The Equality Act (the Act)

1. Why the Equality Act was required

Equality legislation is necessary because:

- Women still earn, on average, 22.6% less per hour than men
- Less academically able, but better off children, overtake more able, poorer children at school by the age of six
- Disabled people are still more than twice as likely to be out of work than non-disabled people
- If action is not taken, it will take almost 100 years for people from ethnic minorities to have the same job prospects as white people
- One in five older people are unsuccessful in getting quotations for motor insurance, travel insurance and car hire
- 6 out of 10 lesbian and gay schoolchildren experience homophobic bullying.

Prior to the Act:

- The discrimination laws had helped make progress on equality, but because they had been developed over more than 40 years, they had become complex and difficult for people to understand and navigate
- There were nine major pieces of discrimination legislation, around 100 statutory instruments setting out rules and regulations and more than 2,500 pages of guidance and statutory codes of practice
- The discrimination legislation at that time contained some illogical provision for certain characteristics that don’t apply to others.

2. What the Equality Act does

The Act replaces and harmonises the previous variety of legislation and forms the basis of straightforward practical guidance for employers, service providers and public bodies and strengthens the equality law by:

A. Introducing a new public sector duty to consider reducing socioeconomic inequalities;
B. Putting a new Equality Duty on public bodies;
C. Using public procurement to improve equality;
D. Banning age discrimination outside the workplace;
E. Introducing gender pay and equality reports;
F. Extending the scope to use positive action;
G. Strengthening the powers of employment tribunals;
H. Protecting carers from discrimination;
I. Protecting breastfeeding mothers;
J. Banning discrimination in private members’ clubs; and
K. Strengthening protection from discrimination for disabled people.
3. Protected characteristics

In the Act, the following are classed as protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief (including lack of belief)
- sex
- sexual orientation.

4. Now implemented

On 1 October, the majority of provisions in the Act came into force, and these included:

- The basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions; premises; work; education; associations, and transport.
- Changing the definition of gender reassignment, by removing the requirement for medical supervision.
- Levelling up protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic, so providing new protection for people like carers.
- Clearer protection for breastfeeding mothers.
- Applying the European definition of indirect discrimination to all protected characteristics.
- Extending protection from indirect discrimination to disability.
- Introducing a new concept of “discrimination arising from disability”, to replace protection under previous legislation lost as a result of a legal judgment.
- Applying the detriment model to victimisation protection (aligning with the approach in employment law).
- Harmonising the thresholds for the duty to make reasonable adjustments for disabled people.
- Extending protection from 3rd party harassment to all protected characteristics.
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs, by restricting the circumstances in which employers can ask job applicants questions about disability or health.
- Allowing claims for direct gender pay discrimination where there is no actual comparator.
- Making pay secrecy clauses unenforceable.
- Extending protection in private clubs to sex, religion or belief, pregnancy and maternity, and gender reassignment.
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce.
- Harmonising provisions allowing voluntary positive action.
5. Key changes

The following are, in general, the most significant changes affecting the sport and leisure industry.

5.1. Definitions of unlawful discrimination

5.1.1 Discrimination based on association. An individual will be protected against direct discrimination and/or harassment because of their association with another individual with a particular protected characteristic. For example, if an individual was directly discriminated against because they have a disabled child, even though they are not disabled themselves.

5.1.2 Discrimination based on perception. An individual cannot be directly discriminated against and/or harassed because they are perceived to have a protected characteristic, even if it then proves that they did not in fact have that characteristic. For example, where an individual with the name Ahmed was prevented from taking part because it was believed they were Muslim, even though they were not, or were not willing to confirm their religion.

5.1.3 Harassment. An individual can now make a claim for harassment, even if the harassment is not directed at them and they also need not have the relevant protected characteristic in question.

5.1.4 Requiring support from others with the same protected characteristic. An individual no longer needs the support of others with the same protected characteristic. For example, a Caribbean individual can make a legitimate complaint against an employer, even though there are a number of other Caribbean people working at the same place who choose not to complain.

5.1.5 Disability discrimination. A new claim type of “discrimination arising from a disability” has been introduced. This will take place if an individual is treated unfavourably because of something arising as a consequence of his or her disability and if it cannot be shown that the treatment is objectively justifiable. In order to make any ruling in a claimant’s favour, the Tribunal/Court must be satisfied that the alleged discriminator knew, or could reasonably be expected to have known, that the claimant was disabled. There is likely to be considerable cross over between this type of claim and indirect discrimination because of disability.

5.1.6 Combined discrimination. The Act will introduce the potential for direct discrimination claims based on a combination of two protected characteristics. This recognises the fact that some individuals suffer from particular discrimination as they have two protected characteristics, e.g. because they are both male and Afro-Caribbean. The new provisions are expected to come into force in April 2011. The Coalition Government first though want to be sure that the new provisions, which are quite complicated, will work in practice and will indeed eradicate the perceived loophole in the existing legislation.
5.2. Positive Action

The Act broadens the scope for positive action and will allow proportionate measures to be taken, not merely to train or encourage disproportionately under represented groups, but also to overcome any perceived disadvantage or to meet specific needs based on a protected characteristic. In this regard, the provisions come close to legitimising reasonable adjustments outside of the disability sphere albeit on a voluntary basis. For example, A Golf Club decides to carry out research as it believes certain racial groups are under represented within their membership. The research shows that a number of racial groups are indeed under represented, as compared to the % the racial group makes up of the English population as a whole or locally, (which is a requirement of the positive action provisions relating to participation). As a result, the Club decides to run coaching clinics for individuals keen to learn the game from those racial groups.

5.3. Employment

5.3.1 Pre-employment health questionnaires. The Act makes it unlawful for employers to require employees to fill in pre-employment health questionnaires except in very limited circumstances, e.g. to ascertain whether the applicant will be able to carry out functions which are intrinsic to the job. There is nothing though in the act which prevents employers asking health-related questions of new staff once recruitment decisions have been made. Employers will though need to tread very carefully if, having offered an individual employment, they then wish to withdraw that offer on the basis of the results of a pre-employment health questionnaire.

5.3.2 Pay secrecy clauses. The Act prevents contractual clauses requiring employees to keep their pay a secret if employees seek or make a pay disclosure for the purpose of assessing (or enabling someone else to assess) whether there is a connection between pay and a particular protected characteristic. This provision would appear not to apply to conversations between colleagues as to the general fairness of pay, or to discussions which reveal information indicating a link between pay and a protected characteristic if this was not the reason the disclosure was sought or made. This provision applies to all strands of discrimination law, not just gender.

5.3.3 Occupational requirements. The Act introduces a new global defence of ‘occupational requirement’ which will apply to all protected characteristics. This means that employers will not discriminate unlawfully 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. This could be, for example, requiring someone of a certain sex or cultural background.

5.3.4 Qualification bodies. Although not strictly employment, sports governing bodies who, for example, issue coaching licences or qualifications which will facilitate a coach’s trade or profession are reminded that, under the Act, it will continue to be unlawful for a qualification body to discriminate on the grounds of a protected characteristic regarding the accreditation process.
5.4. Private Members’ Clubs

5.4.1 Associations. The Act does apply to private members’ clubs but contains a number of potential exemptions provided that the club meets the definition of "Association". An "Association" is defined in the Act as an association of persons which has at least 25 members and admission to membership of which is regulated by the association rules and involves a selection process. An Association can include unincorporated associations and associations which have been incorporated as companies.

5.4.2 Restricting to protected characteristics. Associations will be able to allow members from a specific protected characteristic (e.g. a specific sex, race, sexual orientation etc). The one exception to this rule is that Associations cannot restrict membership to individuals of a particular colour. Where an Association does allow members from different protected characteristics then it must treat all of its members equally. The guidance accompanying the Act gives the example of a golf club which allows male and female members and confirms that it will no longer be lawful to restrict female members’ use of the course to certain days or to restrict access to certain parts of the club house.

5.4.3 Guests. Where an Association is restricted to members of a specific protected characteristic, if the Association allows access to male and female guests it must ensure that those guests are again treated equally. An Association will though be able to distinguish between the services it provides to members and to guests, provided that this is not done solely on the basis of a protected characteristic.

5.5. Sports Exemptions

5.5.1 Sex. The existing sports exemption from the current Sex Discrimination Act is replicated in the new Act. 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.

5.5.2 Gender Reassignment. The Act 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.

5.5.3 Age. When the provisions prohibiting age discrimination in relation to the provision of goods, services and facilities come into force, likely to be in 2012, it is intended that there be a specific sports exemption. This proposed exemption will allow age-banded or age-specific sporting events, leagues or training facilities where the restriction is proportionate to ensure fair competition, the safety of competitors or some other legitimate aim. As the Government Equalities Office states in its guidance, this exemption 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. The guidance gives the specific example of tennis clubs running competitions for "veterans" aged over 40 or 45.
5.6. Public Sector Duties

The Act will replace the existing public sector duties in relation to gender, race and disability with a single equality duty applying to all protected characteristics (apart from marriage/civil partnership), under which public bodies must have regard to the need to eliminate discrimination and advance equality and foster good relations between those who have a protected characteristic and those who do not. As part of this duty, public bodies are likely to be under pressure to try and drive equality through procurement. Clearly this could have a significant impact on sports governing bodies who receive significant funding from Sport England and/or UK Sport (who themselves are regarded as public bodies). Once the single public equality duty is in force, public sector bodies will have to report annually on a number of different aspects, but the exact range of these will not be known for some time yet. It is unlikely that the new duty will come into force until October 2011.

6. Further information

For further information about the Act and to keep up-to-date with developments, the following sources of information are suggested:

6.1 The Vaga Associates monthly Equality in Sport newsletter. Articles relating to the Act have appeared in each edition since June 2010. Previous editions can be accessed at http://www.vagacms.co.uk/vagacms/egresources.aspx?recid=5&mode=new and to request future editions are sent directly to you, Email roger@vagaassociates.com.


6.3 The Equality and Human Rights Commission (EHRC) Website contains codes of practice that will help employers, lawyers and courts to interpret the Act. The Codes are also designed to provide detailed guidance to organisations about what the Act means. As well as formal, legal codes, the EHRC is also publishing more informal guidance that does not have the same legal status in a bid to help organisations understand their obligations. These can be accessed at http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/.