



THE EQUALITY ACT 2010

EQUALITY ACT 2010:

The Equality Bill was published in April 2009 after four years of reviews, discussions consultations. The Equality Act made it onto the statute book on 8th April 2010 just prior to the General Election. The Act primarily seeks to achieve two main goals; namely updating the UK's discrimination laws and enshrining, within one piece of legislation, all discrimination laws in order to significantly simplify a complex area of law enabling an easier understanding of one's legal rights and obligations.

EXTENT:

The Act extends to England and Wales; it forms part of the laws of Scotland (with the exception of one clause) and some provisions of it form part of the law of Northern Ireland.

The majority of the provisions of the Act came into force on 1st October 2010. The requirements under the Act relating to Age are not expected to come into force until 2012.

THE ACT'S APPLICATION TO CLUB'S/RTCs:

The Act will apply to clubs and RTCs by virtue of their being either Service Providers and/or Associations.

The Act applies to all organisations that provide a service to the public or a section of the public and to anyone that sells goods or provides facilities (Service Providers). Therefore clubs that provide RYA training to members of the public may be deemed to be a Service Provider.

The Act also applies to private members' clubs¹ insofar as they are deemed to be an Association. Associations are bodies:

- with 25 or more members; and
- that have rules regulating who can become members (though not necessarily formal or written); and
- that have a process of selection to become a member.

¹ Although there are a number of potential exemptions, for which see below.

The potential incompatibility of the third of these provisions with the membership rules for Community Amateur Sports Clubs has yet to be resolved. In the meantime CASCs should assume that they are covered by the legislation.

If a club is a Service Provider the Act prohibits it from discriminating, harassing or victimising a recipient of the service due to a protected characteristic (see below).

If a club is considered to be an Association the Act prohibits it from from discriminating, harassing or victimising a member, an associate member, prospective member or guest due to a protected characteristic.

The characteristics that are protected by the Act are:

- Age;
- Disability*;
- Gender reassignment;
- Marriage and civil partnership²;
- Pregnancy and maternity³;
- Race (including ethnic origin, national origin, colour, nationality)*;
- Religion or belief;
- Sex;
- Sexual orientation*.

*Under previous legislation private members clubs were obliged not to discriminate only on the grounds marked with an asterisk (above). Employers however, were obliged to comply with all of the discrimination legislation.

The Act has not introduced any new protected characteristics, however, the Act replaces Associations' separate obligations relating to disability, race and sexual orientation with a single set of requirements covering these characteristics and extends them to include religion or belief, gender reassignment, pregnancy and maternity, sex and age.

The definition of race has been made non-exhaustive (i.e. race now **includes** colour, nationality and ethnic or national origin). The definition of gender reassignment has also been widened such that

² This characteristic is protected as a result of either direct or indirect discrimination or by virtue of victimisation. It is not covered under associative discrimination, discrimination by perception, harassment or harassment by a third party. It only arises in an employment relationship; it does not apply to non-employment relationships within clubs/RTCs.

³ This characteristic is only protected when arising as a result of direct discrimination or victimisation.

there is no longer a need for an individual to be under medical supervision to be protected from discrimination.

To come within the scope of the Act and be actionable discrimination must be on the basis of one of the protected characteristics.

For Example: A sailing club has a waiting list for spaces in the dinghy pound but fast tracks successful sailors to the front of the list. Sailing talent/ability is not a protected characteristic and therefore does not fall within the scope of the Act.

The main areas in which Associations i.e. clubs must not discriminate, harass or victimize are:

- In the arrangements they make for selecting or rejecting new members and the terms for joining.
- In the ways in which clubs give or deny benefits or services or remove or vary the terms of membership.
- In the ways in which clubs give or deny associates benefits or services or remove or vary their rights as an associate. Associates are people who are not members but have some membership rights because they are a member of another Association.
- In the arrangements clubs make for deciding who can be invited as a guest and the terms for inviting or refusing people as guests.
- In the ways in which clubs give or deny guests benefits or services.

The main areas in which Service Providers i.e. RTCs must not discriminate, harass or victimize are:

- The terms on which it provides and/or terminates the service or subjecting a person to any other detriment.

As a club and an RTC you are likely to be an Association and a Service Provider under the Act. If so, you will need to consider whether any services you provide are provided to the public or to your members, associate members and guests. The Equality and Human Rights Commission produces Guidance giving advice on complying with equality law aimed at Clubs, Businesses and Charities. The section entitled 'What equality law means for your businesses is likely to be most relevant to Service Providers; the section entitled 'What equality law means for your Association, club or society' may be more relevant to clubs. The Guidance can be downloaded from the EHRC website

(<http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/>).

TYPES OF DISCRIMINATION:

Direct Discrimination:

Direct Discrimination occurs when a person is treated less favourably than another person because of a protected characteristic.

For Example: Club rules do not allow same sex couples to become members. This would constitute discrimination on the grounds of sexual orientation as same sex couples are being treated less favourably than heterosexual couples who are entitled to join membership.

Direct Discrimination can never be justified. However, when the law on age discrimination comes into force (see below) direct discrimination on the basis of age may be justified where the provider of goods, facilities or services can show that the treatment in question was a proportionate means of achieving a legitimate aim.

Indirect Discrimination:

Indirect Discrimination occurs when there is a seemingly neutral rule, policy or practice that applies to everyone but which particularly disadvantages people who share a particular protected characteristic.

Indirect Discrimination may be justified if it meets the 'objective justification' test i.e. that it can be shown that the rule, policy or practice is a proportionate means of reaching a legitimate aim.

Indirect discrimination has, for the first time, been extended to cover disability and gender reassignment.

Associative Discrimination:

Associative discrimination occurs where a person is discriminated against because of their association with someone who has a protected characteristic.

For Example: Where the mother of a disabled child is prevented from joining the club because of her child's disability.

Perceptive Discrimination:

Perceptive discrimination occurs when others perceive an individual to have a particular protected characteristic.

For Example: If an individual is treated less favourably because he is thought to be gay (and it later transpires that he is not or he is unwilling to state whether he is or not).

Harassment:

Harassment is unwanted conduct on the grounds of a protected characteristic that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Harassment applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnerships.

Third party harassment means that an employer is potentially liable for harassment of their employees by people (third parties) who are not employees of your organisation e.g. customers/clients. An employer will only be liable if the harassment has occurred on at least two occasions, it was aware that it had taken place and has not taken reasonable steps to prevent it from happening again.

The Government announced in its 2011 March Budget that it intends to review employers' liability under the Equality Act 2010 for the harassment of employees by third parties (such as clients and customers) - including consultation on removing the requirement that employers take reasonable steps to prevent persistent harassment of staff by third parties.

Victimisation:

Victimisation occurs when a person is treated less favourably because they have made or supported a complaint about discrimination or harassment or because they are thought to be doing or may do these things. Victimisation also occurs when a person is treated badly because they support someone else who makes a discrimination claim.

Combined Discrimination:

The Act introduces the new concept of combined discrimination thereby entitling a claimant to claim direct discrimination based on

a combination of two or more protected characteristics. This provision is not due to be brought into force until April 2011.

The Government announced in its 2011 March Budget that it will not bring into force the dual discrimination provisions under the Equality Act 2010.

Positive Action:

The Act allows Associations/Service Providers/Employers to engage in positive discrimination i.e. where an employer is faced with a choice between two equally qualified candidates, it can in certain circumstances choose to treat the candidate possessing a certain protected characteristic more favourably, but only if individuals with that protected characteristic tend to suffer a disadvantage or if participation in that field by persons with the characteristic is low and if the employer has acted to overcome the disadvantage or encourage participation. Positive action is always voluntary, not compulsory.

Responsibility for what other people do:

Clubs and RTCs will need to bear in mind that they may be held legally responsible for acts of discrimination, harassment and victimisation carried out by their employees/agents⁴. However, if you can show that you took all reasonable steps to stop an employee actually unlawfully or that an agent acted outside the scope of his authority you may not be legally responsible.

You can reduce the risk that you may be held legally responsible for the behaviour of other people by instructing them not to discriminate, harass or victimise including telling your employees/agents what equality law says and incorporating the standards of behaviour within the Club Rules/terms of employment/staff handbook.

SPECIFIC PROTECTED CHARACTERISTICS

Disability Discrimination:

It is no longer a requirement under the Act for claimants to show that their condition affects one of eight specified functions (previously required under the Disability Discrimination Act) some

⁴ An agent in law is someone carrying out your instructions.

or all of which must have been affected for a condition to have qualified as a disability.

The Act introduces a new concept of **discrimination arising from a disability**. This new head of claim has been introduced to counter the effect of a recent House of Lords' decision in ***Mayor and Burgesses of the London Borough of Lewisham v Malcolm [2008] UKHL 43*** which undermined the effectiveness of the legal protection for individuals with disabilities by making it extremely difficult to show that an employer had discriminated against an individual for a reason relating to his or her disability.

Indirect discrimination has been extended to cover disability for the first time.

Reasonable Adjustments

Clubs and RTCs are under a duty not to treat disabled persons less favourably in terms of membership and must make reasonable adjustments in order to ensure its services are available to disabled persons. They have a duty to make 'reasonable' adjustments to the physical features of premises in order to ensure that there are no physical barriers to their services. As the Act imposes a proactive approach, it will be good practice for the club to take action to prepare for its new obligations in advance of the rules coming into force.

The duty to make reasonable adjustments comprises three requirements:

- Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter (i.e. access to benefit, facility or service, members or associates retaining their rights as such or avoiding having them varied, and being admitted to membership or invited as a guest) in comparison with persons who are not disabled a club is required to take such steps as is reasonable to avoid the disadvantage.
- Where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter (i.e. access to a benefit, facility or service or being admitted to membership or invited as guest) in comparison with persons who are not disabled a club is required to take such steps as is reasonable to avoid the disadvantage or adopt a reasonable alternative method of affording access to the benefit, facility

or service or of admitting persons to membership or inviting persons as guests⁵.

- Where a disabled person would, but for the provision of an auxiliary aid, be at a substantial disadvantage in relation to a relevant matter (i.e. access to benefit, facility or service, members or associates retaining their rights as such or avoiding having them varied, and being admitted to membership or invited as a guest) in comparison with persons who are not disabled a club is required to take such steps as is reasonable to have to take to provide the auxiliary aid.

What is 'Reasonable'?

The obligation to do what is termed '*reasonable*' is the real crux for clubs. Your club will need to plan ahead for disabled users, consider the likelihood of persons with disabilities wanting to join the club, attend special events etc... If the club plans to carry out improvements to its premises it will need to consider possible adjustments for potential disabled users. We advise clubs to carry out an assessment/audit considering the reasonable needs of disabled persons and possible improvements to its premises and keep a written record of its considerations so that it may prove, if necessary, that such matters have been taken into account and either actioned or not. As stated above clubs are required to do what is '*reasonable*' and what is '*reasonable*' will depend on a number of issues including the size of the club, its financial resources, the cost of the adjustment(s) and the particular circumstances of the case. Generally speaking, depending upon size and financial resources, clubs will not be expected to make adjustments that are disproportionately expensive.

As before under the Disability Discrimination Act, a club is not required to take steps which would fundamentally alter the nature of the benefit, facility or service concerned, or the nature of the Association. And a RTC is not required to take steps which would fundamentally alter the nature of the service or the nature of the business.

It is worth bearing in mind that positive adjustments for one category of disability may be detrimental to another category of disability.

⁵ For service providers i.e. RTCs, the wording here is amended to read '...to avoid the disadvantage or adopt a reasonable alternative method of providing the service'

Clubs will be required to make adjustments that are 'reasonable', taking into account the specific circumstances of the case, including the cost, the size of the club and the resources available to the club. When considering reasonable adjustments for guests, the club may take into account the frequency of occasions when guests are invited.

Clubs in rented accommodation must seek permission from landlords before making changes to physical features. Landlords are obliged not to refuse such consent unreasonably.

There are justifications for not making reasonable adjustments, namely:

- Less favourable treatment of a disabled person is necessary to avoid endangering the health or safety of the disabled person or any other person.
- The disabled person is incapable of entering into an enforceable agreement or giving informed consent.
- The treatment of the disabled person is necessary to be able to afford members, associates, guests or the disabled person access to a benefit, facility or service.

***For Example:** A tour guide refuses to allow a person with a severe mobility impairment on a tour of old city walls because he has a well founded belief that the extra help that the guide would have to give to the disabled person would prevent the rest of the party from completing the tour*

- The association would otherwise be unable to afford members, associates or guests access to a benefit, facility or service.

The third and fourth of the above justifications will allow a club NOT to make reasonable adjustments where to do so would jeopardise the clubs ability to provide its services to its members, associates, guests or to the disabled person themselves.

- Cost to the club of affording a disabled person membership/associate/guest status is disproportionate to the cost of affording such a benefit to a non-disabled person.

The club may be able to charge the disabled person more for the services it provides where the cost of affording the disabled person access to a benefit facility or service is greater than it is for non-

disabled people, so long as the services provided were 'bespoke' to the disabled person. However, it is not possible for a club to charge a disabled person more where the service in question is provided to all members of the club, in such circumstances, the cost must be shared across all the members.

For Example: A club would not be able to charge a disabled person more than it would an able bodied person for putting a boat into the water whereas it may be entitled to levy a charge for the hoisting of disabled persons into a boat.

How RYA Sailability can help practically:

RYA Sailability provides assistance to clubs in considering what adjustments might be 'reasonable'.

Many clubs are already trying to become more accessible in terms of physical access, sensory improvements and also by encouraging members to attend disability/equity awareness training. This goes a long way towards making more sites accessible.

RYA Sailability ask all its groups, clubs and organisations to complete a Foundation questionnaire: this is an accreditation process to determine their level of accessibility for different categories of disability. The questionnaire (with guidelines on how to complete) takes you through a virtual journey into the building and surrounding area.

RYA Sailability have a leaflet called: '**Are your premises welcoming to disabled people**', which explains the reasons behind the changes and why they are so desirable. This is backed up by a series of leaflets called '**brief guidelines**'. Concentrating on areas such as pontoons and landing stages, accessible showers and toilets, ramps and stairways and finally car parks and pathways. All written in user friendly language.

Many clubs are finding it hard to recruit new members, including disabled people. Your club can help to raise membership numbers, if you are interested in becoming a Sailability Foundation site and actively promoting sailing to disabled people kindly contact our Sailability Team.

RYA Sailability may be able to arrange for a Regional Organiser to visit your club/school to provide advice on what may be needed at your premises and how other bodies may assist.

Disability Awareness courses are held throughout the UK, for more details please contact the office on 0844 556 9550 or sailability@rya.org.uk

It may be the case that clubs are fearful of the subject, however; the RYA and RYA Sailability believe that we can do much to allay your fears and point you in the direction of solutions.

Pre-Employment Health Questionnaires:

Enquiring about a job applicant's disability/health is unlawful (e.g. enquiring as to the number of sick days taken in previous years) unless an employer can show that the enquiries were carried out for permissible reasons which are:

- Assessment of the duty to make reasonable adjustments.
- Establishing whether the applicant can carry out a function that is intrinsic to the job concerned.
- Monitoring diversity.
- Where there is an occupational requirement to have a particular disability.
- For the purposes of taking positive action.

EXEMPTIONS APPLICABLE TO PRIVATE MEMBERS CLUBS:

Can Clubs restrict who can become a member?

The Act recognises that there are benefits to clubs with shared protected characteristics and therefore same sex clubs, clubs for people of a particular religion etc. will still be allowed where the main purpose of the club is to bring together people who share a particular characteristic (e.g. disabled sailing); and clubs will be able to impose the same restrictions on associate members and guests. 'All male' clubs or 'all female' clubs are permitted but clubs will not be able to operate a mixed gender membership and yet bar female members from sailing on certain days, while allowing male members to sail whenever they like. The only exception is that clubs cannot restrict who can become a member on the basis of skin colour.

If a club restricts membership to people who share a protected characteristic it may also choose to permit as guests only people who share that characteristic. It may also restrict access to benefits or services to Associations who share that characteristic.

Whilst a club may restrict membership to people who share a protected characteristic it must not discriminate in relation to any other characteristic.

For Example: A club that restricts membership to women cannot exclude a woman because she is a lesbian or disabled.

Sex/Gender Reassignment:

The existing sports exemption the Sex Discrimination Act 1975 is replicated in the Equality Act 2010. The exemption states that competitions, leagues etc. can be gender specific where the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex.

It also allows for transsexual competitors to be prohibited from competing where the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex and where such a prohibition is necessary for fair competition or the safety of competitors.

Employment Defence:

The Act introduces a new global defence of 'occupational requirement' which applies to all protected characteristics. This means employers will not unlawfully discriminate in relation to a particular requirement for a role if they can show that the requirement in question is an occupational requirement which constitutes a proportionate means of reaching a legitimate aim.

Voting Rights and Committees:

As type of membership is not a protected characteristic clubs may offer different levels of service to members dependent upon the membership package they have and therefore exclude voting rights to some categories of membership. However, the differences cannot be based on a protected characteristic therefore all packages must be available to men, women, disabled, non-disabled, married couples, gay men etc.

Age Discrimination:

Insofar as age is concerned the Act outlaws discrimination based on age in relation to health and social care, financial services and general services. Sailing clubs fall within the scope of general

services, although it is possible that inadvertently the aspects relating to financial services will have some impact on individual boat owners/charterers.

Government has indicated that Service Providers within the public or private sector may use age as a criterion to determine the eligibility for concessions and benefits, where the purpose of the concession is to benefit the age group to which it applies. Thus benefits and concessions such as winter fuel payments, travel, TV licensing and free swimming for certain age groups should be allowed to continue. A specific exception that allows any Service Provider in the public or private sector to use age as a criterion to determine the eligibility for concessions or benefits will therefore be permitted. Government's view is that fair and beneficial age based pricing strategies which do not inhibit access to the service concerned is justified. This exception is likely to be drafted in general terms since it would be impossible to list all likely age based concessions.

It therefore appears that clubs may continue to structure membership pricing according to age, however, the Government is still considering responses to the consultation⁶ which set out areas where it believes different treatment of people of different ages is justified, where it considers specific exceptions from the ban are necessary and how the legislation will be drafted to take account of these. We will advise more precisely as to what the exact terms of the legislation mean for clubs once Government publishes its response to the consultation.

Age Discrimination and Sport:

There is to be an exception for age-banded or age-specific sporting events, leagues and training facilities where the restriction is proportionate to ensure fair competition, the safety of competitors or some other legitimate aim. This exception will allow the continuation of age-restricted competitions in sports, games or other competitive activities where, for example, the capabilities of average people of one age group put them at a disadvantage compared to average people of a different age group. However, sport will need to prove objective justification i.e. that an age criterion in such circumstances is necessary to secure fair competition/safety of competitors.

⁶ Which ran 3 March 2011 to 25 May 2011.

PENALTIES

If a member, associate, prospective member or guest of the club or a customer of a RTC believes they have been discriminated against, they may mount a legal challenge in the County Court. If the claim relates to an employment issue it must be brought in the Employment Tribunal. There is no cap on the compensation that can be awarded; compensation is available for financial loss, injury to feelings and personal injury resulting from the discriminatory act. The club may also be ordered by an Employment Tribunal to alter their practices to prevent future cases of discrimination for the benefit of the wider workforce.

WHAT SHOULD CLUBS AND RTCs DO?

Clubs should review their constitution, rules, practices, policies and procedures to ensure they do not discriminate on the grounds of a protected characteristic either directly or indirectly. Clubs should treat all of their members, associates, guests etc. fairly and give them equal opportunity to participate in and enjoy the benefits of membership.

RTCs should review their equality policy to ensure that they are compliant with the law insofar as employees and customers are concerned. It is also important that RTCs make sure staff are aware of the policy, and understand their rights and responsibilities.

Codes of Practice and Non-Statutory Guidance:

The Equality and Human Rights Commission ('EHRC') is producing various Codes of Practice on the Act all of which can be downloaded from its website.

DEFAULT RETIREMENT AGE:

The default retirement age ('DRA') was scrapped on 1st October 2011. Under the current law an employer can rely on the DRA to legally dismiss an employee when they reach the age of 65 without having to pay any financial compensation. The Government hopes that the scrapping of the DRA will encourage people for work for longer, against a background of an ageing population thus stimulating the economy whilst easing the strain on the public purse.

Employers will still be able to operate their own compulsory retirement age policy, providing they can objectively justify it as a proportionate means of achieving a legitimate aim.

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For more information kindly contact the RYA Legal Team on 0844 5569519 or legal@rya.org.uk

Disclaimer:

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