

Equality Act 2010

Key points

- The statutory torts prohibiting discrimination and related conduct are now codified in the Equality Act 2010 which is now in force.
 - The Equality Act 2010 sets out a clear framework for all forms of discrimination – both direct and indirect discrimination and victimisation and harassment. In addition there are obligations to make reasonable adjustments for disabled people and disabled people have the right not to be treated unfavourably because of something arising in consequence of their disability, unless it can be justified.
 - The Equality Act 2010 encompasses the range of intrinsic aspects of human dignity, known as protected characteristics: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.
 - The contexts in which discrimination and other conduct is prohibited by reference to a protected characteristic is also set out comprehensively in the Equality Act 2010 – from housing, to education, employment and services and public functions.
 - Consideration of equality issues are also brought into the heart of public sector decision making processes by the Public Sector Equality Duty which seeks to tackle institutionalised discrimination that can be hard to challenge through individual rights based litigation.
1. The *Equality Act 2010* - heralded as the single most significant development in equality law for 40 years - is now in force. The Act not only harmonises and consolidates previous anti-discrimination legislation; it also strengthens legal rights to equality and increases the range of unlawful acts of discrimination outside the employment field. In addition it places a new set of statutory equality duties on public authorities. The equality duty (s.149) requires public authorities, in the exercise of their public functions, to have due regard to eliminate prohibited discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations between different groups of people.
 2. The Equality Act's purpose was to replace a mass of disparate mass of legislation with more uniform, accessible and comprehensive rights. It has already succeeded in setting standards and raising awareness of rights to equality, the importance of tackling discrimination and the role of the public sector in achieving equality.
 3. Whilst the 'judicial function' is exempt from the prohibition on discrimination in the exercise of public functions, this exemption is likely to be limited to the core, adjudicative and listing functions. Ancillary functions, e.g. training, mentoring, conducting appraisals, managerial or committee functions and conduct towards colleagues or court staff will not be exempt¹.

¹ See *Engel v Joint Committee for Parking and Traffic Regulations Outside London (PATROL) 0520/12 EAT 13* May 2013.

4. This chapter is intended as an introduction to the concepts and framework of the Equality Act 2010. Whilst there are other statutory provisions – such as the Mental Capacity Act 2005 and the special measures provisions for vulnerable witnesses - that address issues of equality which are discussed in other chapters, it is the Equality Act 2010 which sets out the statutory torts of discrimination, victimisation and harassment. There are also statutory codes of practice² which are wordy but helpful.
5. A claim under the Equality Act will have three components:
 - a. It will allege that the discrimination occurred in a proscribed **context and manner** bringing the matter within the jurisdiction of a court or tribunal – for example jurisdiction for discrimination in the workplace is conferred on Employment Tribunals.
 - b. It will identify the particular alleged type of **prohibited conduct**, such as direct discrimination or failure to make reasonable adjustments for a disabled person.
 - c. It will complain of such conduct by reference to a **protected characteristic**.

Protected characteristics

6. The Equality Act identifies nine protected characteristics, or specific aspects of our humanity, which are intrinsic to an individual's dignity and autonomy: part of our equal worth as human beings.
7. The protected characteristics are:
 - a. **Age.** Age is a protected characteristic and the concept includes “age group”, that is, a group of persons defined by reference to a particular age or a range of ages, or cohort such as “baby boomers”. Age groups may be linked to physical appearance, such as terms ‘grey-haired’ or ‘youthful’.
 - b. **Disability.** A person has a disability if he or she has (1) a physical or mental impairment which (2) has a substantial and (3) long-term adverse effect on (4) his or her ability to carry out normal day-to-day activities, which is to be considered in interaction with the various barriers which may hinder their full and effective participation in society on an equal basis with others. The definition will include those with such an impairment for 12 months or more unlike, for example a short term illness or a condition where the effects are minor or trivial. The definition is important since a person must establish that he or she is a disabled person to access protection under the disability strand of the Act.

There are detailed provisions in Schedule 1 to the Act as well as statutory guidance on matters to be taken into account in establishing whether a person is disabled within the meaning of the Act. The United Nations Convention on the Rights of Persons with Disabilities is directly applicable in the UK and provides that “persons with disabilities include those who have long-term physical, mental, intellectual or

² *EHRC Code of Practice on Employment (2011), EHRC Code of Practice on Services, Public Functions and Associations (2011), EHRC Code of Practice on Equal Pay (2011), statutory Guidance on matters to be taken into account in determining disability, and the pre-existing EHRC Disability Discrimination Act 1995 revised Code of Practice: trade organisations, qualifications bodies and general qualifications bodies 2008* remains in force. See www.equalityhumanrights.com

sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”³. The *cause* of the impairment is irrelevant and may even be unidentified, as long as the evidence demonstrates that the impairment exists. Certain specified conditions are deemed disabilities, such as HIV and cancer, whilst others such as alcoholism and voyeurism are excluded. Progressive and fluctuating conditions are considered as disabling if they are likely to become so in the future.

Past disabilities are also covered.

- c. **Gender reassignment.** Gender reassignment is moving from one's birth sex to the preferred gender. A *transsexual* person is a person who has the protected characteristic of gender reassignment.

This characteristic covers those proposing to undergo or undergoing a process, as well as those who have done so. There is no need for the person to be under medical supervision or to have a gender recognition certificate.

- d. **Marital or civil partnership status.** A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner. It does not extend to those engaged to be married. However broadly speaking, outside the context of work, discrimination, harassment and victimisation by reference to marital/civil partnership status is not prohibited.
- e. **Pregnancy and maternity.** A woman has the protected characteristic of pregnancy if she is pregnant (and, in the case of IVF treatment when the fertilized egg is transferred to her uterus), and maternity status until 26 weeks after the birth of a living child, or a still birth (after 24 weeks of pregnancy). After the 26 week period there is also protection in relation to breast-feeding.
- f. **Race.** The protected characteristic of race is defined as including colour; nationality; and ethnic or national origins. The non-exhaustive definition may also extend to other characteristics, such as caste⁴, and may comprise two or more distinct racial groups – such as East African Asian.
- g. **Religion.** Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief. A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion.

A philosophical belief must be a belief (rather than an opinion or viewpoint) as to a weighty and substantial aspect of human life, which is genuinely held that attains a certain level of cogency, seriousness, cohesion and importance; and is worthy of respect in a democratic society.

³ Article 1

⁴ The Equality Act 2010 confers regulation making power to the Secretary of State to outlaw caste discrimination, which have not yet been utilised.

- h. **Sex.** In relation to the protected characteristic of sex, a reference to a person who has a particular protected characteristic is a reference to a man or to a woman.
- i. **Sexual orientation.** The protected characteristic of sexual orientation means a person's sexual orientation towards persons of the same, or opposite, or both sexes.

Types of discrimination and other prohibited conduct as defined in the Act

Direct Discrimination

- 8. Direct discrimination is less favourable treatment of someone 'because' of a protected characteristic. It may be helpful to make a comparison with the treatment of any actual comparator identified by the Claimant and/or a hypothetical comparator, although it follows that if a person has been treated less favourably because of a protected characteristic they would have been treated differently if they did not have that protected characteristic and were, for example, of a different race.
- 9. Motive is irrelevant in considering whether there has been direct discrimination - it is necessary to address simply the question of the factual criteria that determined the decision made by the alleged discriminator.
- 10. The definition covers cases where the Claimant has the protected characteristic, but is also intended to apply where the Claimant is *perceived* to have it, or is treated less favourably because of an *association* with someone else who has it. For example a judge of Iraqi origin, unlike her colleagues, is not invited to the cathedral court service at the start of the legal year 'because she is Muslim'. In fact she is not Muslim, but is perceived as such and treated less favourably because of this perception.
- 11. Direct discrimination, if found, ordinarily cannot be justified. However, uniquely, direct discrimination on grounds of age is open to the justification that the treatment was a 'proportionate means of achieving a legitimate aim'. For example, to dismiss an employee because she or he has reached 70 is self-evidently treatment because of age. If however the employer can prove, for example, that the purpose was to facilitate access to employment for younger workers, or to preserve the older worker from the indignity of poor performance procedures, they may establish a legitimate aim. If the employer can also prove that the decision to compulsorily retire the employee was both an appropriate and necessary way of avoiding such humiliation or achieving inter-generational fairness, then they will have justified the treatment and it will not amount to unlawful direct age discrimination.
- 12. Less favourable treatment of the non-disabled – in other words, positive discrimination in favour of the disabled – is not unlawful.

Indirect discrimination

- 13. The aim of indirect discrimination is to address hidden and/or inadvertent discrimination, where there is a discriminatory outcome, without direct discrimination. It is where unjustified practices provisions or criteria disadvantage a group with a protected characteristic compared to a group which does not have this characteristic. There are four elements of the definition. The Claimant must show:

- a. that the Defendant has applied, or would apply, a provision, criterion or practice (PCP) regardless of the protected characteristic relied upon; but
 - b. which puts, or would put, persons who share the Claimant's characteristic at a particular disadvantage; and
 - c. which puts, or would put, the Claimant at that disadvantage.
 - d. If so, the claim is made out, subject to a justification defence: that the PCP is a proportionate means of achieving a legitimate aim. In order for the PCP to be a proportionate means of achieving a legitimate aim, it must correspond to a 'real need' and be an 'appropriate' means of achieving the objective pursued and 'necessary' to that end. The court must follow a structured approach to this proportionality test in that:
 - i. the aim must be sufficiently important to justify the measure which disadvantages some groups,
 - ii. the measures designed to meet the objective must be rationally connected to that aim,
 - iii. the means must be no more than is necessary to accomplish the objective, and
 - iv. the interests of the affected individual and the wider community must be fairly balanced.
14. Indirect discrimination has been used successfully to challenge the prohibition of the wearing of cultural and religious artefacts, such as a cross or bangle (Kara) in schools and workplaces, and dress codes such as a ban on corn rows or dreadlocks, veils and turbans and used to obtain rights for part-time workers who are predominantly female.
15. Cost alone is not sufficient to justify indirect discrimination.
16. For example a rule is made that a particular training session will be held between 6 and 8 p.m. on a Friday evening. Although the rule is applied across the workplace, it places those of some religions at a particular disadvantage if they need to be at home or a place of worship before dark. The training organisers would be required to demonstrate that the indirectly discriminatory timing of this particular session was a proportionate means of achieving the legitimate aim of training on this topic.
17. Indirect discrimination now applies in disability cases to disabled persons, which it did not under the previous legislation.
18. Indirect discrimination only protects persons with a protected characteristic, not those who are or perceived as having, or are associated with a person with a protected characteristic. For example, a family member and carer for a disabled person who is unable to work an employer's shift pattern, will not be able to claim indirect discrimination by reference to the disability strand of the Equality Act 2010.
19. Indirect discrimination does not apply to pregnancy/maternity per se, but is likely to amount to indirect sex discrimination.

Harassment

20. Harassment for the purposes of the *Equality Act 2010* has a quite different definition to the *Protection from Harassment Act 1997*. It is defined as conduct that is
 - a. unwanted; and
 - b. *related to* a protected characteristic; and
 - c. has the *purpose or effect*
 - d. of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
21. In determining the effect of the conduct, the Claimant's perception must be taken into account as well as whether it is reasonable to view the conduct as having that effect. A one off incident may be sufficient – for example suggesting to a female Asian employee that she might be “married off in India” was found to constitute unlawful harassment in the employment sphere. Since the test is whether the conduct is *related to* a protected characteristic it is a less strict causation test than direct discrimination. It includes, for example homophobic banter and innuendo made to a work colleague when the perpetrators knew that their colleague was not gay. Homophobic banter in the mistaken belief that someone was gay would also fall within the definition of harassment.
22. Unwanted conduct of a *sexual nature* which has the same degrading purpose or effect as above is also a form of harassment, regardless of any protected characteristic. Less favourable treatment because the victim has either submitted or refused to submit to sexual harassment or harassment related to sex or gender reassignment also amounts to harassment.
23. In the County Court jurisdictions discussed below, there is no protection against harassment on grounds of sexual orientation or religion and belief (nor, in relation to schools, gender reassignment); but what may colloquially be described as harassment could often amount to direct discrimination in law. For example, racist abuse is, by its very nature less favourable treatment because of race. It is also intrinsically related to race and is likely to be unwanted and have the purpose or effect of violating the recipient's dignity.

Disability discrimination

24. Special provisions govern the different forms of disability discrimination. The *Equality Act 2010* recognises that more than formal equality is required to enable disabled people to participate as fully as possible in society. As acknowledged in the UN Convention on the Rights of Persons with Disabilities, it can be the interaction with various barriers in society that hinder the full and effective participation of disabled people on an equal basis with others.⁵ In addition to protection from direct and indirect discrimination, reasonable adjustments may be required to assist a disabled person who, because of his or her disability, is placed at a substantial disadvantage in comparison to others without that disability (s.20). These may be, for example, by

⁵ Article 1

adaptations or modifications to premises, physical features or different arrangements, such as sitting times or provision of a sign language interpreter, or provision of an auxiliary aid or service.

25. The gist of the duty is that it is to take reasonable steps, at no cost to the disabled person, to avoid the disadvantage or provide the aid or service.
26. The responsibility, when it arises, is to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step depends on all the circumstances of the case. The following are some of the factors which might be taken into account when considering what is reasonable:
 - a. whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
 - b. the extent to which it is practicable for the service provider to take the steps;
 - c. the financial and other costs of making the adjustment;
 - d. the extent of any disruption which taking the steps would cause;
 - e. the extent of the service provider's financial and other resources;
 - f. the amount of any resources already spent on making adjustments; and
 - g. the availability of financial or other assistance.
27. The precise framing of the reasonable adjustment duty is modified according to the particular context in which the claim arises - for example if it occurs in the workplace or in the sphere of education. The *Equality Act 2010* has different schedules which set out the details relevant to each context.
28. Unlawful discrimination may also occur if a disabled person is treated unfavourably because of something arising in consequence of his or her disability, which cannot be shown to be a proportionate means of achieving a legitimate aim provided the defendant knew or ought reasonably to have known that the person was disabled. (s.15). For example, a disabled person is refused service at a bar because they are slurring their words, as a result of having had a stroke. In these circumstances, the disabled person has been treated unfavourably because of something arising as a consequence of their disability. It is not direct discrimination since the reason for the treatment is the slurring of words, not because of disability per se, and it is therefore irrelevant whether other potential customers would be refused service if they slurred their words. This will amount to discrimination arising from disability, unless it can be justified or the bar manager did not know or could not reasonably be expected to know the person was disabled.
29. There does not need to be a direct causal link between the disability and the unfavourable treatment. Discrimination arising from disability only requires the disabled person to show s/he has experienced unfavourable treatment because of something connected with his or her disability: there must be a connection between whatever led to the unfavourable treatment, such as the slurring of words, and the

disability. If the person is slurring his or her words because of drinking too much and it is unconnected with any disability, the landlord's refusal to serve more drinks will not arise in consequence of the disability.

30. If the defendant fails to make reasonable adjustments which would have prevented or minimised the unfavourable treatment, it will be difficult for A to show the treatment was objectively justified. However, making reasonable adjustments does not mean there is no discrimination arising from disability. In practice, it is often appropriate to consider whether there is any breach of the duty to make reasonable adjustments before considering s15.

Victimisation

31. Victimisation is detrimental treatment because of a 'protected act' (or the belief that the claimant has done or may do a protected act).
32. Protected acts include making allegations of breach of the *Equality Act 2010*, bringing proceedings under it, or giving evidence or information in connection with such proceedings. The allegations do not have to be true, but making a false allegation in bad faith is not a protected act.
33. For example a magistrate makes a complaint of race discrimination against another magistrate. When she makes enquiries about applying to sit in the youth court she is told that her application will probably fail. If this is because of her complaint about her fellow magistrate, it is likely to constitute unlawful victimisation.
34. The claimant need not have the protected characteristic, but only to have engaged in a protected act: e.g. a white person complains to the doorman for excluding black people from a night club and is himself then refused entry from the club.

Pregnancy/maternity discrimination

35. Less favourable treatment of a woman because she is breast-feeding is specifically deemed to be such treatment on grounds of sex.
36. It is also discrimination to treat a woman unfavourably because of a pregnancy and, for twenty-six weeks after a birth, because she has given birth or is breastfeeding.

Contexts falling with the jurisdiction of the Equality Act 2010

37. Discrimination is prohibited in the contexts and circumstances specified in the *Equality Act 2010*.
38. However, there are a number of important general exceptions and some exceptions specific to the particular context. For example charities may provide assistance only to the elderly or women, or those from a particular community, but are prohibited from treating people differently because of colour (although discriminating on ethnic or national origins would be permissible). Specific exceptions include gender-affected sporting activity, and single sex communal accommodation. In some circumstances there are exceptions for religious organisations in relation to discrimination in respect of sexual orientation. The broad areas of protection are outlined below, but the detail of the precise scope of the *Equality Act 2010* is outside the remit of this chapter.

The workplace

39. Discrimination in the workplace is generally prohibited by Part 5 of the *Equality Act 2010*. A sex equality clause is implied into employment contracts to provide equal pay and terms and conditions between men and women who perform the same, or comparable work and work of equal value.
40. Employment is widely defined to encompass workers and office holders and all but the genuinely self-employed, but volunteers are outside the scope of protection. Job applicants are covered as well as former employees where the discrimination arises out of and is closely connected to the employment relationship.
41. Jurisdiction is conferred on Employment Tribunals but the civil courts may also hear equal pay claims in some circumstances.

Services and public functions

42. Part 3 of the *Equality Act 2010* covers the provision of services to the public or a section of the public, whether for payment or not. It also covers providers of goods and facilities and those undertaking non-service public functions. For example, a restaurant cannot refuse to serve diners because they are Asian and a bank may need to make reasonable adjustments to its buildings to enable access to wheelchair user customers.
43. The types of conduct covered are wide-ranging: not only in relation to the provision or non-provision of the service, but also the quality, manner, terms of provision, termination of the service and any other detriment. A detriment can be by act or omission. The test is whether the claimant reasonably considered him or herself to be at disadvantage and is subject to a de minimus rule.
44. There is no protection by reference to age for those under 18.
45. Jurisdiction is conferred on the county and high court.

Premises

46. There is wide protection in the housing field set out in Part 4. Protection generally applies in relation to 'disposals' and management, and covers decisions on such matters as whether to dispose of the premises, the terms of disposal, grants of permission and treatment of occupiers including evictions.
47. Protection in this context does not apply in respect of the characteristic of age.

Education

48. The coverage extends to schools, further and higher education and general qualifications bodies. Once again it is wide ranging, including in relation to admissions and exclusions, terms of provision and other detrimental treatment.
49. In relation to schools, protection does not apply in respect of age discrimination.

Associations

50. The provisions regarding scope are complex and are set out in Part 7. Broadly, the *Equality Act 2010* applies to any association of twenty-five or more members which

has selective admission rules. However, single characteristic associations are permitted by schedule 16, for example the Garrick Club's prohibition on women members, so long as that characteristic is not colour and the association is not a political party.

51. Where a club or association does not restrict membership under the exemption, it is nonetheless unlawful to provide a different level of facilities or different tiers of membership rights by reference to a protected characteristic. So it would thus be unlawful to exclude women golf club members from the bar in the clubhouse or not allow women members to stand for election as chair of the golf club.
52. Special provisions apply in relation to political parties, in particular with regard to single-sex shortlists.
53. Once again the protection afforded is wide ranging and extends to admissions, terms of membership, in relation to benefits and services, expulsions and other detrimental treatment.

Transport and building regulations

54. There are specific regulations governing transport matters, such as wheelchair-accessible vehicles in the licensed taxi trade and rail vehicle accessibility with a penalty regime, with a right of appeal to the County Court.
55. Specific building regulations concerning accessibility are enforced through local authority and planning authorities and the Secretary of State.

Remedies

56. The County Court has power to grant any remedy which could be granted by the High Court in proceedings for tort or on a judicial review claim. Compensation for injury to feelings may be awarded, assessed in three bands, depending on the extent to which the Claimant's feelings have been injured, and in appropriate cases may include aggravated and exemplary damages.

Public Sector Equality Duty

57. The public sector equality duty was first introduced to address institutional racism following the Stephen Lawrence inquiry in order to tackle 'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture and ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.'⁶
58. It now covers every protected characteristic apart from marriage and civil partnership. The aim is to ensure that equality issues are considered early and to improve the strategic decision making process. In spite of 40 years of individual anti-discrimination rights, inequality remains stubbornly persistent – from the small number of women in

6. *The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report): Chapter 6. The Stationery Office.* February 1999. Retrieved 6 January 2011.

UK board rooms, to the educational performance of African-Caribbean boys, to low levels of participation of disabled people in the workplace. When making decisions of a strategic nature about how to exercise their functions, the Public Sector Equality Duty (PSED) requires public authorities to have due regard to three needs:

- a. to eliminate discrimination, harassment and victimisation and any other conduct prohibited by the Equality Act 2010;
- b. to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- c. to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The duty applies to public authorities and hybrid authorities – a person who is not a public authority but who exercises public functions, in the exercise of those functions. For example the duty could lead an academy school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.

Public authorities also have specific duties imposed upon them pursuant to statutory instrument, which in England are to publish equality objectives at least every four years and information to demonstrate compliance with the duty at least annually, with more specific obligations in each of Wales and Scotland by devolved power.

Breach of the PSED is actionable by judicial review and there is a statutory code of practice published by the Equality and Human Rights Commission.