10 ANTI-DISCRIMINATION LEGISLATION

After studying this chapter, you will:

- *understand in general terms what anti-discrimination laws are trying to do;*
- *understand why employers need codes of practice that their staff are expected to follow in order to avoid breaching the legislation;*
- *know how legislation affects the design of information systems.*

10.1 THE DEVELOPMENT OF ANTI-DISCRIMINATION LEGISLATION

Three hundred years ago, the laws of the UK contained many specific statutes embodying discrimination on grounds of sex, religion and wealth. In order to vote, you had to be male and own property. In order to be admitted to either of the two universities, you had to be male and a member of the Church of England. If you were a woman, when you married all your personal property became the property of your husband.

From 1700 to the 1950s, all these explicit examples of discrimination enshrined in the law were slowly but surely abolished. With a very few exceptions, men and women, whatever their religion and however rich or poor they might be, were treated by the law in the same way. This did not, however, eliminate discrimination. There were, for example, golf clubs that would not admit Jews, medical schools that were very reluctant to admit female students and professions that it was difficult for anyone not from a wealthy background to enter.

Since the 1960s there has been a plethora of legislation outlawing discrimination and a number of bodies were established to help enforce the law. The Equality and Human Rights Commission (EHRC) came into being in 2007 to promote and enforce equality and non-discrimination laws in England, Scotland and Wales, replacing several existing bodies. There is a separate body for Northern Ireland. The Equality Act 2010 brought all the existing legislation together in a single act of parliament. It is, however, one thing to make a law giving women the vote, but quite another to legislate effectively to ensure they are treated on an equal footing with men in all matters concerned with employment, not to mention other matters such as getting a mortgage. Equally, it is one thing to make racial discrimination unlawful but quite another to eliminate racial prejudice. Even if effective legislation can be framed – itself a difficult task – legislation, of itself, is not enough; time is required to bring about the changes of attitude that are necessary if discrimination is to be eliminated.

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Information systems engineers need to have an appreciation of anti-discrimination legislation for two reasons. First, as professionals, they will inevitably find themselves in managerial and supervisory positions and the law requires people in such positions to prevent the people they supervise from behaving in a discriminatory manner and to avoid such behaviour themselves. Secondly, the obligation to avoid certain sorts of discrimination, in particular discrimination on grounds of disability, should influence the way in which information systems are designed and constructed.

Although the Equality Act has done a great deal to bring about consistency in the way that the law deals with discrimination, it is a long, complicated and far-reaching piece of legislation. What is presented here is a very limited and simplified picture of the law as it is likely to impinge on the information systems professional.

10.2 WHAT IS DISCRIMINATION?

Discrimination means treating one person or one group of people less favourably than another on the grounds of personal characteristics. The Equality Act 2010 prohibits discrimination on any of the following grounds, known as **protected characteristics**:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy or maternity;
- race, colour, ethnic origin or nationality;
- religion or belief;
- sex;
- sexual orientation.

Similar legislation applies across the EU, in the US and in many other countries.

Much of the law and much of the debate on discrimination issues relates to employment and related matters. However, the legislation relates to discrimination in other contexts as well – education, the provision of goods and services, letting of premises, and so on.

Discrimination can be **direct** or **indirect**. Direct discrimination occurs when one person is treated less favourably than another specifically because of one of the protected characteristics, such as his or her sex or race. Here are some examples that, on the face of it, would constitute direct discrimination:

- A woman does exactly the same job as a man but is paid less than he is.
- A doctor refuses to treat a Chinese patient on the grounds that he has no room for any more patients but then accepts an English patient.

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- A company advertises for a secretary and automatically rejects all the male applicants.
- A landlord seeking to let a flat tells a black applicant that the flat is already let but next day lets it to a white applicant.
- A company advertises for 'a mature woman to act as the chief executive's personal assistant' or 'a strong young man to work as a trainee zoo-keeper'.

Industrial tribunals have increasingly taken the view that harassment and victimisation constitute direct discrimination and this was formalised under the Act. Harassment is defined as 'engaging in unwanted conduct related to a protected characteristic which has the purpose or effect of violating another person's dignity or is creating an intimidating, hostile, degrading, humiliating or offensive environment'. Victimisation is treating a person badly because that person has brought proceedings under the Act, alleged that someone has contravened the Act or given information or evidence in connection with proceedings under the Act.

Indirect discrimination occurs when general conditions are imposed that have a disproportionate effect on one group.

EXAMPLES OF INDIRECT DISCRIMINATION

Here are a few examples that might constitute indirect discrimination:

- A job is advertised with the requirement that applicants must be at least 180 cm tall. In the UK there are many men over 180 cm tall but very few women. The result is that few women can apply for the job.
- When allocating public housing, a local authority has a policy of giving priority to the children of existing tenants.
- An employer insists that all employees work on Saturdays. This might be held to be indirect discrimination against those who practice Judaism, since Saturday is their Sabbath. This would be discrimination on grounds of religion but, since the practitioners of Judaism are overwhelmingly of the Jewish race, it might also be regarded as racial discrimination.

The Equality Act permits discrimination in many cases where it is 'a proportionate means of achieving a legitimate aim'. Where it is associated with employment, indirect discrimination can also be justified if the employer demonstrates that there is a genuine occupational requirement that the offending condition be satisfied.

10.3 DISCRIMINATION ON GROUNDS OF SEX

Most people under 50 are surprised when they are told about the position of women workers in the 1960s. Where formal salary scales were in operation, there would either

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be separate, lower scales for women or there would be additional allowances for men, especially for married men. A female employee who got married might lose her job or might be transferred to the 'temporary' staff, making her ineligible for bonuses or additional holiday entitlement for long service. Women who had babies were not normally expected to return to work and had no legal right to do so. Outside a few professions such as nursing and teaching, promotion prospects for women were very poor and there were few women in senior positions. Indeed, it was very difficult for women to gain entry to academic and professional courses in fields such as medicine or the law which would have qualified them for senior positions. Discrimination also existed outside the field of employment. Some hotels would refuse to let rooms to unaccompanied women. Building societies applied much stricter criteria when considering whether to offer a mortgage to a single women than to a single man.

10.3.1 Employment

The most important features of the law can be summarised as follows:

- It is unlawful for an employer to discriminate against a person on grounds of their sex or marital status in terms of the arrangements made for recruitment and selection and the terms on which employment is offered (not just pay but also holiday entitlement, sick pay, notice period, and so on). The Act specifically makes unlawful advertisements that explicitly or implicitly suggest that only persons of one sex will be considered. The courts have interpreted the principal of equal pay for equal work as applying not just to men and women doing the same jobs but also to men and women doing jobs 'of equal value'.
- It is unlawful for an employer to discriminate against an employee on grounds of their sex or marital status in regard to opportunities for promotion, transfer or training or to any other benefits.
- It is unlawful for an employer to discriminate against an employee on grounds of their sex or marital status in regard to dismissal or redundancy.
- It is unlawful for an employer to victimise an employee for bringing a complaint of sex discrimination or for giving evidence in support of another employee's complaint.
- It is unlawful for any of the following to discriminate against a person on grounds of sex or marital status: a trade union, a professional body, a registration authority (e.g. the Architects Registration Board; see section in Chapter 2 on royal charters), an employment agency or a provider of vocational training.

Contract workers are also covered by the legislation.

There are a few exceptions to these provisions. The most important is where there is a genuine occupational requirement for a person of a specific sex, as for example in the case of recruiting actors to play roles of a specific sex. There is also a provision that specifically allows political parties to use procedures for selecting candidates for parliament that ensure that women will be selected.

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10.3.2 Education

It is unlawful for a provider of education (public or private, school, college or university) to discriminate against a person on the basis of their sex, in offering admission to the establishment or to specific courses, and in providing access to the other benefits and facilities it offers.

The main exceptions to this are that allowance is made for single-sex establishments and that provision for physical education may be different for the two sexes.

10.3.3 Provision of goods and services

It is unlawful to discriminate on grounds of sex:

- in the provision of goods, facilities or services. This covers accommodation in a hotel, facilities for entertainment, recreation or refreshment, banking and insurance services and so on;
- in selling or letting property.

The main exception to these provisions are for charities that have been founded with the purpose of helping a specific group of people who are all of the same sex, for example, single mothers.

Two consequences of this part of the legislation are that it is unlawful to offer:

- car insurance to women at a lower price than to men because women are statistically less likely to be involved in car accidents;
- offer better pensions to men of a given age than to women of the same age because men are statistically likely to die sooner.

10.3.4 Remedies

A person who believes that they have been discriminated against in their employment because of their sex – whether by being refused a job, refused promotion, paid less, not given training opportunities or anything else – can take the matter to an employment tribunal. If the tribunal finds in favour of the complainant it can award damages and make recommendations to the respondent. If the respondent fails to act on the recommendations, the amount of the damages may be increased.

An individual who feels that they have been the victim of sexual discrimination in the other areas covered by the legislation – education, the provision of goods and services – can take action in the civil courts for damages.

The EHRC provides advice and assistance to complainants who feel that they have been subjected to discrimination on grounds of their sex, whether in their employment or elsewhere. Anyone considering a formal complaint of sex discrimination is well advised to start by consulting the Commission.

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10.4 DISCRIMINATION ON RACIAL GROUNDS

The first race relations legislation in the UK was the Race Relations Act 1965, which made it unlawful to discriminate on grounds of race or colour by banning people from using public services or entering places such as bars, cinemas or theatres. It also created a new criminal offence of incitement to racial hatred by inflammatory publications or speeches. In 1968, a further act was passed making it unlawful to refuse housing, employment or public services to people because of their ethnic background.

The specific provisions of the law relating to discrimination on racial grounds are now very similar to those already described, relating to discrimination on grounds of sex and the EHRC has the same responsibilities for providing advice and assistance to complainants.

There is one major difference, however, that makes the implementation of racial discrimination legislation much more problematic than that of sex discrimination legislation. With a very few exceptions, the human race is divided into two sexes; a person can only belong to one sex at one time; and it is clear to which sex any given person belongs. (The Act does, in fact, make specific provision for persons who change their sex.) The same is very much not true of race, colour, ethnic origin or nationality. The Act does not define these terms. Are the English, the Irish, the Scots and the Welsh to be regarded as different racial groups? Is a person whose parents were Afro-Caribbean but who was born and brought up in Cardiff to be regarded as belonging to the Welsh, British or Afro-Caribbean racial groups, or perhaps to all three? Does the requirement that candidates for a job speak a specific language (e.g. Urdu or Welsh) constitute indirect discrimination? These considerations go far beyond what it is relevant to consider here but they illustrate the difficulty of legislation in this area.

10.5 DISCRIMINATION ON GROUNDS OF DISABILITY

From the 1970s onwards, government had been encouraging the recruitment of disabled employees into the Civil Service and encouraging employers to take on disabled workers by withholding government contracts from companies that could not demonstrate a commitment to offering opportunities to the disabled. It was not, however, until 1995 that anti-discrimination legislation was extended to cover discrimination on grounds of disability, in the Disability Discrimination Act. This was followed in 2001 by the Special Educational Needs and Disability Act, which extended the provisions of the earlier act to cover education. The provisions of these acts are now included in the Equality Act 2010 and the EHRC is responsible for advising and assisting complainants.

The Act makes it unlawful to treat a disabled employee or applicant less favourably because of their disability without justification. The justification must be serious and substantial. Thus it would be justified to reject a blind applicant for a job as a bus driver or a paraplegic for a job as a lifeguard, and it would probably be justified to reject a dyslexic applicant for a job as a copy editor. However, the Act requires the employer to make reasonable adjustments to meet the needs of disabled applicants or employees. This might include adapting a bus so that a disabled applicant could drive it safely or providing a work station with special hardware and software to make it suitable for use by a partially-sighted employee.

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The Act also makes it unlawful for businesses and organisations providing goods and services to treat disabled people less favourably than other people, for a reason related to their disability, and service providers are required to make reasonable changes to make it possible for disabled people to use their services.

The requirement to make reasonable adjustments could certainly include adapting information systems so that they can be used by a blind or partially-sighted employee, provided this can be done at reasonable cost. The requirement for service providers to make reasonable adjustments certainly requires that reasonable adjustments should be made to the way that services are provided over the web. The legislation thus has a direct effect on information systems professionals in a way that other anti-discrimination legislation does not: it directly influences – or should influence – the way in which information systems are designed. In practice, for the ordinary information systems developer (as opposed to specialists working in areas such as text to speech conversion) this translates into the need to make systems usable by the blind, those whose vision is impaired, those whose hearing is impaired, those suffering from lack of manual dexterity (and so unable to use a mouse, for example), and those suffering from dyslexia. This need is most apparent, and most likely to be enforceable, when the system includes publicly accessible web pages.

Just a few of the ways accessibility can be improved include:

- Do not rely on subtle colour contrasts such as yellow text on a green background.
- Provide a textual alternative for non-text content such as diagrams or pictures.
- Make all functions available from the keyboard – some users may have difficulty using a mouse.
- Do not impose time constraints on users, some of whom may only read slowly.
- Ensure that the page can be read satisfactorily by a screen reader (i.e. software that converts text on the screen to speech output).
- If you use speech to convey information, ensure that the information is also available as text.
- Make it easy to avoid or correct mistakes.

In 1997, the World Wide Web Consortium (W3C) established the Web Accessibility Initiative (WAI), with the specific aim of improving the accessibility of the web for disabled users. In 1999, it published version 1.0 of its Web Content Accessibility Guidelines (WCAG) to help developers produce accessible web pages. In 2008, WCAG version 2.0 was published and in 2012 the International Organization for Standardization (ISO) adopted these guidelines as an international standard ISO/IEC 40500:2012.

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The guidelines specify three levels of compliance:

- Level A is the lowest level of compliance. If a web page is not compliant at this level, one or more groups of disabled people will be unable to access the page.
- If a web page is not compliant at level AA, some groups of disabled people will have difficulty in accessing the page.
- Compliance at level AAA will make it easier for some groups to access the web page.

Several pieces of software are available to test whether a web page complies with the W3C guidelines.

Many of the guidelines are likely to make it easier for non-disabled users to use the internet. In 2004, the Disability Rights Commission (one of the predecessors of EHRC) commissioned a study of web accessibility for the disabled, which resulted in a report entitled *The web: access and inclusion for disabled people*. The study included a survey of 1,000 homepages and found that 81 per cent, including many government sites, failed to comply with even the lowest level of the W3C guidelines. Among the commonest reasons why disabled users experienced difficulty were:

- Page layout was unclear and confusing.
- The navigation mechanisms were confusing and disorienting.
- There was poor contrast between the text and the background and colours were used inappropriately.
- Graphics and text were too small.
- Links and images were poorly labelled.
- The web pages were incompatible with the software designed to assist disabled users (screen readers, magnification software).

It is striking that the first four of these, and possibly the fifth, are a source of difficulty for all web users. Eliminating these faults would not only improve the accessibility of the internet to disabled users but would also enhance its usability for everyone. Although many web pages are much improved since the report was produced, many others are still poor.

W3C also produces accessibility guidelines for authoring tools. As stated in version 1 of these guidelines, they are intended to ensure 'that the authoring tool be accessible to authors regardless of disability, that it produces accessible content by default, and that it supports and encourages the author in creating accessible content'. Because most of the content of the web is created using authoring tools, they play a critical role in ensuring the accessibility of the web. Since the web is both a means of receiving information and communicating information, it is important that both the web content produced and the authoring tool itself be accessible.

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Quite apart from the ethical and commercial reasons for making web pages accessible to the disabled, there are legal requirements. In 2012, the Royal National Institute for the Blind served legal proceedings against low-cost airline bmibaby over its failure to ensure web access for blind and partially sighted customers. This case and several others have been settled out of court but similar cases have been brought in other countries. The requirement laid down in the Act is to make reasonable adjustments to allow access by the disabled. In practice, this probably means that a small company can claim that it does not have the necessary resources to make significant adjustments but no such defence is available to larger organisations.

10.6 DISCRIMINATION ON GROUNDS OF AGE

The Equality Act 2010 makes it unlawful to discriminate on grounds of age. In the field of employment this has meant the end of compulsory retirement ages. It also means that it is probably unlawful for employers to seek specifically to recruit new graduates. (This would be indirect age discrimination because a much smaller proportion of over-50s fall into the category of 'new graduates' than of under-25s.)

The test that discrimination can be justified if it represents 'a proportionate means of achieving a legitimate aim' means, however, that examples such as the following might well be considered lawful:

- special treatment of different age groups in order to protect them (but note that the age discrimination provisions of the Act do not, anyway, apply to persons under the age of 18);
- different premiums for life insurance policies, depending on the age of the person at the time the policy is taken out, and different pension rates depending on the age of retirement (but these must not amount to sex discrimination);
- fixing a maximum age for recruitment based on the need for a reasonable period of employment after training and before retirement;
- fixing a minimum age, a minimum amount of professional experience or a minimum number of years with the company before a person will be regarded as eligible for a given post or eligible for certain employment benefits (e.g. additional annual leave).

The IT industry has traditionally been a youthful one and many companies have discriminated against older job applicants, albeit unconsciously or unintentionally, As the industry itself has grown older, the average age of its employees has been increasing, so this phenomenon has become less marked. Legislation against age discrimination will probably have little direct effect on the industry beyond accelerating this tendency.

10.7 AVOIDING DISCRIMINATION

It is not enough for an employer to support anti-discrimination legislation and resolve to comply with it. In an organisation of any size, it is necessary to ensure that all

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members of the organisation share the employer's resolve. Even if this is achieved, the organisation may have to deal with such problems as unlawful harassment from its customers or unjustified accusations of discrimination.

Effective compliance with anti-discrimination legislation in the workplace requires three things:

- a suitable written policy, well publicised and freely and easily available;
- a training programme for new and existing staff, to ensure that they are all aware of the policy and its importance;
- effective procedures for implementing the policy.

It is a sad fact that an employer's ability to rebut an accusation of unlawful discrimination will often depend as much on their ability to demonstrate that proper procedures have been followed as on whether any discrimination took place.

FURTHER READING

The Equality Act:
www.legislation.gov.uk/ukpga/2010/15

The EHRC website contains much information and guidance about the Equality Act 2010. In particular, it publishes a Statutory Code of Practice covering the Equality Act 2010 as it applies to employment:
www.equalityhumanrights.com

ACAS (Arbitration, Conciliation and Advisory Service) also provides much helpful advice relating to equality issues at work:
www.acas.org.uk

The Disability Rights Commission report referred to in the section on discrimination on the basis of disability:
www-hcid.soi.city.ac.uk/research/DRC_Report.pdf

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