits in occupational pension schemes are also exempt from challenge. (Note, however, that if a benefit is provided to married partners it must be provided to civil partners too otherwise this would be direct sexual orientation discrimination.)
- where employment is for the purposes of an organised religion, the employer can insist on someone who is not a woman, not lesbian, gay or bisexual and not a transgender person if it is to comply with the doctrines of the religion or to avoid conflict with the strongly held convictions of a significant number of the religion's followers. However, this exception should apply to only a narrow range of jobs that involve proselytising the religion, such as the clergy, but

not to jobs like a gardener of church land or a care assistant for a faith-based charity.

### **Retirement and age discrimination**

The Equality Act 2010 includes an exception for retirement at or after the age of 65 (the default retirement age) provided that an employer follows the statutory procedure for retirement and considers a right to request to stay on. However, from April 2011 the default retirement age was phased out with the final forced retirements happening under this procedure in October 2011 (an employer had to give six months' notice of their intention to retire anyone who will reach 65 or will be over 65 in October 2011, so the last notifications of retirement would have had to be sent out in April 2011). Now the default retirement age exemption has been removed, an employer can operate a policy of retiring workers at a fixed age only if they can show that it is objectively justified as a proportionate means of achieving a legitimate aim.

It is probably going to be hard to justify a blanket policy of having a fixed retirement age for a whole workforce. It may in some circumstances be possible to justify a fixed retirement age for a particular job, for example where there is strong evidence of declining capability with age and there are health and safety concerns (although even then there may be less discriminatory alternatives as regular medical assessments are likely to be in place for jobs of this kind, so the decision to retire may have to consider the results of such an assessment rather than be based solely on age).

Now the default retirement age has been removed, a worker aged 65 or over, like workers of other ages, will be able to claim unfair dismissal if the employer dismisses them for a reason that is not fair or if they fail to follow the correct process. They could also claim age discrimination if it appears their dismissal was because of their age either directly or indirectly.

Consider negotiating a flexible retirement policy to provide more retirement options, for example by allowing for a phased reduction in working hours or allowing transfer to a different role within the organisation before retirement. Surveys suggest that most older workers would stay in work longer if they could work flexibly. Talk to members and find out what they want.

## **⚠ Operating without a compulsory retirement age**

In recent years many employers have completely abandoned the practice of requiring workers to retire at a fixed age and have allowed workers to choose when they retire. Others have used the default retirement age as a fall back but have accepted many requests from individual workers to stay on past 65. Such employers have recognised the benefits of retaining the knowledge, experience and skills of older workers and encouraging a gradual transition to retirement so there is an effective handover.

Now the default retirement age has been removed:

- employers are no longer able to force individuals to retire at 65 or over unless they have a fixed retirement age policy that they can objectively justify
- you should ensure there is genuine choice for individuals by making sure there is adequate pension provision for those who still want to retire at 65 (or younger if the pension scheme allows for it)
- older workers should be treated the same as others are under any performance management or capability procedures, and they should be given the same support and opportunity to improve their performance. These procedures should not be used simply as an alternative way of getting rid of them now the default retirement age and statutory retirement procedure has gone.

### **Equality duty on public bodies**

Since April 2011, public bodies when carrying out their public functions have had to pay 'due regard' to the need to tackle unlawful discrimination and harassment, advance equality of opportunity and foster good relations with people of eight protected characteristics – age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation. This



replaced the similar public sector equality duties that existed in previous legislation on race, disability and gender.

### **What is a public body?**

The duty applies to public authorities that are listed in the Equality Act (this includes councils, schools, NHS trusts, police forces, fire services, government departments etc.). It also applies to any organisation that carries out a public function. This means it applies to voluntary or private sector providers of public services, too, when they are carrying out that public function.

### **What does 'due regard' mean?**

To show a public body has paid due regard to equality, it should be able to produce evidence that it has considered the impact on different groups of their current and proposed policies. The best way is through an equality impact assessment in which the expected impact on different groups is analysed and documented. If there is a potential negative impact on a group the public body should consider removing the policy or changing its plans. If it feels the policy is necessary then it should consider what steps it can take to mitigate the disproportionate impact. In addition, if it's likely that individual indirect discrimination claims could result from the policy and the public body intends to continue with it, then it would need to consider whether it can justify it as a proportionate means of achieving a legitimate aim.

### **What can unions do?**

Ask whether and how the public body has assessed impact and to see the results. If the policy being considered concerns employment then ideally the public body will have consulted the union during the process of assessing impact. You may be able to produce additional or alternative evidence from your members of actual or anticipated impact. If a public body intends to continue with a policy that is likely to have a negative impact on a particular group, ask how it will mitigate that impact. If it is likely that its proposals could result in individual indirect discrimination claims, then also ask how it can objectively justify what it is doing.

On a more general level, you should press the public body to put in place good monitoring procedures so evidence can be gathered to inform impact assessments and where the public body should be taking action to advance equality of

opportunity. There should be training for those making policy decisions in the organisation to ensure they understand the requirements of the duty and the responsibilities they have to pay due regard to equality. You should seek to get union participation in any consultation activities on how the public body intends to fulfil the equality duty and encourage members from particular groups to participate.

The Equality and Human Rights Commission has responsibility under the Equality Act 2006 for compliance and enforcement of discrimination law. It was formed from the amalgamation of the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission and given responsibility for all discrimination law and human rights.

It has produced the statutory Codes of Practice for the Equality Act 2010, which employment tribunals can take into consideration when hearing a claim, and a range of excellent non-statutory guidance on the law to help employers and workers understand how the law applies in practice. There is also guidance for specific sectors such as education. The EHRC has some unique enforcement powers, including specific powers to enforce the ban on pre-employment health questions and the public sector equality duty.

### **Specific duties on public bodies**

Public authorities that are listed in the Equality Act have to comply with specific duties Regulations. These specific duties vary between England, Scotland and Wales. In England a new approach is being taken from the old race, disability and gender duties, which required public bodies to undertake certain procedures such as monitoring, training of staff and developing written equality schemes. Under the new specific duties in England, listed public authorities have to:

- publish information by 31 January 2012 (or 6 April 2012 if a school) and at least every year after that to demonstrate compliance with the general duty (if there are more than 150 employees then this must include workforce information)

- publish one or more objectives that will help it meet the general duty by 6 April 2012 and at least every four years after that.

Clearly the specific duties that apply in England are much weaker than the old specific duties. However, in order to comply with the general duty a public authority should still be assessing the impact on different groups of its policies and practices, engaging with stakeholders and considering

the need for objectives on eliminating unlawful discrimination, advancing equality of opportunity and fostering good relations.

The EHRC has non-statutory guidance for public authorities on how to meet the new public duty and in summer 2011 it produced statutory Codes of Practice on what public bodies should be doing. These Codes will be important, given the weakness of the new specific duties.

## Checklist

### Good equality practice in the workplace

- » Make sure your employer has an equal opportunities policy in place that has a commitment to equal treatment, which at minimum should include all the protected characteristics covered by the Equality Act.
- » There should be a policy covering bullying and harassment which makes clear that the employer will not tolerate such behaviour in the workplace.
- » There should be regular training of all staff to make them aware of the importance of equality and respect for diversity in the workplace.
- » More detailed training may be required for managers on particular issues such as reasonable adjustments for disabled people, avoiding discrimination in recruitment and selection, dealing with bullying and harassment, or the requirements of the equality duty if working for a public body.
- » Regular monitoring of the workforce should be undertaken. As well as composition of the workforce, ideally it would also cover applicants, appointments, starting salaries, performance assessments, training, grievances and disciplinary cases, and leavers.
- » The union can assist with getting good return rates from monitoring by enabling consultation with the workforce before it is undertaken, ensuring the questions asked are appropriate and that the workforce understands why the information is being gathered, and what will happen as a result.
- » At minimum, monitoring should be by race, gender, age and disability. Particular care should be taken when monitoring by sexual orientation or gender identity. Lesbian, gay, bisexual and transgender (LGBT) workers frequently experience harassment at work and in some workplaces there will be real concerns about how the information is going to be used and how confidentiality is going to be guaranteed. The risks of a breach of confidentiality are particularly high for a transgender person. Note that it is an offence under the Gender Recognition Act 2004 to reveal the previous gender identity of someone who has been through gender reassignment and has a gender recognition certificate.
- » Information from monitoring and staff surveys should be acted upon and not gathered for its own sake. Ask to see the data and feedback and what action the employer plans to take as a result. For example, if it is evident that BME staff are not progressing, then the training, development and promotion structures should be checked for discrimination and positive action measures may be considered to address the problem. Talk to BME members and get their views.

*Continued overleaf*

## Good equality practice in the workplace (continued)

- » Press employers to carry out equal pay audits on a regular basis to check for any unjustified gender pay gaps. Ensure the results are shared with you and action is taken to address any unjustified gaps.
- » Press employers to audit their policies on a regular basis, checking for any disproportionate negative impact or potential impact on particular groups and amending them if a policy or practice cannot be objectively justified.
- » If a new pay structure or employment policy is proposed, get the employer to consider at an early stage the impact it will have on different groups. Speak to members about the proposals and whether there is any potential negative impact. If there is evidence of disadvantage for some groups, press the employer to amend the proposals or put in place measures to mitigate any negative impact. Remember, if you are dealing with a public body, that the equality duty should require this.
- » Ensure policies on family-friendly leave are inclusive and reflect the diverse range of families that exist. Such policies and benefits should make clear that they apply to same-sex couples and parents.
- » Flexible working opportunities should be made available to all workers. Flexible working is not just for women with young children: it can be important in advancing equality of opportunity for disabled workers, carers and older workers as well. Plus, if it is available to everyone it is more likely that the culture of the workplace and the design of jobs will change to meet demand for flexible working, so those who really need it will be more likely to get it.
- » Ensure interview and promotion panels are diverse and that all who sit on them have been given equality and diversity training.
- » With the removal of the default retirement age, talk to members about their concerns around retirement, and consider negotiating flexible retirement options for older workers.
- » Consider dress codes, facilities, working time and leave policies and whether these should be amended to accommodate the requirements of different religions. Some accommodation may be necessary if current arrangements put particular religious groups at a disadvantage and it could be difficult to justify them as a proportionate means of meeting a legitimate aim.

## Supporting individuals

- Take action as quickly as possible when a member approaches you with an issue.
- Clarify the facts and encourage the member to collect evidence of the discrimination or harassment they are suffering. They should keep a record of any incidents – the time, date and location, what was said or done, and if there were any witnesses.
- Find out if there is any evidence of similar incidents against colleagues occurring in the past or evidence that a group of employees are being put at a disadvantage by a particular policy or practice.
- Support the member in raising the issue with their manager (or someone higher up if it is their manager who is the source of the alleged discrimination or harassment) or the HR department. If they feel unable to raise the matter themselves, then they may wish you to raise it on their behalf.
- If it is an issue that cannot be resolved informally then support the member in raising a grievance through formal workplace procedures.
- If you are dealing with a disabled member, consider whether there is any reasonable adjustment that could be made to alleviate the problem. Make sure the member is involved in

discussions about what adjustments are most likely to be effective.

- If it looks likely that the issue is not going to be resolved within the workplace, seek the advice of the union if you have not done so already. Remember that there are time limits for bringing tribunal claims: for discrimination it is three months from the act of discrimination; if you are dealing with a failure to make a reasonable adjustment it would be three months from when the employer decided not to make the adjustment or the end of the period within which you would have reasonably expected them to make the adjustment; for equal pay it is six months from the end of the employment to which the claim relates.
- There are statutory discrimination and equal pay question forms that can be used to gain further information from employers. If an employer fails to respond to a question form or gives evasive responses this may be used against them at tribunal. But seek advice from the union before using statutory question forms.
- Try to ensure lessons are learned from any complaints of discrimination or harassment and that where possible collective policies or actions are put in place to prevent similar cases arising in the future.
- As well as awarding compensation to a victim of discrimination, Employment tribunals can make recommendations that employers change their policy or practice to prevent discrimination in the future. Consider this and keep a record of any recommendations made against the employer as if a further case arises involving similar facts any failure to comply with previous tribunal recommendations will be relevant.

## ! LGBT monitoring

Monitoring sexual orientation and gender identity should be undertaken only if the following principles are observed:

- There is a full LGBT equality policy in place with action to implement it.
- Everyone is clear why monitoring is being carried out and what will be done with the results.
- There has been a process of consultation on, and explanation of, the first two principles prior to monitoring.
- There is an absolute guarantee of confidentiality of the information collected.

If monitoring goes ahead, the form should spell out that answering the questions on sexual orientation and gender identity are optional. The questionnaire should reassure people that information gathered will be stored in a safe way and will be used only for the purpose for which it was collected. The data should be gathered on an anonymous basis. As well as asking if employees are heterosexual, lesbian, gay, bisexual or transgender, it is useful to ask a follow-up question about whether they are 'out' at work as this will provide a very useful indication of how comfortable people feel to be themselves in the work environment.

Monitoring for gender identity (trans) is controversial. Some transgender groups argue it should not be done, as most trans people will want to be identified in their new gender. It should be discussed first with 'out' trans members. If asked, a question about gender identity should be freestanding, not part of sexual orientation or gender questions, and it should ask if the person identifies as trans. Asking an independent third party organisation to carry out the monitoring can help gain trust in the process and boost response rates.

## ! Supporting transgender members

The process of changing gender is slow and arduous, with significant consequences beyond the purely medical for the individual undergoing it. Union representatives will need to be prepared to deal with these consequences in the workplace.

Those undergoing treatment through the NHS will begin by receiving specialist medical advice and diagnosis and they will be expected to commit to the 'real life test' before hormones are prescribed. The real life test is when the individual begins to live as a member of the new gender, and may have records changed to reflect this (such as their driving licence and passport).

One year is the minimum recommended period for the real life test; however NHS patients are likely to be expected to have a minimum of two years and often more. Finally, for the individual intending, and able, to undergo surgery, they undergo corrective surgery to complete, physically, the transition from the previous to the opposite gender. The timing of this varies according to local funding and waiting lists.

The process can be very stressful, requiring support and sympathetic handling. The TUC has given the following guidance to union representatives:

- At every point, the steps to be taken in the workplace must be agreed with the transgender member, and maximum confidentiality must be observed for as long as the member wishes that to be the approach.
- In larger workplaces, the member may wish to transfer to another position at the point at which they adopt their new gender. Early contact with an appropriate manager or HR department will be necessary, and this may involve identifying a specific individual with whom to plan the transition process in order to limit the number of people who know.
- Whether or not the individual remains in the same post, a plan for support during the transition and after will need to address such questions as what information and training needs to be provided to managers and colleagues. It will often happen that the person undergoing transition will wish to take leave before returning to work in their new gender. This will provide the opportunity to brief managers and colleagues and to ensure that management stresses the need for proper treatment of the worker.
- The plan will necessarily include how to deal with the time off needed for medical treatment. Transgender people will need to take time to attend a gender identity clinic at intervals up to and beyond surgery, and also sometimes for other aspects of transition such as hair removal and speech therapy. At minimum, under the Equality Act, a transgender person must not be treated less favourably than someone absent from work because of sickness.
- The plan will need to identify the point at which the individual's new gender is formally established in the employer's personnel records, and any consequent alterations (e.g. security passes, the individual's choice of name for directories etc.). The right of the individual to maintain the confidentiality of their previous identity needs to be secured as part of this stage. This will be particularly important when it comes to references if the individual chooses to leave for another employment and in terms of access to old personnel records that are held for a number of years. Further issues will arise subsequent to the transition and/or the obtaining of a gender recognition certificate.
- It would be good practice for an employer with a dress code to allow flexibility during transition, and to respect the individual's wishes as to when he or she is comfortable to change into the form of dress appropriate for their new gender.

## ⚠ **Supporting transgender members (continued)**

- Agreement needs to be reached on use of toilets and changing facilities. Here, it will be appropriate to agree with managers that the individual starts to use the facilities for their new gender when they begin to live in that gender. This needs to be explained to colleagues.
- If the employer does not already include gender identity among the grounds covered by a policy against harassment, it will be important to ensure that this is negotiated at an early stage.
- There may be pension implications for someone who has changed their gender and remains part of an employer's pension scheme. It may be appropriate to seek the advice of the union's pension experts to ensure that the most beneficial outcome is negotiated.
- It is strongly recommended that union representatives negotiating on behalf of a transgender member and who feel they need more expert advice consult the websites from transgender organisations such as Press for Change ([www.pfc.org.uk](http://www.pfc.org.uk)).

## **Further information**

### **TUC publications and information on equality issues**

- *Representing and Supporting Members with Mental Health Problems*
- *Sickness Absence and Disability Discrimination*
- *Disability at Work: a trade union guide to the law and good practice*
- *Cancer in the Workplace: a guide for union representatives* – a publication, a course and an e-learning facility in partnership with Macmillan Cancer Support
- *Recording Women's Voices: the Equal Pay story* – with DVDs
- *Domestic Violence: a guide for workplaces.*
- *Tackling Racism in the Workplace – a negotiators' guide*
- *LGBT Equality in the Workplace: A TUC guide for union negotiators on lesbian, gay, bisexual and transgender issues*
- *Dyslexia in the Workplace: a guide for unions*
- *TUC Guide to Equality Law*
- *TUC-CIPD Guide to Managing Age Diversity in the Workplace*
- *TUC Equality Audit 2011* (and previous editions)
- *TUC Equality Duty Toolkit.*

### **Equality and Human Rights Commission**

Statutory Codes of Practice and range of guidance and information on equality available from [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

email: [info@equalityhumanrights.com](mailto:info@equalityhumanrights.com)

Helpline for individuals: 0845 604 6610

Disability helpline: 08457 622633

Textphone: 08457 622633