

NAT's submission to the Work and Pensions Committee: the Equality Bill – what steps should DWP take to achieve greater equality?

Summary of recommendations

Recommendation: The Equality Bill should prohibit the use of pre employment questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

Recommendation: The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law to provide proper protection for disabled people in employment.

Recommendation: The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

Recommendation: The Government should ensure the EU directive in goods, facilities and services includes a social model of disability.

Recommendation: A social model of disability should be introduced in all relevant UK legislation.

Recommendation: The Equality Bill must provide protection on the grounds of association and perception for disabled people. This protection should extend to goods, facilities and services.

Recommendation: The EHRC should be ready to respond to the introduction of an Equality Duty, with resources available for public authority professionals working in diversity and equality, to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

Recommendation: Privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

Recommendation: Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

Recommendation: The Government needs to take greater steps to ensure employers are more aware of their responsibilities under the DDA 2005 as well as the benefits of employing disabled people, including people living with HIV.

Recommendation: There should be a statutory right to Access to Work for people with support needs that can be met via the scheme, with a robust, accessible and transparent appeal and review procedure.

Recommendation: People with fluctuating conditions should retain an entitlement to Access to Work after entering employment. This would mean that, once qualified for Access to Work, clients whose support needs reduce, such that they do not need Access to Work support for a period, can reactivate the support on request if their support needs increase at a later point.

Recommendation: Employers (particularly small and medium) should be able to receive support from Access to Work to compensate them for when people with fluctuating conditions need periods away from work (e.g. when people living with HIV are adjusting to changes in their treatment regimes).

Recommendation: The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more than one characteristic (e.g. race and disability).

Introduction

1. NAT (National AIDS Trust) is the UK's leading independent policy and campaigning charity on HIV. NAT develops policies and campaigns to halt the spread of HIV and improve the quality of life of people affected by HIV, both in the UK and internationally.
2. NAT welcomes the chance to submit evidence to the Work and Pensions Committee's Equality Bill inquiry.
3. The inquiry has a broad scope; NAT has focused its response on areas with particular relevance to people living with HIV.

Equality in Employment

4. The inquiry asks how effective DWP has been in **achieving equality in employment**. Research from a recent study of people living with HIV in London found that only 47% of people living with HIV were in employment.¹ Barriers to employment for people living with HIV include concerns about stigma and discrimination, concerns about working when living with a fluctuating condition and concerns about the need to take time off for medical appointments.
5. The inquiry goes on to ask how the Equality Bill **could improve employment opportunities** for disabled people. NAT would like the Government to use the Bill to prohibit the use of pre employment health questionnaires before the offer of a job has been made. Sadly people living with HIV still face discrimination; employers often do not understand that today someone living with HIV can live a long and active life and have a fulfilling and busy career. The lack of understanding about the advancement of treatment means that many employers will discriminate against an HIV-positive person, even if they are the best candidate for the job. If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against this discrimination and make discrimination easier to prove.

Recommendation: The Equality Bill should prohibit the use of pre employment questionnaires before the offer of a job has been made to protect disabled people from discrimination and make discrimination easier to prove.

¹ Elford J, Ibrahim F, Bukutu C, Anderson J, Social and economic hardship among people living with HIV in London, HIV medicine 2008; 9:616-624

6. The inquiry looks at how the Government can use the Equality Bill to respond to the **implications of the Malcolm case**. NAT is very concerned about the impact of this judgment, which has effectively narrowed the scope of Disability Related Discrimination (DRD). DRD, like direct discrimination, now focuses on whether a disabled person has been treated differently from a non-disabled person (for a reason related to their disability). The previous interpretation of DRD in effect asked a completely different question: has the disabled person received unfavourable treatment for a reason related to their disability? NAT welcomes the Government's intention to use the Equality Bill to deal with the consequences of the Malcolm judgement.

Recommendation: The Equality Bill should introduce a clear prohibition of indirect discrimination into disability law to provide proper protection for disabled people in employment.²

Equality in Goods, Facilities and Services

7. The Equality Bill presents an opportunity to provide **explicit statutory protection against harassment** on the grounds of disability in the provision of goods, facilities and services, education in schools, disposal or management of premises or exercise of public functions (protection in the workplace already exists).
8. The Government notes in *The Equality Bill – Government response to the Consultation* that it is considering the implications of the Coleman judgment for the definition of disability harassment before considering whether to extend protection against harassment outside work in respect of disability.

Recommendation: The Equality Bill should provide explicit statutory protection against harassment on the grounds of disability in the provision of goods, facilities and services.

9. NAT welcomes the **draft EU directive in goods, facilities and services**. The Committee will be aware that in the UK we are in the fortunate position of benefiting from the Disability Discrimination Act 2005 (DDA 2005) which provides welcome protection for people living with HIV. The new EU directive provides the opportunity not only to ensure that people living with HIV across the EU can access similar rights, but also to ensure UK citizens living with HIV have genuine freedom to live and work in any EU member state.
10. HIV discrimination is a social phenomenon which rarely relates to visible symptoms, particularly with the widespread accessibility of treatment, but rather is a stigmatising response to the fact of infection itself. We are now calling for the EU to recognise this social model of disability in the equality directive.³

² NAT provided the Committee with supplementary evidence and recommendations in relation to the Malcolm judgment which are attached at the end of this document.

³ NAT is calling on the Government to make the following amendments in the form of additional recital to the Preamble to the Directive: *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers, whether attitudinal or environmental, may hinder their*

Recommendation: The Government should ensure the EU directive in goods, facilities and services includes a social model of disability.

11. In line with this, NAT is calling for the introduction of a social model of disability in all relevant UK legislation.

Recommendation: A social model of disability should be introduced in all relevant UK legislation.

12. The inquiry asks whether **discrimination by association and perception** should be extended to cover goods, facilities and services.
13. NAT is particularly concerned about discrimination by perception as HIV positive status cannot be 'seen' and this profoundly affects how stigma and discrimination are experienced.
14. Discrimination by association can also take place in the context of HIV; one case of discrimination by 'association' that came to our attention was a nurse who was asked to change responsibilities at work and no longer engage in invasive procedures because her spouse was living with HIV.
15. NAT is waiting to see how the Government responds to the Coleman judgment. We hope this will ensure that discrimination by association and perception is included in the Equality Bill. If not NAT will be lobbying to ensure that the Equality Bill ensures that UK's disability discrimination law provides protection on the grounds of association and perception. We would like to see this protection extend to goods, facilities and services.

Recommendation: The Equality Bill must provide protection on the grounds of association and perception for disabled people. This protection should extend to goods, facilities and services.

The Public Sector Equality Duty

16. NAT supports the establishment of a single **Equality Duty**. It seems more appropriate to a single Equality Act and a single Equality and Human Rights Commission. In addition it can more readily and flexibly address the fact of multiple discrimination faced by so many in our society, in particular people living with HIV (many of whom are also gay and / or black African).
17. NAT also supports the extension of the single Equality Duty to other grounds. In particular, the discrimination and inequality faced by gay men in education

full and effective participation in society on an equal basis with others. And: Persons with disabilities, even in the absence of environmental barriers, may experience attitudinal barriers alone, such as stigma, prejudice, stereotyping or discriminatory treatment, which interacting with their impairments hinder their full and effective participation in society on an equal basis with others, for example in the case of asymptomatic HIV infection.

and health systems has a direct impact on the ability of gay men to avoid HIV infection and, for those who are HIV positive, to enjoy and access services in a supportive environment.

18. NAT's main concerns are that the broadening out of the Duty may mean that the needs of people living with HIV are overlooked. NAT's research reveals that even with the current Disability Equality Duty, the needs of people living with HIV are not always considered. Some recent research carried out by NAT revealed that:

- Of the 26 Schemes considered where NAT had hoped that the relevant public bodies would have included HIV in their Scheme, only 15 did so;
- In the Single Equality Schemes reviewed during this research, there were even fewer references to HIV than in Disability Equality Schemes (DESSs);
- Almost three quarters of organisations surveyed did not consider any statistics or profiles about people living with HIV in their area, and less than a third sought guidance about how to include the needs of people living with HIV in their DESSs;
- 65% of Schemes and Action Plans do not make specific reference to HIV (even within their definition of disability);
- Government Department Schemes that were commended by the Disability Rights Commission have not substantively addressed the needs and concerns of people living with HIV.

19. This is a particular concern because many people living with HIV in the UK are already from disadvantaged groups and HIV, as a stigmatised condition, leads to discrimination of a distinct and complex nature making it even more important that their needs are not overlooked.⁴

20. These findings show that steps must be taken to ensure that public authorities consider the different needs of individuals covered by a Scheme, including people living with HIV.

Recommendation: The EHRC should be ready to respond to the introduction of an Equality Duty, with resources available for public authority professionals working in diversity and equality, to ensure the needs of disabled people, particularly those living with HIV, are not overlooked in the single Duty.

Private Sector Commitment and support, guidance, advice and information for employers.

21. NAT welcomes any steps to ensure that **private sector employers take more account of the equality needs of their workforce and customers.** For this reason NAT welcomes the emphasis in the Equality Bill on using public sector procurement to improve the practice on equality issues in the private sector.

⁴ Figures released from the Health Protection Agency reveal that HIV is disproportionately affecting men who have sex with men and black Africans, groups that already face discrimination. 2,700 gay and bisexual men were newly diagnosed with HIV in 2006, the highest number ever. Across the UK 1 in 20 gay and bisexual men are now living with HIV. Black Africans accounted for almost half of all new diagnoses in 2006 and black Caribbeans accounted for 3.2 per cent. Source: Health Protection Agency (2007) *Testing Times*, www.hpa.org.uk/infections/topics_az/hiv_sti/publications/AnnualReport2007/HIVSTIs_AR2007.pdf.

22. The Government also announced its plans to develop, in partnership with the EHRC, an **equality kite mark**. This will recognise employers who are transparent about reporting their progress on equality. NAT recognises that the development of this kite mark, to praise employers who have taken steps to employ disabled staff, including people living with HIV, as a positive step. However, we are concerned that this is a voluntary scheme, and therefore those employers who have the worst record on equality issues will not need to take any further steps.
23. Currently **employment tribunals** can only make recommendations that directly benefit the person who has been discriminated against. As around 70% of employees involved in discrimination cases leave the organisation, this ties the hands of tribunals. The Equality Bill will allow employment tribunals to make wider recommendations in discrimination cases.
24. NAT welcomes this measure which should encourage better employment practices. This will maximise the impact of the individual discrimination case and enable employers to comply with the law and avoid future claims.
25. NAT would like to highlight the importance of considering tribunal complainant's privacy and confidentiality in any proceedings. Introducing measures to protect the privacy of claimants living with HIV and other stigmatised conditions during the tribunal process will encourage people to take discrimination cases to tribunal. This will send out the important message that discriminating against people living with HIV is unacceptable.

Recommendation: Privacy measures should be introduced into the tribunal process to encourage people living with stigmatised conditions, such as HIV, to take discrimination cases to tribunal.

26. The Government is considering introducing representative actions in discrimination cases. Currently individuals who have been discriminated against have to shoulder the burden of bringing a claim. Representative actions would enable bodies such as trade unions or the EHRC to take cases to court on behalf of a group of individuals. However, although the Government is exploring this further, it has recently announced this will not be included in the Equality Bill.

Recommendation: Representative actions in discrimination cases should be introduced to remove the burden of bringing a claim from the individual.

27. NAT was disappointed that the proposed benefits reforms in the recent Green Paper, **No one written off: reforming welfare to reward responsibility**, put the onus for returning to work solely on people accessing the benefits system, rather than also on employers. The Government needs to take greater steps to ensure employers are aware of the benefits of employing disabled people, including people living with HIV.
28. The need for this is illustrated by the Chartered Institute of Personnel and Development (CIPD) findings from 2003 that discovered that more than 60

per cent of employers said they disregarded applications from people with drug or alcohol problems, a criminal record, a history of mental health problems or incapacity. More than half of respondents said nothing would persuade them to recruit from these 'core jobless' groups.⁵

29. Further research reveals that one in ten employers has withdrawn a job offer because the applicant had lied or misrepresented their health situation on the health-screening questionnaire. Seven per cent of employers have dismissed an employee while in employment for the same reason. Withdrawn job offers or dismissal on these grounds is twice as common in large organisations.⁶ This is particularly relevant to people living with HIV as people's experience of stigma and discrimination mean that some are unwilling to disclose their status on health-screen questionnaires.
30. Given this evidence, it is clear the Government need to take further steps to educate employers about their responsibilities under the DDA 2005. Employers need to be informed about conditions such as HIV, both in terms of what they need to do to be a supportive employer and also the understanding that just because someone has HIV does not mean they cannot bring a great deal to the workforce.

Recommendation: The Government needs to take greater steps to ensure employers are more aware of their responsibilities under the DDA 2005 as well as the benefits of employing disabled people, including people living with HIV.

31. The inquiry looks at recent developments in the **Access to Work Scheme**. NAT welcomes the Government's recognition in *No one written off* of the need to specifically consider fluctuating conditions.
32. As noted in our response to the Green Paper, there needs to be greater flexibility within the scheme, with the introduction of support for people with fluctuating conditions in times of poor health.
33. NAT would welcome consideration of financial assistance being made available to small and medium sized employers to help support people recently diagnosed with a fluctuating condition through a period of disability leave. This leave could be statutory, subsidised by Government, and could work in the same way as maternity and paternity leave. This would enable employees and employers, to assess an individual's condition and how this affects their role, and consider how best to facilitate a return to work.

Recommendation: There should be a statutory right to Access to Work for people with support needs that can be met via the scheme with a robust, accessible and transparent appeal and review procedure.

Recommendation: People with fluctuating conditions should retain an entitlement to Access to Work after entering employment. This would mean

⁵ CIPD (October 2005) Labour Market Outlook: Survey Report Summer/Autumn 2005

⁶ Labour Market Outlook: quarterly survey report – Autumn 2007' (2007) Chartered Institute of Personnel and Development

that, once qualified for Access to Work, clients whose support needs reduce, such that they do not need Access to Work support for a period, can reactivate the support on request if their support needs increase at a later point.

Recommendation: Employers (particularly small and medium) should be able to receive support from Access to Work to compensate them for when people with fluctuating conditions need periods away from work (e.g. when people living with HIV are adjusting to changes in their treatment regimes).

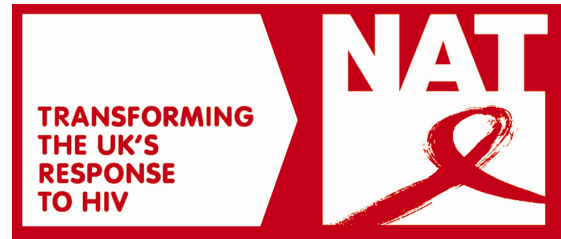
Single Equality Act

34. NAT welcomes the new single Equality Bill. As outlined above, people can often be discriminated against for more than one reason, not solely because they are disabled.
35. HIV in the UK disproportionately affects two groups which experience inequality and discrimination – gay and bisexual men, and black Africans – and amongst black Africans women are disproportionately affected. It is often hard to disentangle HIV discrimination from the homophobia, racism, anti-immigration prejudice and sexism which so many people living with HIV also experience and which fuel HIV stigma. The single Equality Act presents an opportunity to recognise this and see disability in a broader discrimination context.
36. As the law stands people can only bring a claim against someone that has treated them unfairly because of one particular characteristic, but as set out above, there are examples where people are discriminated against for a number of reasons.
37. NAT welcomes the Government's commitment to look at the question of bringing claims involving multiple discrimination. However, we note that it discusses the need to explore 'what the costs and benefits would be.' NAT is concerned that the Government may step back from these measures due to concerns about cost. We will encourage the Government to use the opportunity that the Equality Bill presents to take this area of work forward, as many people living with HIV are subject to multiple discrimination.

Recommendation: The Equality Bill should amend the law so that people can bring a claim that someone has treated them unfairly on more than one characteristic (e.g. race and disability).

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Supplementary note from NAT to the Work and Pensions Committee on the Malcolm judgment

NAT would like to provide the Work and Pensions Committee with updated information on our response to the Malcolm judgment, referred to in our original submission to the Committee at para.6.

Subsequent to our initial submission there was more detailed consideration within the disability sector on how best to restore effective protections from discrimination for disabled people. Whilst the introduction of provisions on indirect discrimination, as proposed in our original submission, is still strongly supported, we also believe the Government should revise the definitions of disability related discrimination so as to restore the originally intended scope of protection. Below are the key recommendations we later made to the consultation on the Malcolm judgment conducted by the Office for Disability Issues – ‘Improving protection from disability discrimination’:

Recommendation: The Government should adopt the concept of indirect discrimination for disability but this should be in addition to, not instead of, reforming disability related discrimination in the light of the Malcolm judgment.

Recommendation: The Government should use the opportunity the Equality Bill presents to introduce the necessary provision for reforming disability related discrimination, as set out by RADAR, which states:

“A person discriminates against a disabled person where he carries out an act which puts that person at a substantial disadvantage for a reason connected with their particular disability, and which cannot be justified as being a proportionate means of achieving a legitimate aim.”

Recommendation: If the Government adopts its proposals on indirect discrimination, specific provisions should be inserted into the Bill to:

- clarify that indirect discrimination applies in relation to single acts or omissions;
- clarify that in relation to disability the relevant comparators are people in the same or similar circumstances but who do not have a disability or face issues connected with a disability; and
- provide that knowledge of the claimant’s disability is not relevant for the purposes of establishing whether or not indirect discrimination has taken place.

NAT February 2009