

Northern Ireland equality law reform & HIV



Briefing paper
National AIDS Trust
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1. The issue

Disability discrimination legislation is vital in preventing discrimination against people living with and at risk of acquiring HIV. However, these protections are not equal across all nations of the United Kingdom.

In 2010, the UK Parliament passed the [Equality Act 2010](#). Part of the intention of the Equality Act, as stated [on the face of the legislation](#), was:

“To reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics”.

The Equality Act was remarkably successful at streamlining & strengthening equality protections for people living with and at risk of acquiring HIV. It consolidated the existing disability discrimination protections introduced in the [Disability Discrimination Act 1995](#) with other anti-discrimination legislation, whilst extending protections further (see below).

However, hardly any of the provisions of the Equality Act apply in Northern Ireland. Responsibility for policy related to “equality of opportunity” was devolved to the newly created Northern Ireland Executive by [Part VIII](#) of the [Northern Ireland Act 1998](#). The 1998 Act gave effect to [The Belfast \(Good Friday\) Agreement](#), which committed to affirm:

“The right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity” (Page 16).

Within the political, social & historic context of Northern Ireland, particularly the conflict of “The Troubles”, it made sense that responsibility for “equality of

opportunity” was devolved to the Northern Ireland Executive. However, the devolution of this issue has meant that equality law in Northern Ireland has not kept pace with the law in England, Scotland and Wales.

As highlighted by the Equality Commission for Northern Ireland (ECNI) in their 2022 paper [“The need for a NI Single Equality Act”](#), stronger protection is needed for discrimination against disability. National AIDS Trust echo the ECNI’s calls for a single Equality Act for Northern Ireland. We also believe that people living with HIV, or at risk of acquiring HIV, in Northern Ireland are currently being failed by out-of-date disability discrimination legislation that offers less robust protection than comparable laws in Great Britain.

2. HIV & disability discrimination protections in Northern Ireland

HIV in the Disability Discrimination Act 1995:

People living with HIV in Northern Ireland are protected from discrimination by Paragraph 6A of [Schedule 1](#) of the Disability Discrimination Act 1995 (DDA), which states:

“A person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person”.

This paragraph was inserted into the legislation by [Article 18 of the Disability Discrimination \(Northern Ireland\) Order 2006](#), to match changes to the definition of a person living with a disability introduced by the [Disability Discrimination Act 2005](#) in England, Scotland and Wales.

This secondary legislation was passed by the UK Parliament, as the Northern Ireland Executive [was suspended](#) between October 2002 and May 2007. This legislation intends to bring more people living with progressive conditions into the scope of [disability discrimination protections](#). For example, people living with HIV were now protected from discrimination from diagnosis, rather than when their HIV began to have a substantial adverse effect on their day-to-day activities.

The merits of updating Northern Ireland's equality legislation:

The Equality Commission for Northern Ireland (ECNI) in their 2022 paper "[The need for a NI Single Equality Act](#)", stated that all of the existing equality legislation in Northern Ireland should be strengthened through the introduction of a single Equality Act. They say that this would improve consistency, understanding and efficiency, and prevent a 'hierarchy of rights' that exists because of the current different laws protecting different groups that experience discrimination in Northern Ireland.

We agree with the ECNI that this is necessary, particularly with regards to the protections that exist for disabled people in Northern Ireland, including those living with HIV. We believe that there are several deficiencies in the Disability Discrimination Act 1995 that make it an inferior counterpart of the Equality Act 2010 with regards to people living with HIV:

1. **Harassment** – [Section 26](#) of the Equality Act protects people living with HIV in Britain from harassment in all contexts. Harassment is defined as conduct related to a relevant protected characteristics that has the effect of

"Violating... (a person's) dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for (them)".

Under the Equality Act, harassment is an offence regardless of the setting in which it takes place. Under the Disability Discrimination Act, however, people living with HIV are only protected from harassment related to their disability [in employment](#) and in the [provision of further and higher education](#).

This means that individuals living with HIV are not protected in Northern Ireland if they receive harassment related to their HIV status when accessing goods and services or buying and renting property.

Across the UK, National AIDS Trust has assisted individuals with cases of harassment related to their HIV status in many service settings. For example, an individual living with HIV who tried to access cosmetic surgery found that they were denied the service based on their HIV status.

When they tried to complain about this discriminatory treatment, the clinic hired a lawyer to tell them to desist with their complaint and used derogatory language about their HIV status. Despite the genuine distress that this language caused, it would not be legally actionable as disability discrimination if the incident occurred in Northern Ireland.

This a clear example of anti-discrimination protections being weaker for people living with HIV in Northern Ireland compared with Great Britain.

2. **Discrimination by perception or association** – [Section 13](#) of the Equality Act 2010 makes direct discrimination unlawful in Britain against people with protected characteristics. Section 13(1) states:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

The highlighted phrase is worded in such a way to protect individuals who are perceived to have a protected characteristic or those who are associated with an individual who has a protected characteristic, as well as those that actually have a protected characteristic.

However, the Disability Discrimination Act does not have the same protections against discrimination by perception or association. People in Northern Ireland who are discriminated against because they are perceived to be living with HIV, or because they are associated with a person living with HIV, are not protected from discrimination. This is because [Section 3A](#) of the Disability Discrimination Act 1995 only deals with situations where:

"a person discriminates against a disabled person".

This does not offer the same opportunity for open interpretation in the wording as the Equality Act, hence the lack of protection against discrimination by perception or association in Northern Ireland compared to Britain.

- 3. Pre-employment questionnaires** – [Section 60](#) of the Equality Act prevents the use of pre-employment questionnaires during the recruitment process. This means that recruiting organisations are not allowed to ask job applicants questions related to their health or disabilities before they make a job offer. Recruiting organisations in Great Britain are therefore not allowed to ask about an applicant's HIV status before an offer of a job has been made.

Even after a job offer has been made, organisations can only disbar people living with HIV from a role if they can prove that it is a necessary operational requirement for the role, and that such discrimination is a proportionate means of achieving a legitimate aim. In the vast majority of cases, it would still be unlawful to not offer a person living with HIV a role because of their HIV status.

There is however no equivalent protection against discrimination in pre-employment health questionnaires in Northern Ireland, creating another clear lack of protection for people living with HIV under Northern Irish equality law.

- 4. Direct discrimination** – As highlighted above, Section 13 of the Equality Act prohibits “direct discrimination” in all scenarios, which is defined as treating an individual less favourably because of a protected characteristic, such as because they are living with HIV. In Northern Ireland however, this protection does not exist in relation to people living with a disability in relation to goods, services and facilities. Instead, there is much narrower provision, [Sections 19 and 20](#) of the DDA, which is about discrimination in relation to goods, facilities and services.

The DDA has different provisions for disability discrimination, depending on the setting in which the discrimination occurs.

Harmonising and simplifying disability discrimination legislation so that direct discrimination is prohibited in all settings, as it is under the Equality Act in Britain, would benefit people living with HIV in Northern Ireland hugely.

- 5. Reasonable adjustments** – [Sections 20 to 22](#) of the Equality Act sets out the requirement for organisations to make reasonable adjustments to provisions, criteria or practices that put disabled people at a substantial disadvantage compared to people who are not disabled. For people living with HIV, for example, this might involve altering a workplace absence management policy in order to allow a person living with HIV to attend medical appointments related to their HIV care.

Under the DDA in Northern Ireland, however, it is permissible for organisations in some contexts to justify why they should not make a reasonable adjustment.

We agree [with the ECNI](#) that this defence should not be permissible, as if an adjustment is required for a person living with HIV, organisations should not be able to relieve themselves of this duty just because they have stated they have a reason to do so.

We also agree with the ECNI that there should be a single justification threshold within Northern Ireland disability discrimination legislation for when reasonable adjustments need to be made in all settings. Having different thresholds for different settings where discrimination might be experienced makes it harder for people living with HIV in Northern Ireland to know if they have the right to make requests for reasonable adjustments related to their HIV status. Making the threshold the same for each setting would make it easier for individuals to utilise this protection, and likely increase compliance by service providers, who are not currently subject to the same requirements as employers are in Northern Ireland.

- 6. Indirect discrimination:** [Section 19](#) of the Equality Act protects people living with HIV in Britain from indirect discrimination, which is defined as:

“(Applying) a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of (an individual)”.

For example, for people living with HIV, this could include an employer having a policy not allowing employees to take medical appointments during working hours.

This could be indirect discrimination against a person living with HIV if they were required to attend medical appointments to manage their HIV treatment.

In Northern Ireland, however, no equivalent protection exists. [The ECNI](#) highlight the case of [Mayor and Burgess of the London Borough of Lewisham vs. Malcolm \(2008\)](#) (Malcolm) in the House of Lords, which restricted the DDA's protection against "disability-related discrimination" in establishing a comparator that discriminatory treatment has occurred.

Whilst the Equality Act countered this effect by introducing the provision of indirect discrimination in Britain, this is not the case in Northern Ireland. Introducing a similar provision into Northern Irish law would establish parity of protection for people living with HIV in the rest of the United Kingdom.

- 7. Discrimination arising from a disability:** [Section 15](#) of the Equality Act protects people living with HIV in Britain from discrimination arising from a disability, which is defined as:

"Treating someone unfavourably because of something arising in consequence of (a person's) disability".

For example, for people living with HIV, if a doctor in a hospital required an individual living with HIV to disclose their viral load before getting treatment, where this was unnecessary for their care, this could be considered "discrimination arising from a disability".

As above, the *Malcolm (2008)* case restricted the ability of disabled people to bring "disability-related discrimination" cases under the DDA. Whilst the Equality Act introduced the provision of "discrimination arising from a disability" in Britain, no equivalent protection exists in Northern Ireland. This should be rectified to protect people living with HIV in Northern Ireland from as many kinds of discrimination as possible.

- 8. Positive action:** [Sections 158 and 159](#) of the Equality Act extend positive action measures in Britain.

These actions can lawfully be taken to allow individuals with a protected characteristic to overcome a substantial disadvantage compared to other groups and increase their representation.

These rights particularly apply within employment, and in any setting can only be used if they are a proportionate means of achieving a legitimate aim.

For example, it might be permissible in certain circumstances for an employer to choose a person living with HIV to be recruited into a role over an equally qualified applicant not living with HIV, if it could be demonstrated that people living with HIV are underrepresented in their workforce.

In Northern Ireland, however, there is no such explicit provision related to positive action to combat disability discrimination. Creating a positive action provision in Northern Irish law would be useful in helping people living with HIV overcome the disadvantage they still experience in settings such as the workplace.

This need is particularly undercut by data from the [Positive Voices](#) report, which found that found that **10%** of people living with HIV in Great Britain were unemployed. This data illustrates that a significant proportion of people living with HIV experience challenges with unemployment that could be addressed by disability discrimination legislation.

3. Case study: Discrimination by perception in employment in Northern Ireland:

National AIDS Trust runs a [Discrimination Advice Service](#) for people living with, or at risk of acquiring, HIV in the UK. Through this service, we connect people to legal advice about whether they might have a legal case of discrimination on the grounds of their actual or perceived HIV status.

We were contacted about a case of discrimination by perception of HIV status in Northern Ireland, which provided a real-world example of how the current disability discrimination legislation is not robust enough to protect people at risk of acquiring HIV.

The individual involved was a medical student in Northern Ireland, who takes PrEP (pre-exposure prophylaxis, the HIV prevention medication).

PrEP is extremely effective medication that is taken by individuals at risk of acquiring HIV, [reducing the risk](#) through sexual transmission by about 99%.

Despite this, the occupational health team at the institution where this individual studied determined that they would have to provide additional and ongoing documentation about their PrEP medication to ensure that there was no risk of HIV transmission. This included asking them invasive questions about their lifestyle and sexual activity.

Given that these concerns were scientifically unfounded, we assess that the conduct of the occupational health team could be considered “discrimination by perception” as it was perceived that the individual could be living with HIV.

If this individual lived in Britain, they would be protected from “discrimination by perception”, they would be protected by the Equality Act 2010 (see above). However, given that this incident occurred in Northern Ireland, there was no route to recourse within the law, as there is no equivalent protection under the Disability Discrimination Act 1995.

People at risk of acquiring HIV in Northern Ireland deserve to be protected from discrimination they may experience because they are taking HIV prevention medication. Without changes being made to disability discrimination law, people living with and at risk of acquiring HIV in Northern Ireland are at a substantial disadvantage compared to those living in Britain.

4. Policy recommendations

National AIDS Trust makes the following policy recommendations in relation to this briefing:

For the Northern Ireland Executive:

1. Conduct a thorough review of existing disability discrimination legislation in Northern Ireland, including by consulting with the Equality Commission for Northern Ireland.
2. As required, taking into account the deficiencies identified by this briefing and elsewhere, and legislate to ensure that disability discrimination protections in Northern Ireland are at least on par with those in the rest of the United Kingdom.
3. Commit to regularly review disability discrimination and other equalities legislation, to ensure that going forward protections for people with disabilities in Northern Ireland are

not lesser than those in the rest of the United Kingdom.

For Northern Ireland’s political parties:

1. Make clear policy commitments to legislate to update, simplify and harmonise Northern Ireland’s legislation in line with the recommendations of [the Equality Commission for Northern Ireland](#).
2. Place these commitments in party manifestos ahead of the next Northern Ireland Assembly election.
3. Work on a cross-party basis to table and pass legislation that enhances disability discrimination protections in Northern Ireland via harmonised, simplified, and stronger protections in law.

For the Equality Commission for Northern Ireland:

1. Work with the Northern Ireland Executive, to effectively legislate to enhance disability discrimination protections for people living with and at risk of acquiring HIV in Northern Ireland.
2. Continue to campaign for a Single Equality Act for Northern Ireland, making the case to all Northern Irish political parties to include this in their manifestos.
3. Place the issues of disability discrimination against people living with HIV and at risk of acquiring HIV at the centre of future campaigns work about a Single Equality Act for Northern Ireland.

Contact us:

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