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A Guide to Discrimination and the Equality Act 2010



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A Guide to Discrimination and the Equality Act 2010

This guidance is intended to provide an overview of the provisions of the Equality Act 2010 ("the Act") highlighting key responsibilities and duties for employers.

The Act - Background

The Act unified, strengthened and consolidated existing discrimination legislation when it was introduced in 2010. As with previous anti-discrimination legislation, the Act covers all aspects of the employment relationship from before an individual starts to after they have left (including recruitment, terms and conditions of employment, career progression, dismissal, references, etc.). It is also applicable to casual staff and volunteers.

Who is Protected?

The Act affords protection against discrimination (direct and indirect), harassment and victimisation to nine groups of individuals with certain 'protected characteristics'. These protected characteristics are:

- Age
- Disability (further detail below)
- Gender reassignment (an employee will have this protected characteristic from the point that they propose to change their gender. There is no requirement for medical intervention for an individual to be protected. Recent case law (*Jaguar Land Rover v Taylor* 2020) has confirmed that this protection extends to non-binary and gender-fluid individuals)
- Marriage and civil partnership
- Pregnancy and maternity
- Race (including colour, nationality, ethnic or national origin, and caste)
- Religion (widely interpreted and includes mainstream and non-mainstream religions as well as sects or belief (being a religious or philosophical belief) as well as lack of religion (e.g. atheism))
- Sex
- Sexual orientation.

What are they Protected Against?

As mentioned above, the Act protects those individuals with one or more protected characteristic or, in certain circumstances (see below), those 'perceived to have' a protected characteristic or 'associated with someone' who has a protected characteristic, against certain acts. These are:

- **Direct discrimination:** treating a person less favourably for a reason that relates to a protected characteristic. Direct discrimination may also apply where the individual concerned is 'perceived' to have a protected characteristic or where they themselves do not have a protected characteristic but are 'associated with someone' who does (except in relation to marriage and civil partnership). This is because treatment can be 'because of' a perceived characteristic. For example: 'A' was refused promotion because they went to a Gay Pride event even though they aren't gay themselves. Direct discrimination is relatively rare. What is more common, and sometimes harder to detect, is indirect discrimination.
- **Indirect discrimination:** where a 'policy, criteria or practice', on the face of it, applies to everyone but is shown to put individuals with a relevant protected characteristic at a disadvantage. For example: working full-time has been shown to put women at a disadvantage as they primarily have caring responsibilities, and the employer cannot establish it is 'objectively justified' (see below).

- **Harassment:** unwanted conduct that relates to a protected characteristic (except in relation to marriage and civil partnership or pregnancy and maternity – although be cautious of sex discrimination in these circumstances) that has the ‘purpose or effect’ of violating a person’s dignity or creating an offensive, intimidating or hostile environment. It is the perception of the individual not the perpetrator that is key. For example: ‘B’ feels uncomfortable that others make comments about them being a skiver when they are permitted to leave early on a Friday to observe Jewish Shabbos on a Friday evening. It is important to note that although the definition of general harassment can be wider, to be covered by the Act, it must relate to a protected characteristic.
- **Victimisation:** treating a person less favourably because they have complained (or intend to complain) about discrimination or have given evidence in relation to another’s complaint. For example: ‘C’ was a witness in ‘D’s’ grievance against their joint manager that they were being bullied because they are black and now ‘C’ is at risk of redundancy and they think it is because they were a witness for ‘D’.

It is important to note that as with harassment, this is more specific than the wider definition of victimisation.

What Action can be Taken?

If an individual feels they have been subject to discriminatory behaviour, they can bring a claim in the Employment Tribunal. The individual can name other individuals as well as the employer in their claim.

The employer is legally responsible for the acts of discrimination, harassment and victimisation committed by its employees during the course of their employment. It is irrelevant whether the employer is aware or approves of the behaviour. An individual does not have to be employed to raise a claim, they could raise a claim after applying for a job for example, if they consider they have been discriminated against. An individual could also raise a claim even after just one day of employment. The employee can also raise a claim whilst an employee and may or may not be attending work as normal, whilst a claim is considered by an Employment Tribunal.

If the claim is successful, the damages that can be awarded (against the employer and/or individuals) are un-capped. In addition to the financial implications of a claim, there is potential damage to reputation as well as the impact on staff morale, management time etc. Accordingly, supporting staff and training them regarding equality issues is a key responsibility for employers (see EPM training later). This will assist in avoiding and defending claims as well as fostering a good and respectful working environment.

Disability – Further Detail

A person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on an individual’s ability to carry out normal day to day activities.

The definition considers both medical and social elements – looking at the individual’s medical impairment and its social impact. Through the Act and case law, the definition has been provided with greater clarity:

- **“Substantial”** is defined in the Equality Act as meaning more than minor or trivial.
- **“Long-term”** is defined in the Equality Act as an impairment that has lasted or is likely to last at least 12 months, or is likely to last for the rest of the life of the person affected. Note that the duration of related consecutive impairments can be aggregated.
- **“Adverse effect”** is intended to focus on what an individual can do rather than what they cannot do.
- **“Normal day-to-day activities”** means anything that is not abnormal or unusual which most people do on a frequent or fairly regular basis. It should take account of work-related activities.

There are special rules for progressive, fluctuating and recurring conditions.

For progressive conditions, the individual is deemed to be disabled from the point in time when the impairment begins to have an effect and it can be shown that it will have a substantial adverse effect in the future. It is not necessary for the condition to be having a substantial adverse effect at the point of diagnosis for protection to apply.

Recurring or fluctuating conditions are impairments that have had a substantial adverse effect on a person's ability to carry out normal day to day activities but that effect ceases but is likely to recur. The person may have periods of remission. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments, in respect of the meaning of 'long-term' – a condition which ceases to have a substantial adverse effect will be treated as continuing to have that effect if that effect is likely to recur. In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.

The Act contains a non-exhaustive list of 'deemed disabilities' whereby an individual with a listed condition will automatically gain the protection of the Act from the day of diagnosis, such as HIV, cancer or multiple sclerosis.

The Act also includes a list of specifically excluded conditions, such as alcoholism and pyromania. Where an excluded condition is the underlying cause of an impairment this may still be protected. For example, disability does not include alcohol or drug dependency but can include any issues causing or as a consequence resulting from the dependency, e.g. depression, liver disease etc

A person with a history of disability, who has fulfilled the definition in the past, is deemed to be protected by the legislation even if they do not have a disability at present.

- **Discrimination arising out of disability:** The Act also protects against discrimination 'arising out of disability'. For example: E has a visual impairment so cannot work as quickly as his colleagues. He is dismissed because of his low output. Accordingly, he is not dismissed because of his disability (i.e. because of his visual impairment) but because of an issue arising out of his disability (i.e. his visual impairment impacts on his output). This will be discriminatory unless it can be 'objectively justified' (see below).
- **Reasonable adjustments:** In addition to protecting against discriminatory behaviour, the Act imposes a positive duty on employers to make 'reasonable adjustments' in relation to disabled candidates, employees and ex-employees. It covers individuals the employer knows, or could reasonably be expected to know, have a disability. This duty only applies to this protective characteristic. Helpfully, the Equality and Human Rights Commission (HMRC) Code contains a non-exhaustive list of examples (e.g. reallocation of duties, changing working hours, modification of sickness absence management procedures, purchasing equipment etc.) and Occupational Health can also be very helpful in providing guidance in respect to this. The [Access to Work Scheme](#) can also provide support to employees in the workplace.
- **Pre-employment health questions:** The Act (s60) makes it unlawful for an employer to inquire about the health of an applicant until after a job offer has been made unless the enquiry relates to an 'intrinsic function' of the job. Keeping Children Safe in Education enables an employer to ask relevant questions about an applicant's disability and mental capacity to verify their fitness to carry out the requirements of the role. Accordingly, unless the enquiry is intrinsically (which the EHRC Code equates to 'absolutely fundamentally') related to the function of the job, information should only be sought following the offer of a job. The EHRC Code makes clear this will only arise in 'very few' situations.

The EPM Model safer recruitment documentation can be found on www.epm.co.uk under Knowledge Bank/Safer Recruitment and DBS.

Objective Justification

This term is referred to throughout the Act, but what does it actually mean? It means that an employer that acts in an ostensibly discriminatory manner can avoid liability by showing the actions were a 'proportionate means of achieving a legitimate aim'. It is often referred to as the 'objective justification' defence. It is complicated and only applies in cases of indirect discrimination, direct age discrimination and discrimination arising out of a disability. It is important to note that the onus is on the employer to prove the justification. The legitimate aim must also link to a real business need and the employer's actions must be proportionate to achieving that legitimate aim.

Unlike for all other protected characteristics, age discrimination can be objectively justified even in cases of direct discrimination because there may be circumstances where age discrimination is necessary, such as compulsory retirement or recruitment for a recent graduate. This is a clear example of treating someone less favourably when compared to someone of a different age group. The employer must, therefore, be clear that applying such a policy is discriminatory and explain that it is a proportionate means of achieving a legitimate aim. The objective justification must not be based on cost-saving alone and the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training, as opposed to purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness.

Exceptions and Defences

- **Occupational requirement:** The Act also sets out a number of 'occupational requirement' exceptions in relation to all protected characteristics, except gender reassignment or marriage and civil partnership. The exception is available where, having regard to the nature or context of the work, being of a protected characteristic is an occupational requirement e.g. the sex of a PE teacher so that they can supervise children when changing. However, each case needs to be considered on its own facts e.g. does it have to be the teacher who supervises changing?
- **Religious schools:** Schedule 22 of the Act and the School Standards and Framework Act 1998 allow schools with a religious character and ethos certain permitted exceptions in relation to sex or religious discrimination. These are complicated and depend on the type of school involved. Contact your HR adviser if you would like to know more about this specifically.
- **Legitimate discrimination:** There are also limited circumstances when an employer can legitimately discriminate e.g. immigration legislation may require an employer to refuse to employ an applicant on the grounds of their nationality even though they are the best qualified for the job.

Positive Action

The Act introduced the concept of 'positive action' (not to be confused with positive discrimination - being where an employer recruits or promotes solely because a person has a relevant protected characteristic - which is unlawful). Positive action is a recruitment and promotion provision that enables an employer to treat a person with a relevant protected characteristic more favourable than others providing they are equally as well qualified and the employer reasonably thinks that individuals with that protected characteristic are disadvantaged or disproportionately under-represented in that organisation. For example, 75% of teaching staff are Afro-Caribbean but only 25% of the SLT. The Principal has SLT applications from two equally qualified candidates, one white and one Afro-Caribbean. The Principal could choose to exercise positive action and appoint the Afro-Caribbean candidate. It is important to note however that there is no duty to take positive action. Further advice should always be sought from EPM if positive action is being considered.

The Equality and Human Rights Commission (EHRC) Code

The code is prepared by the [Equality and Human Rights Commission](#) and has statutory force. It does not impose legal obligations but can be taken into account when deciding whether discrimination has taken place. A breach of the EHRC Code can shift the burden of proof onto the employer to prove that discrimination has not taken place.

The [Equality and Human Rights Commission](#) has produced guides to explain what employers must do to meet the requirements of equality law and their liabilities in respect of the actions of their employees. The evidence that an employer has followed the guidance will be taken positively into account by an Employment Tribunal and will help to avoid an adverse decision by the Tribunal in proceedings brought under the Act. The guides also give advice on what to do if someone says they've been discriminated against.

Public Sector Equality Duty

The Equality Act introduced a single Public Sector Equality Duty (PSED) that applies to all public bodies (including schools and academies) and in relation to all protected characteristics (although only point one below applies to marriage and civil partnership). The PSED requires the organisation concerned to have "due regard" to the following three principles when carrying out its duties:

- Elimination of discrimination, harassment, victimisation and any other conduct prohibited by the Act.
- Advancement of equality of opportunity between those with a protected characteristic and those without.
- Fostering of good relationships between those with a protected characteristic and those without.

Having "due regard" means public authorities must consciously consider or think about the need to do the three things set out in the PSED. It is the courts who decide if a public authority has done enough to comply with the duty. The purpose of the PSED is to integrate consideration of equality and good relations into the day-to-day business of public authorities by requiring organisations to consider equality when designing policies and delivering services and for these issues to be kept under review.

There is no duty on schools to produce an Equality Impact Assessment or create equality schemes; however, there is a duty to have equality objectives and to publish these every four years. The need to publish equality data for employees only applies where there are more than 150 individuals employed in the organisation. EPM has model Public Sector Equality Duty Statements (depending on the size of your organisation) which are available on our website under Knowledge Bank/Equality and Diversity.

It is also good practice to keep a note of equality considerations for internal monitoring purposes in order to assist in defending a discrimination challenge or responding to a freedom of information request. This could be achieved via an Equality Impact Assessment or some other documentary evidence of these considerations.

An Equality Impact Assessment (EqIA) is a process designed to ensure that a policy, project or scheme does not discriminate against any disadvantaged or vulnerable people. An assessment involves analysing a proposed policy, change to an existing policy, or proposed organisational change to assess whether it will have a disproportionate impact on employees with protected characteristics. Despite there being no legal requirement to undertake an EqIA, it can be useful to demonstrate compliance by ensuring a written record of the equality considerations taken into account and how these can be avoided or mitigated against. Furthermore, the courts place significant weight on the existence of some form of documented consideration of equality issues when determining compliance with the PSED.

Gender Pay Gap Reporting

Gender pay reporting legislation requires employers with 250 or more employees to publish statutory calculations each year showing how large the pay gap is between their male and female employees. Employers with less than 250 employees are not required to comply with the regulations, but they should give serious consideration to the benefits of publishing the information. EPM guidance is available on our [website](#) under Knowledge Bank/Equality and Diversity.

Equality and Pay

Equal Pay

The Equality Act 2010 provides the right to equal pay between women and men for equal work. This covers individuals in the same employment and includes equality in pay and all other contractual terms, e.g. basic pay, non-discretionary bonuses, fringe allowances, performance-related benefits, sick pay, overtime rates, hours of work etc.

The School Teachers' Pay and Conditions Document provides a framework for teacher pay based on the responsibilities of the role and experience and qualification of the individual.

In order to ensure equal pay for support staff, job evaluation schemes provide a basis for grading and pay structure by assessing the demands of the job objectively in order for an employer to demonstrate that they are providing equal pay for equal work.

For schools that do not follow the STPCD or have a job evaluation scheme, it is advisable to implement a clear staffing structure, with a job description and person specification for each role that demonstrates the demands of the role and the skills, knowledge and experience required to undertake the role, and for each role to be benchmarked consistently against your pay scales.

Pay Progression

It is not only important to ensure staff are appointed on the appropriate pay scale for their role, but it is also necessary to ensure that progression through that pay scale is fair and equitable. Many schools will have implemented a performance-related approach to pay progression, although some may still use automatic increments. Where progression is related to performance, both the pay policy and appraisal policy must be reviewed to ensure they are not discriminatory.

It may also be necessary to give additional consideration to employees with a protected characteristic to ensure equality of opportunity. For example, in respect of pay progression for an employee who has been absent through long-term illness or on maternity leave (or other long-term leave) and as a result it has not been possible to undertake a review of their performance, it is strongly recommended that consideration is given to performance in the previous academic year or for the part of the academic year that they were not on leave and assume that the performance would have continued throughout. If performance was good, then pay progression must not be withheld on the basis of the leave as this may be discriminatory.

Advertising Jobs

EHRC has issued guidance on avoiding unlawful discrimination in advertising for jobs: [Advertising frequently Asked Questions](#).

Data Protection

Under the Data Protection Act 2018, there is stronger legal protection for a number of categories of more sensitive information, including:

- Race
- Ethnic background
- Religious beliefs
- Health
- Sex life or orientation

Much of this information may be collected as part of your equality monitoring activities. For these kinds of data, you must have both a lawful basis for processing the data (Article 6 of the GDPR) and separate condition for processing special category data (Article 9 of the GDPR), these do not need to be linked. You must also ensure that this information is made available to employees and prospective employees in your privacy notice(s).

Find Out More

EPM can provide Equality Awareness Training sessions for employees, managers, and governors. Please contact your HR Adviser for further information.

EPM Model Policies

The following model policies are available on our [website](#) under Knowledge Bank/Equality and Diversity:

- Bullying and Harassment Policy
- Equality & Diversity Policy for Staff
- Public Sector Equality Scheme (2 policies one for under 150 employees and one for over 150 employees)

We recommend that the Governing Body adopt the above or comparable policies.

External Guidance

For further information and guidance the links to the following are also available on our [website](#):

- [The Government Equalities Office - Various Guides](#)
- [Department of Education - The Equality Act: Advice for Schools](#)
- [ACAS: Equality Act 2010](#)
- [EHRC: Statutory Code of Practice](#)
- [EHRC: Public Sector Equality Duty: Guidance for Schools](#)



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