



The Equality Act 2010

A Guide for Managers in NHS Greater Glasgow & Clyde

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1. Rationale

This short paper has been produced by the Corporate Inequalities Team as a guide for operational managers and those with responsibility for service planning and design. It highlights some of the key areas of the new Equality Act 2010 which will have specific relevance for risk management of potential legislative breach.

2. Introduction

The Equality Act 2010 serves to strengthen, harmonise and streamline 40 years of equalities law. The Act brings together more than 116 separate pieces of legislation into a single source and ensures that everyone who is protected under law from discrimination, harassment or victimisation is afforded the same level of protection.

3. Who does the law protect?

The Equality Act 2010 has introduced the concept of *protected characteristics*, referred to in previous legislation as Equality Groups or Equality Strands.

The Protected Characteristics are:

- Age
- Disability
- Gender Reassignment
- Marriage and Civil Partnership
- Pregnancy and Maternity
- Race
- Religion and Belief
- Sex
- Sexual Orientation

4. What does the law protect against?

The Equality Act 2010 brings a uniform level of protection from discrimination for four main groups of people:

- People with a Protected Characteristic
- People who associate with others who have a protected characteristic
- People who are mistakenly presumed to have a protected characteristic
- People who may or may not have a Protected Characteristic but are unwillingly exposed indirectly to discriminatory behaviour (e.g. overhearing a conversation with homophobic content between two members of staff).

People are protected against the following types of discrimination:

- **Direct discrimination**
Where a rule exists explicitly excluding someone with a protected characteristic from participating or benefiting from a service. For instance, a service may require patients to be of a certain age to qualify for treatment. If there is no objective justification for this rule to exist, the exclusions it places on patients would constitute direct discrimination.

- **Indirect Discrimination**

Where a rule exists that may inadvertently discriminate against an individual. For instance, an outpatient service has a rule that each appointment time will not exceed 15 minutes. The rule will indirectly discriminate against people who require communication support and therefore longer consultation times.

- **Discrimination arising from disability**

This is similar to indirect discrimination but specifically relates to the protected characteristic of disability. It prevents discrimination arising from the effects of disability. For instance, an employee crèche has a rule that all children must be toilet trained before they can gain a place. They reject an application for a young child who, as a result of a disability, has limited bowel control. This would constitute discrimination arising from disability. Similarly someone who requires an assistance dog is asked to leave a service because dogs are not allowed (unless there is a clear and demonstrable clinical risk management issue).

- **Harassment**

This tends to be unwanted behaviour that demeans or aggravates relations between people who have a protected characteristic and those who do not. For instance, two members of staff are overheard making derogatory comments about gay men. This is unwanted behaviour on the part of the person who hears the conversation. Importantly, the person who takes the claim of harassment does not need to have a protected characteristic. In the above instance, a straight/heterosexual person hearing the conversation could take a case.

- **Third Party Harassment**

This is concerned with experience of harassment of members of staff by a third party and the duty of care an employer should take to address this. For example, a female South Asian nurse is subjected to racist and sexist abuse by patients in an accident and emergency ward. She reports the first incident to her manager who does nothing about it. A second incident occurs some days later and is also reported. The manager decides the incident is uncommon and again decides to take no action. The nurse is subjected to abuse on a third separate occasion and takes a case against her employer on the grounds of third party harassment. If it can be proven that her employer was aware of the harassment, that it had happened on at least two other occasions and that they had failed to take such steps as would be reasonably practicable to prevent it, the case would be upheld.

- **Victimisation**

This tends to extend to complaints procedures and outcomes for individuals. For example, someone makes a complaint about service experience and alleges discrimination based on a protected characteristic. If the complaint is upheld, but as a result the individual is asked not to return to the service they could take a case of victimisation. Similarly if someone without a protected characteristic provides support in a case to someone else and are treated unfavourably as a result of their involvement they could also take a case of victimisation.

- **Discrimination by Association**

There is significant evidence that it is not just people with protected characteristics that are treated unfavourably, but family, friends, carers and many others associated with them. This inclusion extends protection from discrimination and unfair treatment to this group of people on the basis that their discrimination and unfair treatment stems from an association with someone with a protected characteristic.

- **Discrimination by Perception**

Where someone is mistakenly perceived to have a protected characteristic and is treated unfavourably as a result. For example a member of staff is assumed to be much younger than they are and subsequently their issues are dismissed through an assumption that young people don't have the necessary experience to understand organisational demands.

5. What does this mean for Public Sector services?

The Equality Act 2010 includes instruction for legal compliance for public sector organisations. This is split between a General Duty and a set of Specific Duties. At the time of writing this guidance, the content of the Specific Duties was still being considered by the Scottish Government. The Public Sector General Duty however, came into force on 5th April 2011 and states that all public authorities will be required to pay due regard to:

- Eliminate discrimination, victimisation, harassment or other unlawful conduct that is prohibited under the Equality Act 2010
- Advance equality of opportunity between people who share a characteristic and those who do not; and
- Foster good relations between people who share a relevant protected characteristic and those who do not.

Essentially the requirement to provide quality-focused and patient centred care hasn't changed. However, as many of the routines we employ within the NHS are based on historical models that in themselves may have discriminatory elements it is imperative that legislative risk reviews are undertaken. This may take the form of Equality Impact Assessments (EQIAs) that will help interrogate systems and highlight deficiencies, or other proofing mechanisms using the legislation as a guiding framework. It is no longer appropriate (or legally compliant) to wait until breaches of legislation occur and deal with them on a case by case basis.

As the largest public sector employer in the UK, it is important we appreciate that people come into this organisation with very different beliefs and values. A good deal of the legislation protects against discrimination or harassment arising from individual behaviour, so it is vital that every member of staff understands their role in creating an inequality sensitive health service.

6. Identifying Areas of Risk

Evidence of upheld complaints based on breach of equalities legislation is a stark and often expensive reminder that services are not meeting their Public Duty and not functioning as they should. As public awareness of legal protection grows, there is a greater likelihood that breaches will be more noticeable to an informed patient population and acted upon personally or through a legal intermediary, bypassing the standard NHS complaints process.

Ideally, every service should be in a position to confidently demonstrate compliance, but as with any large organisation, there will be functions or services that pose greater risk than others.

Captured below is a list of possible areas that may indicate a review is in order. This is not an exhaustive list and all services should give consideration to planned reviews on an ongoing basis.

- **Services with Explicit Exclusion Criteria**

The most obvious high risk areas will be those where service exclusions already operate. For example you may have a service with an age cut-off or only deliver services to certain groups of people. Wherever these qualifiers exist, risk of discrimination will be high. In the case of age, treatment decisions should be based on biological rather than chronological determinants. Where this is not the case you will need to be able to defend your position (have objective justification).

- **Un-reviewed Service Protocols**

Many services may still be reliant upon service arrangements that were felt to be appropriate before equalities legislation came into force. It is vital that service protocols are reviewed in light of the Equality Act 2010, the General Public Duty and the Specific Public Duties when they become available. In clinical areas, challenges may have been made to national guidance under equalities law or wider human rights approaches. Make sure you are up to date with any changes and implement them at local level.

- **Services that are configured on a gender basis**

There have been significant changes to the law with regard to gender reassignment. While the number of transgender people in NHS Greater Glasgow & Clyde is relatively small, feedback from representative transgender groups suggests that public services are still unsure of their legal responsibilities in the provision of goods and services and will often make the wrong choices and subsequently breach the law. If you run female/male only services or are responsible for inpatient accommodation, make sure you know what the law says before you make a care decision. If you're unsure, speak to the transgender patient and read NHS Greater Glasgow & Clyde's Transgender Policy – available at www.equality.scot.nhs.uk.

- **Services based in older buildings**

While not exclusively a concern for older buildings, breaches of the Disability Discrimination Act (DDA) tend to be more commonly reported in buildings that were designed and built before the DDA came into force in 1995. Services need to be confident that barriers to physical access have been removed in accordance with the Act and that the requirement for 'reasonable adjustment' can be evidenced. Note that the definition for reasonable adjustment has changed to strengthen the protection of disabled people.

- **Parallel Services for People with a Protected Characteristic**

If community engagement and research informs a service of potential barriers experienced by some people, then the service must take the necessary steps to remove those barriers. In some circumstances it may be beneficial to test out new service approaches with a community that shares a protected characteristic to better understand mainstream requirements. This kind of parallel service activity is a learning opportunity and not a sustainable solution. Clear plans must be in place from the outset to factor in exit strategies and knowledge transfer back into mainstream provision. Creating reliance on unsustainable services may result in significant legal challenge at a later date. It also fails to address the core service barriers that instigated the activity in the first instance.

- **Services with High Demand and Throughput Pressures**

Where patient demand and throughput are both high, there may be an increased risk that required elements of care, central to a person's protected characteristic, are overlooked. For example, in a busy outpatient department staff may look to save time by using a family member to interpret for a patient rather than follow the approved NHSGGC Interpreting Protocol. If, as a result, the patient is misinformed and experiences poorer health outcomes then NHSGGC may face legal challenge.

- **Services with high DNA rates**

Services that have consistently high DNA rates particularly amongst groups with a shared protected characteristic may be indicative of issues with legislative compliance and therefore risk. For instance, if all invites are made by letter and in small print English, you may be indirectly discriminating against specific patient cohorts.

- **Services subject to cost savings**

Some services may be subject to cost savings leading to a reduction in provision or the removal of certain aspects of a service. Wherever this is the case, the service will need to evidence that any service changes will not disproportionately impact on groups or individuals with a protected characteristic. For instance, an outpatient clinic removes a domiciliary service and uses savings to increase staff available for drop in appointments. This may disproportionately impact on anyone with the protected characteristic of disability.

For further information about equality proofing cost savings please see the appropriate link in the *Useful Resources* section of this document.

7. Support to get it Right – NHS Greater Glasgow & Clyde’s 10 Goals

As a first point of reference for your service, consider the protected characteristics. Are you as a manager confident that your service is meeting the needs of people with protected characteristics and if called upon to do so, would you be able to provide evidence to support this?



NHS Greater Glasgow & Clyde has developed a tool to help you identify potential risk areas. The '*10 Goals for an Inequalities Sensitive Health Service*' helps analyse and describe risks of discrimination and the various levels of confidence required within service to evidence compliance.

To reduce the risk of breaching the law consider:

Goal 1: Knows and Understands the Inequalities and Discrimination Faced by its Patients and Populations

Do you collect patient data that tells you if the people who should be using your services are actually doing so? Can you describe your patient population profile by protected characteristics? If not what do you need to do to make this happen?

Goal 2: Engages with those Experiencing Inequality and Discrimination

Do you ever speak to people with protected characteristics about their experience of using your service? What's stopping you doing this? Patient

involvement is at the heart of equalities law. Evidencing active user participation that includes representation of protected characteristics will help to better understand barriers within services. Some of these barriers may be invisible within the day to day routine of a busy service, but investment in this area will inevitably avoid costs incurred through reacting to legal claims of breach at a later date. More importantly, it will mean the people who need your service most are given appropriate and sensitive support to navigate into, through and out of your care.



Goal 3: Knows people's Experience of Inequality Affects the Health Choices Available to them

Does your service understand that people's experience of inequality will affect the health choices they make? Do you look at the symptoms of inequality i.e. the disease or illness without considering the causal factors? This is particularly important if you are delivering preventative services but adopt a one size fits all model. For example, providing alcohol brief intervention work may not have the impact you would hope for if the individual is using alcohol as a coping mechanism for experience of abuse. Are you confident you could work with the abuse issue?

Goal 4: Removes Obstacles to Services and Health Information Caused by Inequality

How do you communicate with the people that use your service? Do you use plain English and translated texts in written information? Do you know how to remove barriers to effective communication through interpreting services - are you familiar with NHSGGC's Accessible Information Protocol? How accessible is your service to someone who is disabled?

Goal 5: Uses an Understanding of Inequality and Discrimination when Devising and Delivering Treatment and Care

Is your service delivered through an understanding of inequality and discrimination? Do you regularly review processes and procedures to ensure fair inclusion? Have you undertaken any Equality Impact Assessments (EQIAs) within the service?



Goal 6: Uses its Core Budget and Staff Resources Differently to Tackle Inequality

Have you had to make any cost savings in your service. Have you considered whether the decisions you make will have a disproportionate impact on people with protected characteristics? You need to have a transparent and justifiable rationale for any decisions made and be able to evidence that any negative impact on protected characteristics has been avoided.

Goal 7: Has a Workforce which Represents Our Diverse Population and Addresses their Needs

Do you encourage members of staff to complete the NHS Staff survey? The organisation needs to know that it is an attractive employer for people with protected characteristics. What does your staff group look like in terms of protected characteristics? Is there more you could do to improve actual diversity or monitoring of diversity in the workforce?

Goal 8: Creates a Workforce which has the Skills to Tackle Inequality and Create a Non-Discriminatory Working Environment

With a collective staff numbering in excess of 40,000 employees, we have to assume that employees are bringing a range of experiences, beliefs and values into the organisation. What are you doing to ensure that staff know what is expected of them in terms of addressing inequality. How do you address this in PDPs or KSFs? Do you have a training plan in place to help staff learn?



Goal 9: Spends the Money Invested in Buildings, Goods and Services in a way which Tackles Poverty and Discrimination

Do you ever use your budget in a way that helps tackle inequality and discrimination? Do you work with local employment agencies or financial inclusion organisations? If on a larger scale you make capital investments – new builds etc, have you arranged for social benefit clauses to be included. If you contract work to an external agency, can they provide evidence of their own approach to tackling inequality and removing discrimination as part of their tender application?

Goal 10: Works with Partners to reduce Inequality Caused by Income, Social Class, Sex, Gender Reassignment, Race, Disability, Age and Sexual Orientation

Can you/do you work in partnership with other agencies to develop good practice to tackle inequality and remove discrimination?



8. Useful Resources

NHSGGC has developed a number of tools, resources, policies and guidance documents to help avoid legislative breach and provide inclusive services for people with a protected characteristic. Listed below are some of the key documents you may want to familiarise yourself to support compliance and meet the wider goal of sensitive and inclusive patient care.

NHSGGC Accessible Information Policy

http://www.equalitiesinhealth.org/accessible_info_policy.html

NHSGGC Gender Based Violence Plan

<http://www.equalitiesinhealth.org/documents/GBVPlanNovember2008.pdf>

NHSGGC Transgender Policy

<http://www.equalitiesinhealth.org/documents/NHSGreaterGlasgowClydeTransgenderPolicy.pdf>

Faith and Belief Communities Manual

<http://www.staffnet.ggc.scot.nhs.uk/Info%20Centre/Documents/Complete%20Manual%20amended%20following%20proof%20from%20printer.pdf>

NHSGGC Equality Scheme 2010 – 2013

http://www.equalitiesinhealth.org/documents/EqualityScheme_Access_Web.pdf

Equality Proofing Financial Decisions

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/guidance-and-codes-of-practice/using-the-equality-duties-to-make-fair-financial-decisions/>



9. Further Help

If you are concerned that your service may be at risk of breaching the law or would like to find out more about how you to make sure you remain legally complaint, contact the Corporate Inequalities Team for further information or advice.

Tel: 0141 2014560 or e-mail CITAdminTeam@ggc.scot.nhs.uk

Please visit us for regular updates of equality information relevant to you at www.equality.scot.nhs.uk