Equality and Human Rights Commission

Statutory Code of Practice

Services, public functions and associations

equalityhumanrights.com

Equality and Human Rights Commission

Statutory Code of Practice

Services, public functions and associations

Presented to Parliament pursuant to Section 14 of the Equality Act 2006



© Crown copyright 2026

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit **nationalarchives.gov.uk**

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at **www.gov.uk/official-documents**

Any enquiries regarding this publication should be sent to us at **correspondence@equalityhumanrights.com**

ISBN 978-1-5286-6395-3

E03578801 05/26

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of His Majesty's Stationery Office.

Contents

Chapter 1: Introduction 11

Purpose of the Equality Act 2010 12
Status of the Code 13
Scope of the Code 14
Age as a protected characteristic 15
Marriage and Civil Partnership 15
Purpose of the Code 15
Human Rights 16
Large and small service providers 17
How to use the Code 17
Examples in the Code 19
References in the Code 19
References to types of 'discrimination' 19
Changes to the law 20
Further information 21

Chapter 2: Who has rights under Part 3 (services and public functions) and Part 7 (associations) of the Act? 22

Introduction 23
Age 24
Disability 26
Gender reassignment 29
Pregnancy and maternity 32
Race 32
Religion or belief 35
Sex 38
Sexual orientation 39
Restrictions on protection under the Act 39

Chapter 3: Who has obligations under Part 3 (services and public functions) and Part 7 (associations) of the Act? 40

Introduction 41
Services to the public 42
Public functions 42
Associations 43
Relationships which have ended 43
Contracts 44
Territorial scope 45
What is not covered by the Code? 46
Liability of employers and principals 49
When an act is 'in the course of employment' or 'with the authority of a principal' 50
Liability of employers and agents 51
Meeting obligations under the Act: avoiding discrimination, harassment and victimisation, and good practice 52

Chapter 4: Direct discrimination 54

Introduction 55
What the Act says 55
What is 'less favourable' treatment? 56
Segregation 57
Protected characteristics of the service provider are irrelevant 59
Comparators 62
Discrimination by association 66
Discrimination by perception 67
Discrimination because of pregnancy and maternity 68
Direct age discrimination 72
More favourable treatment of disabled people 75
Advertising an intention to discriminate 76
Direct discrimination on the grounds of religion or belief 76

Chapter 5: Indirect discrimination 80

Introduction 81
What the Act says 81
A provision, criterion or practice is applied equally 83
Disadvantage and the comparative approach 85
The comparative approach 87
Individual disadvantage 93
Objective justification 94
Indirect discrimination: same disadvantage 98
Indirect discrimination and the duty to make reasonable adjustments for disabled persons 100

Chapter 6: Discrimination arising from disability 102

Introduction 103
Discrimination arising from disability 103
Unfavourable treatment 106
The meaning of 'something arising in consequence of disability' 107
When discrimination arising from disability can be justified 108
Role of reasonable adjustments 109
When the service provider, person exercising a public function or association does not know that the person is disabled 110
Treating a disabled person more favourably 112

Chapter 7: Disabled people: reasonable adjustments 113

Introduction 114
The duty to make reasonable adjustments 115
The meaning of 'reasonable' steps 122
Costs of providing reasonable adjustments 127
Not complying with the duty to make reasonable adjustments 127
The duty to change a provision, criterion or practice 128
Auxiliary aids or services 129
Physical features 132
Leases, binding obligations and reasonable adjustments 138
Special provisions regarding transport vehicles 141
Reasonable adjustments in practice 141

Chapter 8: Harassment 142

Introduction 143
What the Act says 143
Harassment related to a protected characteristic 144
'Purpose or effect' 147
The meaning of 'related to' 150
Sexual harassment 153
Less favourable treatment for rejecting or submitting to unwanted conduct 154
Statutory defence 155

Chapter 9: Victimisation and other unlawful acts 156

Introduction 157
Victimisation 157
Instructing, causing or inducing discrimination 162
Aiding contraventions 166

Chapter 10: Positive Action 169

Introduction 170
What positive action is 170
What the Act says 171
Action to remedy disadvantage 175
Action to meet needs 176
Action to encourage participation in activities 178

Chapter 11: Services and Public Functions 185

Introduction 186
What discrimination means in this chapter 186
Services 187
Public functions 190
Unlawful discrimination in relation to services 192
Unlawful discrimination in relation to the exercise of public functions 195
Failure to make a reasonable adjustment in service provision and in the exercise of a public function 196
Other prohibited conduct 200
Relationship of Part 3 to other Parts of the Act 202
Good practice on avoiding discrimination and improving the delivery of services and the exercise of public functions 208

Chapter 12: Associations 209

Introduction 210
What an association is 210
Application of the Act to associations 213
Unlawful discrimination by association 214
Other unlawful conduct 215
What is unlawful in relation to people seeking to become members 216
What is unlawful in relation to members 218
What is unlawful in relation to associates 220
Guests and people seeking to be guests 221
Reasonable adjustments 224
Associations may restrict membership to persons who share a protected characteristic 225
Positive action by associations 228
Political parties: positive action in selection of candidates 228
Avoiding unlawful discrimination 232

Chapter 13: Exceptions 233

Introduction 234
References to types of discrimination 235
Statutory exceptions 235
Statutory authority 235
Nationality discrimination authorised by statute or the executive 238
Parliament and the legislative process 239
Judicial functions 239
Armed forces 239
Security services 240
National security 240
Religious or belief organisations 241
Training provided to non-residents 244
Charities 244

Contents

Meeting the test for restricting benefits	246
Activity to support a charity	249
Competitive sport	250
Services for particular groups	256
Justification for separate and single-sex services	260
Communal accommodation	270
Asking about protected characteristics	271
Pregnancy – health and safety	278
Insurance and other financial services	281
Financial services arranged by an employer	286
Immigration	287
Care within the family	291
Blood services	292
Exceptions for certain transport services in relation to disability discrimination	292
Exception for television, radio and online broadcasting and distribution	293
Exceptions for services provided by Information Society Service Providers	294
Exceptions relating to the solemnising of marriage and registering of civil partnerships	297
Same-sex marriage	298
Civil partnerships	299
Opposite-sex marriage and existing civil partnerships	301
Exceptions relating to gender reassignment	302
Age-specific exceptions	303

Chapter 14: Enforcement 314

Introduction 315
Unlawful acts that can be remedied by the civil courts under the Act 316
Assessors in cases under the Act 317
Time limits 317
Burden of proof 320
Settling complaints without recourse to the court 321
Use of judicial review 322
Immigration cases 323
National security 323
Remedies 324
Damages 324
The Equality and Human Rights Commission 326

Appendix: The meaning of disability in the Equality Act 2010 327

The definition of disability in the Act 328
Equality Act protection for people who have recovered from a disability 328
The meaning of 'impairment' in the Act 329
'Substantial' adverse effects of impairments 329
'Long-term' effects of impairments 330
Effects that come and go over a period of time 331
'Normal day-to-day activities' 331
The impact of treatment or other measures on the definition of disability 332
People who wear spectacles 332
People who have disfigurements 332
People who are automatically treated as disabled under the Act 333
Long Covid 333
Conditions that are going to get worse over time 334
Menopause 334

Endnotes 335

Chapter 1

Introduction

Purpose of the Equality Act 2010

1.1 The Equality Act 2010 (the Act) covers discrimination, harassment and victimisation because of:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

These nine categories are known in the Act as 'protected characteristics'.

1.2 An important purpose of the Act has been to unify the different pieces of legislation that had previously been developed and which outlawed discrimination, harassment and victimisation against people with different protected characteristics, where appropriate.

1.3 Discrimination, harassment and victimisation in most areas of activity is unlawful under the Act, subject to certain exceptions. These areas of activity include:

- employment and other areas of work
- education
- housing
- the provision of services
- the exercise of public functions
- membership of associations

1.4 Different areas of activity are covered under different parts of the Act.

Part 3 of the Act is about discrimination, harassment and victimisation in the provision of services and the exercise of public functions.

Part 4 is about discrimination, harassment and victimisation in the sale, letting, management and occupation of premises, including housing.

Part 5 is about employment and other work-related situations.

Part 6 is about education including schools, further education, higher education and general qualifications bodies.

Part 7 is about discrimination, harassment and victimisation by membership associations.

A person may have duties under more than one Part of the Act, for example, where they employ people and provide services to customers.

Status of the Code

1.5 The Equality and Human Rights Commission (the EHRC) has prepared and issued this code of practice (referred to as the 'Code') based on its powers under the Equality Act 2006. It is a statutory Code. This means it has been approved by the Secretary of State and formally laid before Parliament.

1.6 The Code does not impose legal obligations. Nor is it an authoritative statement of the law: only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Courts and tribunals must consider any part of the Code that appears relevant to any questions arising in such proceedings.

1.7 If providers of services, those exercising public functions and associations follow the guidance in the Code, it may help them avoid an adverse decision by a court in such proceedings.

Scope of the Code

1.8 This Code covers discrimination, harassment and victimisation in services and public functions as set out in Part 3 of the Act. It also covers discrimination, harassment and victimisation by associations, as set out in Part 7.

1.9 Part 3 of the Act is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against, harassed or victimised when using any service provided publicly or privately. That is the case whether that service is given for payment or not. This does not necessarily mean that service providers should treat everybody in the same way. In some circumstances, a service provider will need to provide services in a different way to meet the needs of people. For example, the parts of the Act concerning positive action, single-sex services and reasonable adjustments for disabled people make provision for this. The steps that service providers should take to ensure that they do not discriminate, harass or victimise are explained in this Code.

1.10 Public authorities carrying out 'public functions' are also covered by Part 3 of the Act, and their duty not to discriminate, harass or victimise when carrying out these functions is explained in this Code. Other organisations in the private or voluntary sectors are also covered by the same provisions in the Act when they are carrying out public functions. 'Public functions' are defined as in the Human Rights Act 1998 and are often carried out under a statutory power or duty, such as policing, licensing or determining the framework for benefit entitlement.

1.11 Membership associations are also covered in this Code as these organisations generally provide services or other benefits to their members, associates or guests. The provisions relating to associations are found in Part 7 of the Act. Under the Act, associations are bodies which have at least 25 members, have membership criteria, and have a process of selection for members. Only associations that meet these criteria have obligations under this part of the Act. This will include many private clubs and political parties.

1.12 This Code applies to England, Scotland and Wales (read paragraphs 3.19 to 3.24 for more information on the territorial scope of the Act).



Age as a protected characteristic

1.13 For services and public functions (Part 3 of the Act), protection against age discrimination and harassment related to age is limited to those aged 18 and over. For associations (Part 7 of the Act), the protection covers individuals of any age. There are also several exceptions applicable (read paragraphs 13.297 to 13.352).

Marriage and Civil Partnership

1.14 The Act does not provide protection against discrimination because of marriage and civil partnership in the areas covered by this Code (Parts 3 and 7 of the Act). Therefore, this Code does not cover discrimination because of this protected characteristic in the provision of services, the exercise of public functions or by associations.

Purpose of the Code

1.15 The main purpose of this Code is to provide a detailed explanation of the Act. This will assist courts when interpreting the law and help lawyers, advisers and others who need to apply the law and understand its technical detail.

1.16 The EHRC has also produced practical guidance for service providers, those exercising public functions, associations and members of the public which assumes no knowledge of the law. This may be more helpful and accessible for people who need an introduction to the Act. It can be accessed on the EHRC's website.

1.17 This Code, together with the practical guidance produced by the EHRC, will:

- help service providers, those exercising public functions and membership associations to understand their responsibilities and help to avoid complaints and discrimination claims
- help members of the public to understand the law and what they can do if they believe they have been discriminated against, harassed or victimised
- help lawyers and other advisers to advise their clients
- give guidance to the courts on matters designed to ensure or facilitate compliance with the Act

Human Rights

1.18 Public authorities have a duty under the Human Rights Act 1998 (HRA) not to act incompatibly with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) (section 6 Human Rights Act 1998). The public functions covered by this Code are functions of a public nature as defined in the HRA.

1.19 Article 14 of the Convention prohibits discrimination when enjoying Convention rights. So, if a public authority or any other body discriminates in breach of the Equality Act when carrying out a function of a public nature, where this engages a Convention right, it may also amount to a breach of the Convention. Equally, discrimination under Article 14 could also be a breach of the Equality Act where it is based on a characteristic protected under the Act.

1.20 Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with Convention rights, unless it is impossible to do so (section 3 Human Rights Act 1998). This duty applies in any claim brought under the Act, whether a public authority is involved in the case or not, and even if the case concerns something other than the exercise of a public function. This means that, in any discrimination claim brought under the Act, the court or tribunal must ensure that it interprets the Act compatibly with Convention rights where it can.

1.21 Because of the close relationship between human rights and equality, it is good practice for those exercising public functions to consider equality and human rights together when drawing up equality or human rights policies.

Large and small service providers

1.22 Though all service providers have the same legal duties under Part 3 of the Act, the way that these duties are put into practice may be different. Large and small service providers may comply with their duties in different ways. For example, small service providers may have more informal practices, fewer written policies and be more constrained by financial resources. However, no service provider is exempt from duties under Part 3 because of size.

How to use the Code

1.23 **Chapter 1** (this chapter) introduces the Code.

Chapter 2 explains the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The characteristic of marriage and civil partnership is not covered by this Code.

Chapter 3 explains who has obligations under Part 3 and Part 7 of the Act. It explains how some services, such as employment services, are covered by other parts of the Act and are included in different Statutory Codes of Practice.

Chapter 4 explains direct discrimination, including segregation (in relation to race). It also explains when it is unlawful to treat a woman unfavourably because of her pregnancy and maternity.

Chapter 5 explains indirect discrimination.

Chapter 6 explains discrimination arising from disability.

Chapter 7 explains the duty to make reasonable adjustments for disabled people, including the duty to change a provision, criterion or practice, the duty to provide auxiliary aids or services and the duty to make reasonable adjustments to physical features.

Chapter 8 explains the three types of harassment, including sexual harassment.

Chapter 9 explains other unlawful acts, namely victimisation and instructing, causing, inducing, or aiding discrimination.

Chapter 10 explains the positive action provisions as they relate to Part 3 and Part 7 of the Act. It explains the measures the Act permits organisations to take which may involve treating groups differently to address disadvantage, meet different needs, or improve low levels of participation.

Chapter 11 explains the provisions of Part 3 as they relate to services and public functions. It explains what is meant by a 'service' and 'public function' and what discrimination (or other prohibited conduct) looks like in practice. It also sets out those services and public functions to which Part 3 does not apply.

Chapter 12 explains Part 7 of the Act which imposes obligations on associations. It explains what is meant by an association and sets out when associations can lawfully restrict their membership to persons who share a particular characteristic. It includes the provisions that relate to political parties.

Chapter 13 explains exceptions which permit conduct in some, limited, circumstances that would otherwise be unlawful under the Act.

Chapter 14 deals with enforcement of Part 3 and Part 7 by the civil courts.

Appendix contains further information about the meaning of disability in the Act.

Examples in the Code

1.24 Examples of good practice, case law and how the Act is likely to work in different situations are included. They are intended to illustrate the principles and concepts used in the legislation and should be read as such. The examples use as many different protected characteristics as possible, in a variety of contexts relating to services, public functions, and associations, to demonstrate the breadth and scope of the Act.

References in the Code

1.25 In this Code, 'the Act' means the Equality Act 2010. References to sections and schedules of the Act are shown in brackets. Occasionally other legislation or regulations are also referred to in brackets. Where that is done, the full title of the legislation or regulations is included.

References to types of 'discrimination'

1.26 Under the Act (section 25), for all protected characteristics except disability and pregnancy and maternity, 'discrimination' relating to service providers, persons exercising public functions and associations means:

- direct discrimination
- indirect discrimination

1.27 For the protected characteristic of disability, under the Act (section 25, paragraph 2) 'discrimination' also means:

- discrimination arising from disability
- a failure to make a reasonable adjustment

1.28 Discrimination because of the protected characteristic of pregnancy and maternity is defined separately under the Act (section 17).

1.29 These forms of discrimination are discussed in:

- Chapter 4 – Direct discrimination
- Chapter 5 – Indirect discrimination
- Chapter 6 – Discrimination arising from disability
- Chapter 7 – Disabled people: reasonable adjustments

1.30 In this Code, unless specifically indicated otherwise, the term 'discrimination' is used in the same way as in the Act. For example, 'race discrimination' would include both direct race discrimination and indirect race discrimination.

Changes to the law

1.31 This Code refers to the provisions in the Equality Act which are in force at the time of publication.

1.32 There may be changes to the Act in relation to the areas covered by this Code. Other legislation may affect the duties explained in the Code.

1.33 Decisions of the courts when applying and interpreting the Act may clarify particular provisions.

1.34 Readers of this Code will need to keep up to date with any developments that affect the Act's provisions and should also be aware of the other statutory codes issued by the EHRC. Further information can be accessed on the EHRC's website.

Further information

1.35 Copies of the Act and regulations made under it can be purchased from The Stationery Office. **The Act can also be accessed online**. Separate codes covering other aspects of the Act are also available from The Stationery Office. The text of all the EHRC's codes (including this Code) and guidance relating to the codes can also be can be accessed on the **EHRC website**.

1.36 Questions, comments or information about alternative formats can be emailed to **correspondence@equalityhumanrights.com**.

Chapter 2

Who has rights under Part 3 (services and public functions) and Part 7 (associations) of the Act?

Introduction

2.1 As explained in **Chapter 1**, the term 'discrimination' is used to refer to direct discrimination, indirect discrimination and, where relevant, discrimination arising from disability, a failure to make a reasonable adjustment and pregnancy and maternity discrimination.

2.2 The Equality Act 2010 (the Act) protects people from discrimination and harassment based on protected characteristics.

2.3 The protected characteristics covered in this code of practice (the Code) are:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

The Act lists these alphabetically, and this Code uses the same order (section 4).

2.4 As explained in **Chapter 1**, the protected characteristic of marriage and civil partnership is not covered by this Code (read paragraph 1.14).

2.5 The Act also protects people from victimisation when they have done a protected act (read paragraphs 9.5 to 9.11). This protection applies irrespective of their protected characteristic. Read **Chapter 9** for more information on victimisation and protected acts.

Age

What the Act says

2.6 The Act defines age by reference to a person's age group. An age group includes people of the same age or people within a particular range of ages (section 5).

2.7 When the Act refers to people who share the protected characteristic of age, it means that they are in the same age group.

2.8 Age groups can be large, for example, 'people under 50' and 'people aged 50 and above'. An age group can also be small, for example, 'people aged 50', 'people in their mid-40s' or 'people born in 1952'. An age group may also be relative, for example, 'younger than A' or 'older than the other club members'.

2.9 Age groups can also be identified indirectly. This can be by using age-related terms such as 'youthful', although the meaning may differ according to the context, for example, a 'young athlete' as compared to a 'young pensioner'. Another way of indirectly identifying age groups is by referencing actual or assumed physical appearances or other characteristics of certain age groups, for example, 'grey-haired', 'grandmother' or 'grandad'.

2.10 There is some flexibility in the definition of a person's age group and everyone can be described as belonging to several different age groups. In terms of sharing the protected characteristic of age, the relevant age group will depend on the context.

Examples

2.11 A woman aged 25 could be seen as sharing the protected characteristic of age with people in several different age groups, including '25-year-olds', 'the under 30s', 'the over 20s' and 'young adults'.

A man of 86 could be said to share the protected characteristic of age with people in the following age groups: '86-year-olds', 'over 80s', 'over 65s', 'pensioners', 'senior citizens', 'older people' and 'people in later life'.

2.12 An age group may be identified by external factors which apply only to persons of a particular age group, for example, 'people born after the start of COVID-19' will usually mean any person born after December 2019.

2.13 Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which a comparison should be made. It could be everyone outside the person's age group, but, in many cases, the choice of comparator age group will be more specific. This will often be led by the context and circumstances.

Example

2.14 The man of 86 might compare himself to 'those 85 and under', the 'under 86s', the 'under 80s', non-pensioners, or younger people, depending on the circumstances.

2.15 More detail on how to identify a comparator in cases of direct discrimination is set out in **Chapter 4**.

2.16 A significant proportion of people in older age groups may have one or more health conditions. If their health condition meets the definition of disability (read paragraphs 2.19 to 2.35), they will also have protection under the disability provisions of the Act.

2.17 People under the age of 18 are not protected from age discrimination and harassment related to age by service providers and those exercising public functions (section 28, paragraph 1(a)). Scottish and Welsh bodies may have to consider other obligations imported by other nation specific legislation[1].

2.18 All age groups, including those under the age of 18, are protected from age discrimination and harassment related to age by an association.

Disability

What the Act says

2.19 Only a person who meets the Act's definition of disability has the protected characteristic of disability (section 6). When the Act refers to people who share a protected characteristic in relation to disability, it means they share the same disability (section 6, paragraph 3).

2.20 The Act says that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (section 6, paragraph 1). The Code uses the term 'impairment' because this is the language used in the Act. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing. In considering whether an individual has such an impairment, the focus should be on the things they cannot do, or can do only with difficulty, rather than on the things the person can do[2]. It is wrong to conduct an exercise balancing what a person can do against what they cannot do[3].

2.21 'Long-term' means that the impairment has lasted, or is likely to last, for at least 12 months or for the rest of the affected person's life (schedule 1, paragraph 2(1)). Whether an impairment is likely to last for at least 12 months should be assessed by looking at the facts and circumstances at the date of the alleged discriminatory act[4].

2.22 An impairment which consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities.

2.23 Substantial means more than minor or trivial (section 212, paragraph 1). If the adverse effect of an impairment is not minor or trivial, then it must be treated as substantial[5].

2.24 Some disabilities or impairments are not immediately apparent, such as mental health conditions and learning disabilities. They also include physical impairments such as diabetes and epilepsy. These are referred to as 'hidden' or 'non-visible' disabilities or impairments. People with non-visible impairments will be protected where they meet the definition in the Act.

Example

2.25 A woman experiences menopausal symptoms. She has hot flushes, disturbed sleep, fatigue, anxiety and memory and concentration problems. As a result, she is unable to exercise in the way she could previously. She is slower at reading and writing, distracted from tasks and conversations, and she has difficulties remembering things such as her car registration plate. If her symptoms have lasted or are likely to last for at least 12 months, or for the rest of her life, then her condition may meet the definition in the Act.

2.26 If an impairment would be likely to have a substantial adverse effect on a person's ability to carry out their normal day-to-day activities, were it not for measures taken to treat or correct it, it is to be treated as though it has this effect (schedule 1, paragraph 5). This does not include the use of glasses or contact lenses.

Example

2.27 A man experiences anxiety and depression which amounts to a disability under the Act. He is prescribed anti-depressants and counselling which alleviate his symptoms. Without the medication and counselling, his anxiety and depression would return. His anxiety and depression would still be treated as having a substantial adverse effect on his ability to carry out his normal day-to-day activities because it would be likely to have that effect without his ongoing treatment.

2.28 Where an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it can still meet the definition in the Act, even if they have a coping strategy which involves avoiding, adapting or altering that activity[6]. A coping strategy may break down in some circumstances, such as when a person is under stress. This is relevant when considering the effects of the impairment[7].

2.29 Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis (schedule 1, paragraph 6). In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled (Equality Act 2010 (Disability) Regulations 2010/2128. Reg. 7).

2.30 Progressive conditions and those with fluctuating and recurring effects will amount to disabilities in certain circumstances, even if the impairment does not currently have a substantial adverse effect on a person's ability to carry out normal day-to-day activities (schedule 1, paragraph 2(2) and 8).

Example

2.31 A man has fluctuating symptoms of chronic fatigue syndrome (ME/CFS). On some days he has bursts of energy to carry out various activities. On other days, when he experiences extreme fatigue and lack of mobility, he is unable to go outside and has difficulty with tasks such as cooking and ironing. His ME/CFS would still be treated as having a substantial adverse effect on his ability to carry out his normal day-to-day activities even though the effects fluctuate from day to day.

2.32 Certain conditions are not regarded as disabilities under the Act (Equality Act 2010 (Disability) Regulations 2010/2128. Reg. 3 and 4). These are:

- an addiction to, or dependency on, alcohol, nicotine, or any other substance, except where addiction followed medical prescription or treatment
- seasonal allergic rhinitis, such as hay fever, except where it aggravates another condition
- a tendency to set fires, steal or physically or sexually abuse another person
- exhibitionism
- voyeurism

2.33 In most circumstances, a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability, except in relation to Part 12 (transport) and section 190 (improvements to let dwelling houses) (section 6, paragraph 4).

2.34 Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (read paragraphs 4.48 to 4.53). In some circumstances, a non-disabled person may be protected where they experience harassment (read **Chapter 8**) or some other unlawful act such as victimisation (read **Chapter 9**).

2.35 For a fuller understanding of the concept of disability under the Act, reference should be made to the Appendix to this Code.

Gender reassignment

2.36 The Act defines gender reassignment as a protected characteristic (section 7, paragraph 1). People who are proposing to undergo, are undergoing or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

2.37 For the purposes of this Code of practice, a reference to a trans person is a reference to a person who has the protected characteristic of gender reassignment (section 7, paragraph 2).

2.38 The Act uses the term 'transsexual' for individuals who have the protected characteristic of gender reassignment. We recognise that some people consider this term outdated so we have used the term 'trans' to refer to a person who has the protected characteristic of gender reassignment. This refers only to persons who fall within the Act's definition of gender reassignment. It does not include persons who may identify as trans or transgender but are outside of this definition.

2.39 A trans person is protected against gender reassignment discrimination and harassment at any stage in their transition process, even if they have only started but not completed a stage. This includes stages from proposing to reassign sex, undergoing a process of reassignment, to having completed it. A trans person does not need to be proposing to undergo, be undergoing or have undergone medical treatment or surgery to be protected. It also does not matter whether a trans person has applied for, or obtained, a Gender Recognition Certificate (GRC).

2.40 The Act protects people from victimisation when they have done a protected act. This protection applies irrespective of their protected characteristic.

Example

2.41 A person who was registered as female at birth and has decided to spend the rest of his life as a man has the protected characteristic of gender reassignment.

Example

2.42 A person who was registered male at birth and has been living as a woman for some time and who has obtained a Gender Recognition Certificate has the protected characteristic of gender reassignment.

2.43 There is no minimum age for the protected characteristic of gender reassignment, which means that children and young people are protected if they are proposing to undergo, are undergoing, or have undergone a process of gender reassignment.

2.44 People with non-binary or gender fluid identities will only be protected if they meet the definition of gender reassignment as set out in the Act. They may also be protected against discrimination by perception (read paragraph 4.51 to paragraph 4.53).

Example

2.45 A person informs their GP practice that they are 'gender fluid' while they are undergoing gender reassignment and on some days they will present as female and on other days as male. The receptionist at the practice begins to treat the individual unpleasantly, for example, by making comments referring to the individual as 'it.' This is likely to be direct gender reassignment discrimination. The person is likely to be protected as they have adopted a 'gender fluid' identity as part of a process of reassigning their sex.

2.46 A person who dresses and presents in ways which are commonly associated with the opposite sex will be protected where they do so as part of a process of reassigning their sex. The Act does not define what is meant by reassigning sex. It does not have to be a medical process – though some people will take medical or surgical steps – but it is likely to at least involve more permanent changes, such as changing one's pronouns and consistently dressing and presenting as the opposite sex. A person presenting in a gender non-conforming way for some other reason does not have the protected characteristic of gender reassignment. However, they may be protected against harassment and discrimination by perception (read paragraph 4.51 to paragraph 4.53).

Example

2.47 A group of men who have dressed in women's clothing for a stag party are refused entry to a nightclub that has a dress code. This is unlikely to be discrimination based on the protected characteristic of gender reassignment.

2.48 Where an individual has gender dysphoria and the condition has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, they will also be protected under the disability discrimination provisions of the Act (read **Chapter 6** and **Chapter 7**).

Gender Recognition Certificates (GRC)

2.49 The Supreme Court in For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16 has ruled that a GRC does not change a person's legal sex for the purposes of the Equality Act 2010. The judgment held that 'sex', 'woman' and 'man' mean, respectively, biological sex, biological woman and biological man for the purposes of the Equality Act. The judgment uses the expression 'biological sex' to describe the sex of a person at birth. The phrase 'biological sex' has the same meaning when used throughout this Code. This is also referred to as 'sex at birth' in this Code.

2.50 This means that, in relation to the Act, a person's sex remains their biological sex, whether they have a GRC or not. For example, a trans man with a GRC is a woman and a trans woman with a GRC is a man, for the purposes of the Act.

2.51 This Code only relates to the application of the Equality Act 2010. It does not deal with the implications of the For Women Scotland judgment for the application of section 9 of the Gender Recognition Act 2004 to any other legislation.

2.52 A trans person will be protected from discrimination because of gender reassignment, whether they have a GRC or not.

2.53 A trans person will also be protected from sex discrimination whether they have a GRC or not. They will be protected from sex discrimination that is based on their sex at birth. They will also be protected from sex discrimination related to their acquired gender where they suffer:

- direct discrimination by association or where this is because of their perceived sex in their acquired gender (read about discrimination by perception in paragraphs 4.51 to 4.53)
- indirect discrimination by association (section 19A) of the Act (read about indirect discrimination by association in paragraphs 5.58 to 5.62)
- harassment related to sex (section 26) (read about harassment related to sex in paragraphs 8.23 to 8.34)

Pregnancy and maternity

What the Act says

2.54 The Act lists pregnancy and maternity as a protected characteristic (section 4). Pregnancy and maternity discrimination are considered in paragraphs 4.54 to 4.72.

Race

What the Act says

2.55 The Act defines 'race' as including colour, nationality and ethnic or national origins (section 9, paragraph 1).

2.56 A person has the protected characteristic of race if they fall within a particular racial group (section 9, paragraph 2). A racial group can also be made up of two or more distinct racial groups. Read paragraphs 2.66 to 2.69 for the meaning of 'racial group'.

Nationality

2.57 Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation (section 9, paragraph 1(b)). It is distinct from national origins (read paragraphs 2.63 to 2.65).

Ethnic origins

2.58 Everyone has an ethnic origin, but the provisions of the Act only apply where a person belongs to an 'ethnic group' as defined by the courts (section 9, paragraph 1(c)). This means that the person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community.

2.59 There are two essential characteristics which the courts have established an ethnic group must have: a long-shared history and a cultural tradition of its own[8]. In addition, an ethnic group may have one or more of the following characteristics:

- a common language
- a common literature
- a common religion
- a common geographical origin
- being a minority or an oppressed group

2.60 An ethnic group or national group could include members new to the group, for example, a person who marries into the group. It is also possible for a person to leave an ethnic group.

2.61 The courts have found that the following are protected ethnic groups:

- Sikhs
- Jewish people
- Romany Gypsies and European Roma
- Irish Travellers
- Scottish Gypsies / Travellers

This is not an exhaustive list of the ethnic groups that are likely to be protected.

2.62 The courts have also confirmed that 'ethnic origins' is a wide and flexible phrase that can include a person's caste[9].

Caste is a form of identity that is used as a basis for social differentiation. It is usually considered to be acquired by birth and sustained by endogamy (in which marriage is restricted to individuals of the same caste).

National origins

2.63 National origins must have identifiable elements, both historic and geographic, which at least at some point in time indicates the existence or previous existence of a nation (section 9, paragraph 1(c)). For example, as England, Wales and Scotland were once not a part of Great Britain or the United Kingdom, the English, the Welsh and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense.

2.64 National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China, but many are citizens of other countries.

2.65 A person's own national origin is not something that can be changed, though national origin can change through the generations.

Meaning of 'racial group'

2.66 A racial group is a group of people who have or share a colour, nationality or ethnic or national origins (section 9, paragraph 3). For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination and harassment under the Act.

2.67 A person may fall into more than one racial group. For example, a 'Nigerian' person may be defined by colour, nationality or ethnic or national origins.

2.68 A racial group can be made up of two or more distinct racial groups (section 9, paragraph 4). For example, a racial group could be 'black Britons', which would encompass those people who are both black and who are British citizens. Another racial group could be 'South Asian', which may include Indians, Pakistanis, Bangladeshis and Sri Lankans.

2.69 Racial groups can also be defined by exclusion. For example, the courts have accepted that 'non-UK nationals' constituted a class of people sharing a racial characteristic.

Religion or belief

What the Act says

2.70 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief (section 10, paragraph 1 and 2).

2.71 For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or any lack of one.

2.72 The meaning of religion and belief in the Act is broad and consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).

Meaning of religion

2.73 'Religion' means any religion and includes a lack of religion (section 10, paragraph 1). The term 'religion' includes the more commonly recognised religions in the UK such as the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for the courts to determine what constitutes a religion.

2.74 A religion does not need to 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 for the purposes of the Act.

Meaning of belief

2.75 Belief means any religious or philosophical belief and includes a lack of belief (section 10, paragraph 2).

2.76 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.

2.77 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism, Atheism and Ethical Veganism.

2.78 A belief does not need to include faith or worship of a God or Gods but must affect how a person lives their life or perceives the world.

2.79 For a philosophical belief to be protected under the Act:

- it must be genuinely held
- it must be a belief, and not an opinion or viewpoint based on the present state of information available
- it must be a belief as to a weighty and substantial aspect of human life and behaviour
- it must attain a certain level of cogency, seriousness, cohesion and importance
- it must be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others

2.80 The threshold for a belief to be considered worthy of respect in a democratic society is relatively low. The belief would only not be protected under the Act if it involves a very grave violation of the rights of others, which is tantamount to the destruction of those rights[10].

Example

2.81 A person believes in a philosophy of racial superiority for a particular racial group. It is a belief around which they centre the important decisions in their life. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a 'belief' for the purposes of the Act.

Manifestation of religion or beliefs

2.82 The protected characteristic of religion or belief includes protection for the manifestation of a religion or belief. This protection is consistent with Article 9 of the European Convention on Human Rights, which guarantees freedom of thought, conscience and religion.

2.83 Manifestations of a religion or belief could include:

- treating certain days as days for worship or rest
- following a certain dress code
- following a particular diet
- expressing religious or philosophical views online
- carrying out or avoiding certain practices

2.84 A person does not have to prove that the manifestation of their religion or belief is a core component of the religion or philosophical belief they follow. The manifestation may be a means by which they choose to express their adherence to their religious belief. However, there must be a sufficiently close and direct connection between the manifestation and the underlying belief[11].

2.85 Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination. Read paragraph 4.91 for more detail.

Example

2.86 A jeweller refuses to allow anyone whose face is covered into his shop. This will be indirect discrimination against Muslim women who wear the burqa, unless the policy can be objectively justified.

Sex

What the Act says

2.87 Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and / or boys, or women and / or girls (section 11(a) and (b) and section 212, paragraph 1).

2.88 The Supreme Court in For Women Scotland ruled that 'sex', 'woman' and 'man' in the Act mean biological sex, biological woman and biological man. The judgment uses the expression 'biological sex' to describe the sex of a person at birth. Earlier case law[12] has set out the indicators of biological sex.

2.89 A Gender Recognition Certificate (GRC) does not change a person's sex for the purposes of the Act. Read paragraphs 2.49 to 2.53 for more information on GRCs. Read paragraphs 13.161 to 13.182 for more information about when and how it may be appropriate to request information or evidence of the sex of a person at birth.

2.90 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (read paragraphs 2.49 to 2.53) or sexual orientation (read paragraphs 2.92 to 2.96).

2.91 There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity, or because she is breastfeeding (section 13, paragraph 6(a) and section 13, paragraph 7). Read paragraphs 4.54 to 4.73 for more information.

Sexual orientation

What the Act says

2.92 Sexual orientation is a protected characteristic (section 12, paragraph 1). Under the Act, this means a person's sexual orientation towards:

- persons of the same sex (the person is a lesbian woman or a gay man)
- persons of the opposite sex (the person is heterosexual)
- persons of either sex (the person is bisexual)

2.93 Sexual orientation relates to how people feel as well as their actions.

2.94 Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. These may include someone's appearance, the places they visit or the people they associate with.

2.95 When the Act refers to the protected characteristic of sexual orientation (section 12, paragraph 2), it means the following:

- a reference to a person who has this protected characteristic is a reference to a person who is of a particular sexual orientation
- a reference to people who share the protected characteristic is a reference to people who are of the same sexual orientation

2.96 Gender reassignment is a separate protected characteristic and unrelated to sexual orientation, despite often being grouped together (for example, under the acronym 'LGBTQ+ people').

Restrictions on protection under the Act

2.97 The Act contains several exceptions to the protection it provides against discrimination, harassment and victimisation in the provision of services, exercise of public functions and the activities of associations. These are covered elsewhere in this Code.

Chapter 3

Who has obligations under Part 3 (services and public functions) and Part 7 (associations) of the Act?

Introduction

3.1 This chapter of the code of practice (the Code) provides an overview of who has obligations under the provisions of Parts 3 and 7 of the The Equality Act 2010 (the Act), and in what circumstances.

3.2 In practice, more than one obligation under the Act may be relevant to a person or organisation depending on their activity. For example, those exercising public functions may also be providing services to the public, or a section of the public. In those instances, they would be subject to the duties imposed on service providers. When not providing a service, they would be subject to the duties imposed on those exercising public functions.

Example

3.3 A local authority provides a service to enable people to pay their council tax at local offices, where they can also get free advice on debt and their entitlement to a range of services and benefits. However, when the local authority decides to use its enforcement powers to collect council tax debts, it is exercising a public function.

3.4 This chapter also explains the potential liability of employers and principals for the actions of their employees and agents, as well as potential liability for instructing, causing or inducing a breach of the Act. A principal is any entity with the legal capacity to act but appoints another entity to carry out those actions on its behalf. Principals may be individuals or businesses. A principal / agent relationship occurs when a principal gives authority to an agent to act on its behalf. This is explained further in paragraphs 3.36 to 3.49.

3.5 The chapter suggests steps that service providers, associations and those exercising public functions may wish to take to ensure they are meeting their obligations under the Act.

As explained in **Chapter 1**, the term 'discrimination' is used to refer to direct discrimination, indirect discrimination and, where relevant, discrimination arising from disability, a failure to make a reasonable adjustment and pregnancy and maternity discrimination.

Services to the public

3.6 Part 3 of the Act imposes obligations on those concerned with the provision of services to the public, or to a section of the public, whether in the private, public or voluntary sectors. It does not matter if services are provided free of charge, such as access to a shopping mall, or in return for payment, such as a meal in a restaurant. The obligation also applies to the provision of services on a website (section 29).

3.7 Under the Act, the provision of services to the public includes the provision of goods or facilities. Throughout this Code, unless otherwise indicated, reference to provision of services includes provision of goods or provision of facilities.

More detail is provided on services to the public, including exceptions to the obligations under Part 3, in **Chapter 11** and **Chapter 13**.

Public functions

3.8 Part 3 of the Act also imposes obligations on any person who exercises public functions, as defined in the Act (section 31, paragraph 4).

This applies to those exercising a public function which does not involve the provision of a service (section 29, paragraph 6).

More detail is provided on services to the public, including exceptions to the obligations under Part 3, in **Chapter 11** and **Chapter 13**.

Associations

3.9 Part 7 of the Act (section 107) imposes obligations on any association of persons, if:

- it has 25 or more members
- admission to membership is regulated by its rules and there is a selection process (section 107)
- it is not a trade organisation, such as a business or professional organisation or a trade union (section 100)

Part 5 of the Act applies to trade organisations, and the duties of trade organisations under the Act are outside the scope of this Code.

It does not matter if the association is incorporated or not, or if any of its activities are carried out for profit.

More detail is provided on associations, including exceptions to the obligations under Part 7, in **Chapter 12** and in **Chapter 13**.

Relationships which have ended

3.10 It is unlawful to discriminate against, harass or victimise[13] someone after a relationship covered by the Act has come to an end, where the treatment arises out of and is closely connected to that relationship and the treatment would have been prohibited if the relationship was continuing (section 108).

3.11 A person will be able to enforce protection against discrimination, harassment or victimisation as if they were still in the relationship which has ended.

Example

3.12 After their business relationship has ended, a builder makes abusive and hostile remarks to a previous customer because of her race. This would be harassment.

3.13 Reasonable adjustments must be made for disabled people even after a relationship has ended if there is a risk that they will be put at a substantial disadvantage in comparison to people without a disability.

Example

3.14 A woman with a visual impairment had completed a wine tasting course at a wine retailer. When the woman initially registered for the course, she made the retailer aware that she required any information to be sent to her by email and they agreed to make this reasonable adjustment.

Six months later, the retailer sent letters to all attendees offering a 50% discount on the next course if they returned the enclosed form. The woman was unable to enjoy the discount for the next course afforded to the other attendees, as this was sent to her only by letter.

Failing to ensure that she received and could reply to the offer in an appropriate format is likely to amount to a failure by the retailer to make a reasonable adjustment, even though the woman is no longer undertaking a course with them.

Contracts

3.15 The Act prevents service providers, associations and those exercising public functions from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate, harass, victimise or commit other unlawful acts (sections 142 to 144).

Unenforceable terms

3.16 A contract term that promotes or provides for treatment that is prohibited by the Act is unenforceable (section 142). However, this will not prevent a person who is or would be disadvantaged by an unenforceable term from relying on it to get any benefit they are entitled to.

3.17 The Act also says that a contract term that attempts to exclude or limit the anti-discrimination, anti-harassment or anti-victimisation provisions of the Act is unenforceable by a person it would operate in favour of. However, this does not prevent the parties to a claim in the county court, sheriff court, or employment tribunal from entering into an agreement which has the effect of settling the claim. For a claim in the employment tribunal, the agreement must either be made with the assistance of a conciliation officer or be a qualifying settlement agreement (section 144 to section 147 of the Act).

Removal or modification of terms

3.18 A person who has an interest in, or is affected by, a contract containing an unenforceable term may apply to a county or sheriff court for an order to have that term removed or modified. However, no order will be made unless every person who would be affected by the order has been given notice of the application and can make representations.

An order removing or amending the unenforceable term can be retrospective in its effect (section 143).

Territorial scope

3.19 The Act applies in England and Wales. Apart from section 190 (improvements to let dwellings) and Part 15 (family property), it also applies in Scotland (section 217).

The provisions of Parts 3 and 7 do not apply in Northern Ireland.

3.20 Generally, there is a presumption that Acts of Parliament do not have effect outside of the UK unless:

- there is an explicit provision in the legislation for it to apply outside the UK
- there is an exception, such as it being necessary for the Act to apply outside the UK to give effect to the law as Parliament intended[14]

3.21 The Act includes the following explicit provisions which apply outside the UK:

- For the purposes of exercising public functions (section 29, paragraph 6) in relation to the granting of entry clearance (section 29, paragraph 9), it does not matter whether the act complained of occurs outside the UK when relating to race, religion or belief.
- For the purposes of transportation of people and provision of services on board ships and hovercraft in prescribed circumstances (section 30), it does not matter whether the ship or hovercraft is within or outside the UK (section 30, paragraph 3).
- For services provided by an information society service provider, where different territorial rules apply (read paragraphs 11.76 to 11.82 for further details of this provision) (schedule 25).

3.22 Apart from these explicit exceptions, the presumption will apply. The Supreme Court has stated: 'In the absence of express words, the extraterritorial application of legislation may be implied but it is a high threshold that needs to be overcome'[15].

3.23 Whether or not an act which takes place outside Great Britain is covered by the Act's provisions will be determined by the courts, applying this presumption.

3.24 A UK tour operator has been held liable for discrimination that took place in a third country on the specific facts of the case[16].

What is not covered by the Code?

Education

3.25 Part 6 of the Act prohibits discrimination, harassment and victimisation in relation to education provided by specified 'responsible bodies' in specified circumstances. Those bodies include the governing bodies and proprietors of schools and institutions of further and higher education (section 84 to section 94). Discrimination, harassment and victimisation under Part 6 is not dealt with in this Code.

3.26 Some recreational and training facilities provided by local authorities also fall within Part 6, as do the functions of general qualifications bodies.

3.27 Where activities fall within Part 6, Part 3 will not apply. However, there will be services and functions carried out by educational bodies, and recreational and training facilities which do not fall within Part 6, and to which Part 3 will therefore apply (sections 95 to 97). These are discussed in **Chapter 11**, read paragraphs 11.59 to 11.65.

Premises

3.28 Part 4 of the Act prohibits discrimination, victimisation and harassment in relation to the disposal and management of premises in specified circumstances. This covers, for example, those who provide premises for rent and also the sale of property (sections 32 to 38). This Code does not deal with Part 4 of the Act.

3.29 Part 4 of the Act does not apply in the following circumstances, but these could fall under Part 3:

- where the provision of accommodation is generally for the purpose of short stays by individuals living elsewhere (section 32, paragraph 3(a))
- where accommodation is provided solely for the purpose of providing a service or exercising a public function (section 32, paragraph 3(b))

3.30 For example, accommodation is provided in prison for the purpose of carrying out the public function of detaining convicted offenders and people on remand. This will be subject to Part 3 of the Act. Similarly, the provision of overnight accommodation in a guesthouse would be subject to Part 3 of the Act.

Transport

3.31 Part 3 of the Act applies to certain transport infrastructure (such as stations and airports), services (for example, ticketing) and vehicles (schedule 3, Part 9).

Part 12 of the Act has been amended by the Taxis and Private Hire Vehicles (Disabled Persons) Act 2022. This makes provision for specific duties on the drivers of taxis and private hire vehicles.

However, this Code does not cover these provisions.

Ships and hovercraft

3.32 The services provisions do not apply to ships and hovercraft. The Act provides that regulations may be made to do so, but no regulations have yet been made.

3.33 In relation to the exercise of public functions that do not involve providing a service to the public, a duty not to do anything that constitutes discrimination, harassment or victimisation applies to ships and hovercraft in all cases except for disability discrimination for which regulations will also be needed (section 30).

Employment services

3.34 Employment services, which include vocational guidance or training services or services designed to assist people to find or keep jobs or to establish themselves in self-employment, are dealt with in Part 5 of the Act, under 'work' (sections 55 to 56). These provisions are covered in the Employment Statutory Code of Practice.

Exceptions

3.35 General exceptions which apply to all or some service providers, those exercising public functions, and associations, are discussed in **Chapter 13**. Specific exceptions which apply only to service providers and those exercising public functions are discussed in **Chapter 11**.

Liability of employers and principals

What the Act says

3.36 The Act makes employers legally responsible for acts of discrimination, harassment or victimisation committed by their employees in the course of employment. Principals (including employers) are also liable for acts committed by their agents while acting under the principal's authority. It does not matter whether the employer or principal knows about or approves of the acts of their employee or agents (section 109).

3.37 Service providers, those exercising public functions and associations will not be vicariously liable for discrimination, harassment or victimisation by someone other than their employee or agent. However, they could be directly liable if they fail to take action about something done by a third party, and the reason for their inaction is a protected characteristic[17] [18].

Example

3.38 A Black gym member is called a racist term by another member. They complain to the gym owner who is dismissive of the complaint and justifies the use of the term. The gym owner may be liable for harassment related to race as the comments to the Black gym member have created an intimidating, hostile, degrading, humiliating and / or offensive environment for the Black gym member.

3.39 Employers have a positive legal duty to take reasonable steps to prevent sexual harassment of their employees. This duty is specific to employees and does not extend to the provision of services, the exercise of public functions or in associations. Read our **guidance on harassment and sexual harassment at work** for further information.

3.40 Employers' and principals' liability does not extend to criminal offences under the Act. The only exception to this is offences relating to disabled persons and transport under Part 12 of the Act.

When an act is 'in the course of employment' or 'with the authority of a principal'

3.41 The phrase 'in the course of employment' has a wide meaning: employees of service providers, those exercising public functions and associations who commit an unlawful act against individuals while carrying out duties or while providing or delivering services will usually be regarded as acting in the course of their employment. The same breadth of meaning should be given to acting 'with the authority of the principal' in the case of agents.

The employer's defence

3.42 An employer will not be liable for unlawful acts committed by their employees in the course of employment where the employer has taken all reasonable steps to prevent such acts.

3.43 Service providers, those exercising public functions, and associations who have employees would be considered to have taken all reasonable steps if there were no further steps that they could reasonably have been expected to take. 'Reasonableness' is assessed objectively based on all the circumstances of the case. In deciding whether a step is reasonable, service providers, those exercising public functions or associations should consider its likely effect and whether an alternative step could be more effective. Even if the steps taken do not prevent discrimination, harassment or victimisation from occurring in practice, an employer may comply with the Act if they can show that the steps taken met the 'all reasonable steps' threshold.

Example

3.44 A shop owner becomes aware that her employee is refusing to serve a trans customer. The employer instructs the employee to treat trans customers in the same way as other customers and advises the employee that discrimination is a disciplinary offence. However, the employee continues to treat trans customers less favourably. Another trans customer brings a claim against both the employee and the employer. The employer may be able to show that they have complied with the Act and so avoid liability in this instance if they can show that they took all reasonable steps to stop their employee from acting in a discriminatory way. Paragraphs 3.50 to 3.54 list some steps which, depending on all the circumstances, may be considered reasonable. Questions that may arise in this context will include what steps the employer took to monitor the effectiveness of its action and to take disciplinary action in relation to any further incidents.

Liability of employers and agents

What the Act says

3.45 Individual employees may be held personally liable under the Act for unlawful acts which they commit in the course of employment, whether or not the employer has a defence against liability (read paragraphs 3.41 to 3.44). Agents may also be held personally liable for unlawful acts which they commit under their principal's authority, whether or not the principal condoned the acts (section 110).

Knowledge that the act is unlawful

3.46 It is not necessary for the employee or agent to know that they are acting unlawfully to be liable for their actions.

3.47 However, if the employee or agent reasonably relies upon a statement by the employer or principal that an act is not unlawful, then the employee or agent is not liable for the unlawful act.

3.48 It is an offence punishable by fine, for a service provider, those exercising public functions, or an association to knowingly or recklessly make a false or misleading statement on which the employee or agent relies to carry out an unlawful act.

Liability for instructing, causing, inducing or knowingly helping

3.49 Someone who instructs, causes or induces someone else to unlawfully discriminate, harass or victimise will potentially be liable for discrimination, harassment or victimisation (section 111). This is also the case for someone who knowingly helps another person to discriminate against, victimise or harass another person (section 112). However, if a person reasonably relies on a statement from the person instructing them that this does not contravene the Act, they will not be liable.

This is covered in more detail in **Chapter 9**.

Meeting obligations under the Act: avoiding discrimination, harassment and victimisation, and good practice

3.50 Service providers, those exercising public functions and associations need to take steps to ensure that discrimination, harassment and victimisation is not occurring.

3.51 A service provider, those exercising public functions or associations will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.

3.52 Service providers, persons exercising public functions and associations are more likely to be able to comply with their duties under the Act and prevent their employees from discriminating against, harassing or victimising individuals if they take the following steps:

- establish a policy to ensure equality of access to and enjoyment of their services by individuals from all groups in society
- communicate the policy to all staff, ensuring that they know that it is unlawful to discriminate when they are providing services
- train all staff, including those not providing a direct service to the public, to understand the policy, the meaning of equality in this context and their legal obligations
- monitor the implementation and effectiveness of the policy
- address acts of discrimination, harassment or victimisation by staff as part of their disciplinary rules and procedures
- ensure that performance management systems address equality and non-discrimination, non-harassment and non-victimisation
- maintain an easy to use and well-publicised complaints procedure
- review practices to ensure that they do not unjustifiably disadvantage particular groups
- consult customers, staff and organisations representing groups who share protected characteristics regarding the quality and equality of their services and how they could be made more inclusive

3.53 In relation to the duty to make reasonable adjustments for disabled people, the following actions will help service providers, those exercising public functions, and associations meet their obligations under the Act:

- review regularly whether services are accessible to disabled people
- carry out and act on the results of an access audit carried out by a suitably qualified person
- provide regular training to staff which is relevant to the adjustments to be made
- review regularly the effectiveness of reasonable adjustments and act on the findings of those reviews

3.54 Small businesses and organisations which provide services, exercise public functions or are associations may find a less formal approach sufficient, such as talking to individuals and thinking about whether their services are being used by all sections of the community. The points regarding communicating clearly with staff about the unacceptability of discrimination, victimisation and harassment will still be essential.



Chapter 4

Direct discrimination

Introduction

4.1 This chapter explains what the Equality Act 2010 (the Act) says about direct discrimination in the provision of services, the exercise of public functions and associations for all the protected characteristics covered by this code of practice (the Code). It discusses how an appropriate comparator may be identified when necessary to show discrimination. It also refers to provisions in the Act which make it unlawful to treat a mother unfavourably because of her pregnancy and maternity.

In relation to the protected characteristic of sex, the definition is as set out in paragraph 2.88.

What the Act says

4.2 Direct discrimination occurs when a person treats another less favourably than they treat, or would treat, others because of a protected characteristic (section 13, paragraph 1).

4.3 Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:

- in relation to the protected characteristic of age, where a person is treated less favourably because of age but the service provider, those exercising public functions and associations can show that the treatment is a proportionate means of achieving a legitimate aim (read paragraphs 4.74 to 4.86) (section 13, paragraph 2)
- in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person (section 13, paragraph 3)
- where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (read **Chapter 11** and **Chapter 13**)
- in relation to the protected characteristic of religion or belief, less favourable treatment may be justified in certain circumstances (read 4.91)

What is 'less favourable' treatment?

4.4 To decide whether service providers, those exercising public functions or associations have treated an individual 'less favourably', a comparison must be made with how they have treated other individuals, or would have treated other individuals, in similar circumstances. A comparator can be hypothetical. If the treatment puts the individual at a disadvantage compared with other individuals, then it is likely that the treatment will be less favourable: for example, where a customer is refused service or a person's membership of a club is terminated. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity. If the quality of the service being offered or the manner in which it is offered is comparatively poor, this could also amount to less favourable treatment (section 31, paragraph 7).

4.5 The term 'treatment' includes one-off acts or omissions. It also includes rules and practices and their application in a particular case.

Example

4.6 A security guard in a bar refuses to admit a trans man and says that when he is working, he does not let trans people in. This is a one-off act and is less favourable treatment of the person because of their protected characteristic of gender reassignment.

If the bar never admits anyone who is, or appears to be, trans, they may have adopted an unlawful rule or practice that amounts to less favourable treatment because of gender reassignment.

4.7 Individuals do not have to experience financial loss for the treatment to be less favourable. It is enough that the individual can reasonably say that they would have preferred not to be treated differently from the way service providers, those exercising public function or associations treated, or would have treated, another individual.

4.8 Under the Act, it is not possible for service providers, those exercising public functions or associations to balance or mitigate less favourable treatment by offsetting it against more favourable treatment, for example, by offering an alternative service at a discount.

Example

4.9 More men than women are using a council sports centre. The management team wants to encourage more women to use the facilities. They decide to restrict the number of men who can use the gym at popular times. They also offer their male users some vouchers for special training events to compensate. As the restriction only applies to men, they are being treated less favourably because of their sex, regardless of the additional benefit of the special offer.

4.10 For direct discrimination because of pregnancy and maternity, the test is whether the treatment is 'unfavourable', rather than 'less favourable' (section 17). Hence there is no need for the mother to compare her treatment with that experienced by other service users. Read paragraphs 4.54 to 4.73 for further detail about pregnancy and maternity discrimination.

Segregation

4.11 When the protected characteristic is race, deliberately segregating an individual or group of individuals from others of a different race automatically amounts to less favourable treatment (section 13, paragraph 5). There is no need to identify a comparator because racial segregation is always discriminatory. The segregation must be a deliberate act or policy rather than a situation that has occurred inadvertently.

Example

4.12 A youth club has had trouble with racial conflicts between young people. It decides to open on Tuesdays and Thursdays for young Black people only, and on Wednesdays and Fridays for young White people only. As separating users of the club by race is a deliberate policy of the club, this is likely to amount to segregation and would be unlawful.

Example

4.13 At another youth club, all young people are welcome at every session. Sometimes, Black boys choose to separate themselves from White boys, playing different sports or simply standing together in a group. Because this is a choice of the users of the youth club, and not an enforced policy of the club, it would not amount to segregation and would not be unlawful.

4.14 There is no equivalent statutory rule that segregation automatically amounts to less favourable treatment for protected characteristics other than race. Segregation linked to other protected characteristics may lead to less favourable treatment and therefore constitute direct discrimination. Whether this is the case will depend on the circumstances.

4.15 If the protected characteristic is sex, separating men and women service users may be permitted in limited circumstances. Read about exceptions for competitive sport, communal facilities and separate services in **Chapter 13**.

Protected characteristics of the service provider are irrelevant

4.16 Direct discrimination can take place even if service providers, those exercising public functions and associations share the same protected characteristic that the individual is treated less favourably for (section 24, paragraph 1).

Example

4.17 After several incidents when the police needed to be called, an Asian café owner refuses to serve Asian young men after 7pm on Friday and Saturday. This is likely to be direct race discrimination even though the owner shares the same protected characteristic (race) with the customers he refuses to serve.

'Because of' a protected characteristic

4.18 'Because of' a protected characteristic has the same meaning as the phrase 'on grounds of'. The wording questions why the alleged discriminator acted as they did, whether consciously or unconsciously[19].

4.19 The characteristic needs to be the reason for the less favourable treatment but does not need to be the only reason. It is sufficient if the protected characteristic has a significant influence[20].

Example

4.20 After an incident on a prison wing involving two Sikh and three non-Sikh prisoners, in which prison property was damaged, the prison restricts association time for the two Sikh prisoners but does not impose a similar restriction on the three non-Sikh prisoners. If the religion or belief of the Sikh prisoners is one of the causes of the less favourable treatment, then it does not matter that their recent conduct is another cause.

4.21 In some instances, the reason for the discriminatory treatment will be obvious from the treatment itself. An example would be where service providers, those exercising public functions or associations refuse to serve an individual explicitly because of a protected characteristic[21].

Example

4.22 A Roma couple are refused service in a pub and they are told this is because the pub has a 'No Gypsies, Roma and Travellers' policy. The pub also hangs a sign on the door setting out this policy. It is obvious from the notice on the door and the treatment the Roma couple receive that their less favourable treatment is because of race.

4.23 In other cases, the link between the protected characteristic and the treatment will be less clear. In these cases, it will be important to consider whether the characteristic significantly influenced the thought processes of the alleged discriminator[22].

Example

4.24 A lesbian couple is seated at a restaurant waiting for a member of staff to take their order. There is a long delay in their order being taken and they observe the staff serving others who arrived after they did. In this case it will be necessary to look at why there was a delay in serving the lesbian couple as compared to others to determine whether their less favourable treatment was because of sexual orientation.

4.25 However, direct discrimination is unlawful, no matter what the motive or intention of the service providers, those exercising public functions or associations, and regardless of whether the less favourable treatment of the individual is conscious or not. Service providers, those exercising public functions and associations may have prejudices that they do not admit to themselves or may act out of good intentions. They may simply be unaware that they are treating the service user differently because of a protected characteristic.

Example

4.26 An amateur dramatics association that organises theatre trips for its members turns down an application for membership from a woman with a hearing impairment as they believe she would not get the same benefits as other members. Although the association may be well-intentioned in rejecting her membership application, this is likely to amount to direct disability discrimination.

4.27 Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate for that person.

Example

4.28 A common stereotype is that women are less interested in sport than men. A bank offers male customers the chance to win a ticket to sporting events when they come in to discuss their finances. They do not extend the same opportunity to female customers. This is likely to be less favourable treatment because of sex.

4.29 Service providers, those exercising public functions and associations cannot base their treatment on another criterion that is discriminatory, for example, where the treatment in question is based on a decision to follow a discriminatory external rule.

Example

4.30 A student travel agency is aware that the local university charges international students higher fees than it charges UK students, as provided for in regulations. The travel agency decides to adopt this same approach and offers a special student package holiday priced at £200 for UK students, and £275 for international students. The regulations permitting higher fees for most international students apply only to further and higher educational institutions and do not apply to providers of commercial services. Therefore, while the differential fees imposed by the university are authorised in statute, there is no equivalent statutory basis for the travel agency to show this difference in treatment. The travel agency's differential pricing is likely to be less favourable treatment because of non-UK nationality.

4.31 A service user experiencing less favourable treatment 'because of a protected characteristic' does not have to have the characteristic. For example, the person might be associated with someone who has the characteristic ('discrimination by association', explained in paragraphs 4.48 to 4.50) or the person might be wrongly perceived as having the characteristic ('discrimination by perception', explained in paragraphs 4.51 to 4.53)[23].

Comparators

4.32 In most circumstances, direct discrimination requires that the treatment of individuals by service providers, those exercising public functions and associations is less favourable than the way they have treated or would have treated another individual who does not have the protected characteristic (section 13, paragraph 1). This other person is referred to as a 'comparator'.

4.33 The purpose of identifying a comparator is to provide an analytical tool for considering whether someone has experienced less favourable treatment because of a protected characteristic. It should be noted that no comparator is needed in cases of racial segregation (read paragraph 4.11) or pregnancy and maternity discrimination (read paragraphs 4.54 to 4.73). Furthermore, identifying a comparator is not always necessary in other cases, particularly if the question of whether the treatment complained of was 'because of' a protected characteristic is already answered[24].

Appropriate comparators

4.34 The Act says that when comparing people for the purpose of identifying direct discrimination, there must be no material difference between the circumstances relating to each case (section 23, paragraph 1). However, it is not necessary for the circumstances of the two people (that is, the service user and the comparator) to be identical in every way. A material difference is one that is significant and relevant[25].

Example

4.35 A man is not accepted as a member of a prestigious cycling club, and a woman who applied at the same time is accepted. The man has recently bought his first bicycle and the woman has recently cycled from Land's End to John O'Groats. As a relevant circumstance is cycling experience, which is not the same for the man and the woman, it would not be helpful for the man to choose to refer to the woman as an appropriate comparator. To more effectively test his allegation of direct discrimination, it would be necessary for him to refer to a woman with the same level of cycling experience as an appropriate comparator.

Example

4.36 A woman and her husband play pool to the same standard. They both ask to join their local pub team. The man is accepted but his wife is not as 'there are no other women playing in their league'. The woman could refer to her husband as a comparator in a claim of direct discrimination because of sex.

Example

4.37 A café allows a person only to drink his coffee in the garden rather than in the main café, because he has a severe facial disfigurement which the café owner thinks might upset other customers. The customer is treated less favourably than another customer who does not have a disfigurement and who is given a choice over where they drink their coffee. The customer without a disfigurement can be used as a comparator in a claim of direct discrimination because of disability.

Hypothetical comparators

4.38 In practice, it is not always possible to identify an actual person whose relevant circumstances are the same, or not materially different, so the comparison will need to be made with a hypothetical comparator.

4.39 In some cases, a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless, their treatment may help to construct a hypothetical comparator.

4.40 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, a court may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

Example

4.41 A young Black woman enrolled on a 10-week computer course at a private business college. She arrived late for the first three classes. The college manager told her that her late arrival disturbed the concentration of the other students and if she arrived late a fourth time, she would not be able to continue and she would forfeit her fee.

In the absence of an actual comparator the Black student could compare her treatment to that given to two White students in slightly different circumstances. One White student had arrived drunk on two occasions and had disrupted the class for two hours but had not been given a final warning. The other White student on two occasions left the class thirty minutes early which distracted the tutor and the students. She had not been given a final warning either. Elements of the treatment of these two comparators could allow a court to construct a hypothetical comparator to test whether the Black student had been treated less favourably because of race.

Comparators in disability cases

4.42 In disability cases, an appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person, regardless of whether those abilities or skills arise from the disability itself (section 23, paragraph 2(a)).

Example

4.43 A disabled man with a chronic heart condition is a member of a tennis club. He asks whether he can join the club's tournament team but is told his game is not good enough. Another club member with the same ranking as him, who doesn't have this disability, is selected for the team. This new team member could be a comparator to the disabled man.

4.44 It is important to focus on those circumstances which are relevant to the less favourable treatment. Although in some cases certain abilities may be the result of the disability, these may not be relevant circumstances for comparison purposes.

4.45 If disabled claimants cannot bring a claim for direct disability discrimination, they may be able to bring a claim for discrimination arising from disability, provided it meets the relevant criteria (section 15). In a claim of discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of their disability. There are other criteria that apply to a claim for discrimination arising from disability. For more information, read **Chapter 6**.

Comparators in sexual orientation cases

4.46 For sexual orientation, the Act states that the fact that one person is a civil partner while another is married is not a material difference between the circumstances relating to each case (section 23, paragraph 3). The Supreme Court has confirmed this[26].

Example

4.47 A woman who is married books an anniversary holiday with her husband. Because it is her anniversary, the travel agency offers a room upgrade at a reduced price. A woman who is in a civil partnership books an anniversary holiday with her female partner at the same agency, but she is not offered the same upgrade. The fact that the second woman is a civil partner while the first woman is married will not be a material difference in the circumstances, so the second woman would be able to refer to the first as a comparator in this case.

Discrimination by association

4.48 It is direct discrimination if service providers, those exercising public functions or associations treat an individual less favourably because of the individual's association with another individual who has a protected characteristic. However, this does not apply to pregnancy and maternity. Discrimination by association can occur in various ways, for example, where the individual has a relationship of parent, child, partner, carer or friend of someone with a protected characteristic. The main question is whether the protected characteristic of the other individual was the cause of the less favourable treatment.

Example

4.49 A boy wishes to join his local football club but his membership at the club is rejected because his parent is trans and the football coach who grants membership is openly transphobic. This is direct discrimination by association because of gender reassignment due to the child's association with his parent.

Example

4.50 A group of four young men try to enter their local nightclub. Three of the men are Polish and one of them is English. They are all told that the nightclub is full and therefore they cannot enter. The doorman then lets a group of four men who are speaking with English accents into the club. The first group could complain that they have all been treated less favourably because of race, the English man because of his association with his Polish friends. If, however, the only reason the group was not admitted was that the three Polish men did not have enough money to pay the admission fee, then the English man could not claim that the reason for his less favourable treatment was race.

Discrimination by perception

4.51 It is direct discrimination if service providers, those exercising public functions or associations treat an individual less favourably because the service providers, those exercising public functions or associations perceive that the individual has a protected characteristic even if they do not. However, this does not apply to the protected characteristic of pregnancy and maternity. In a discrimination by perception claim, the comparator would be assessed in the same way as in a standard direct discrimination claim (read paragraph 4.34).

Example

4.52 People with certain Irish surnames are subjected to more stringent checks by a holiday company and then excluded from making holiday bookings because they are assumed to be Irish Travellers. This is less favourable treatment because of race.

Example

4.53 A trans woman is a member of an association and applies to become treasurer, but her application is rejected. She is told by the Chair of the association that this is because they want a man to take the role on as they do not think a woman could do the job as well. This is less favourable treatment because of sex. The trans woman would have a claim for direct discrimination because of her perceived sex as a woman, no less than if she were a biological woman.

Discrimination because of pregnancy and maternity

4.54 The Act provides protection against discrimination because of pregnancy and maternity in the provision of services, the exercise of public functions and in associations (section 17).

4.55 When explaining these provisions, we use the same language as the Act, which refers to discrimination against women on the grounds of pregnancy and maternity. The pregnancy and maternity provisions in the Act apply on the basis of sex and so trans men are included in the protections against discrimination provided by these provisions.

4.56 It is discrimination to treat a woman unfavourably:

- because of her pregnancy
- because she has given birth, and the unfavourable treatment occurs within a period of 26 weeks beginning with the day on which she gave birth
- because she is breastfeeding, and the unfavourable treatment occurs within the period of 26 weeks beginning with the day on which she gave birth

4.57 Mothers are protected even if their baby is stillborn, if the pregnancy lasted for at least 24 weeks before they gave birth.

4.58 Outside the 26-week period, a mother may be protected by the sex discrimination provisions (read paragraphs 4.67 to 4.72).

4.59 Any unfavourable treatment will be pregnancy and maternity discrimination if the treatment would not have taken place if not for the woman's pregnancy, the fact that she has given birth within the previous 26 weeks or that she is breastfeeding a baby that is not more than 26 weeks old.

What unfavourable means

4.60 For pregnancy and maternity discrimination to occur, a mother must have been treated 'unfavourably'. This means that the treatment must result in a detriment or disadvantage. If the detriment is obvious, it will be clear that the treatment has been unfavourable. For example, she may have been denied a service, given a poorer service or have been provided with a service in a different manner than she would have been, were it not for her pregnancy or maternity.

4.61 Being denied a choice or being excluded from an opportunity is also likely to be unfavourable treatment. Even if a service provider, person exercising a public function or an association thinks that they are acting in an individual's best interests, denial of, or exclusion from, a service, public function or association may still amount to unfavourable treatment because of pregnancy or maternity, including breastfeeding.

Example

4.62 A cashier, concerned about what she perceives to be the possible risks of non-prescription medicine for pregnant women, refuses to sell paracetamol to a pregnant woman. This is likely to be unfavourable treatment because of pregnancy. As the cashier does not refuse to sell paracetamol or other goods to other people with other physical conditions, she cannot rely on the health and safety exception (paragraphs 13.193 to 13.202).

The meaning of 'because of' in relation to pregnancy and maternity

4.63 'Because of' in this context should be understood in the same way as 'because of' in relation to direct discrimination, discussed in paragraphs 4.18 to 4.31. Pregnancy and maternity needs to be a cause of the unfavourable treatment but does not need to be the only cause – it is sufficient if pregnancy and maternity has a significant influence[27].

The motive of the service provider is irrelevant, and it does not matter if the unfavourable treatment is intended or not.

Example

4.64 A trans man applies for a mortgage from his local building society and reveals that he is pregnant. He is subsequently refused a mortgage and asks for an explanation. The loans manager says that they are concerned that he may not be able to maintain repayments and mentions several concerns including his pregnancy. The refusal is likely to be pregnancy discrimination.

4.65 Pregnancy and maternity discrimination includes unfavourable treatment of a woman based on an assumption or stereotype about pregnancy or maternity, whether or not it is accurate.

Example

4.66 A club that organises salsa dance evenings deletes a woman from their list as soon as they learn that she is pregnant, on the assumption that pregnant women do not take part in active exercise of this type, and so during her pregnancy she will not want to come to salsa evenings. This decision, resulting in unfavourable treatment based on a stereotype, is likely to be pregnancy discrimination.

Pregnancy and maternity discrimination beyond the protected time period

4.67 The protected period in relation to pregnancy and maternity is 26 weeks. If a woman is treated less favourably because she is breastfeeding after the 26 weeks, this would still be unlawful but her claim would be direct sex discrimination, rather than pregnancy and maternity discrimination, as she is outside of the protected period.

4.68 Where the claim is direct sex discrimination, she will usually need to show that she has been treated less favourably than others are, or would be, treated in comparable circumstances and so a comparator will need to be identified. As this is a claim for direct sex discrimination, the appropriate comparator is likely to be a man. For more discussion of comparators, read paragraphs 4.32 to 4.47.

4.69 Where the factual circumstances of a claim make it difficult for a woman to make a comparison with a man, courts will sometimes remove the comparator requirement and simply consider whether the less favourable treatment experienced by the woman was because of her sex[28].

4.70 Conduct relating to breastfeeding may also constitute unlawful harassment on the grounds of sex. Read **Chapter 8** for more information[29].

4.71 In considering discrimination against a man, it is not relevant to consider any special treatment given to a woman in connection with pregnancy or childbirth.

Example

4.72 A large department store provides a private resting area for women who are pregnant or breastfeeding. A man, feeling tired, complains that he does not have access to a similar facility. This is not discrimination because special treatment for pregnancy and maternity cannot be taken into account in relation to sex discrimination.

Exceptions for pregnancy and maternity

4.73 Read **Chapter 13** for the limited circumstances in which a service provider or an association may treat a woman differently because of pregnancy and maternity, by refusing to provide a service or offering or providing it conditionally.

Direct age discrimination

4.74 A different approach applies to age, compared to other protected characteristics, in that less favourable treatment because of age is not unlawful if the treatment can be objectively justified (section 13, paragraph 2).

4.75 Whether less favourable treatment because of age, including an age-based rule or practice, is objectively justified depends on whether it is a proportionate means of achieving a legitimate aim. Read paragraphs 5.52 to 5.57 of **Chapter 5** for more information on proportionality.

The legitimate aim

4.76 If the treatment is less favourable because of age, it can only be justified if it has a legitimate aim. The range of aims that can justify direct age discrimination is narrower than the range of aims that can justify indirect discrimination[30]. In the context of direct age discrimination, aims must be socially positive, or in the public interest, to be legitimate. Although reasonable business needs and economic efficiency may be legitimate aims, there would need to be wider social factors too if they are to be justified.

4.77 The following are examples of aims that are likely to be legitimate:

- enabling people of particular age group(s) to socialise together, for example, outings, events or concerts
- enabling people of particular age groups to enjoy activities together, for example, hiking or sports
- ensuring the health and safety of individuals, provided risks are clearly specified
- preventing fraud or other forms of abuse or inappropriate use of services or functions provided by the service providers, those exercising public functions and associations
- ensuring the wellbeing or dignity of those using the services, public functions or members of associations
- ensuring that services, public functions and associations are targeted at those who most need them

Example

4.78 A local rambling club sets up regular weekend walks for under 25s. The club wants to promote a healthy lifestyle for members of this age group, as well as giving them an opportunity to socialise with people of a similar age. These aims would be legitimate.

Example

4.79 A local authority develops a contract specification to commission a day centre service primarily targeted at people aged 75 and over. Evidence suggests people in this age group are more likely to benefit from the centre because of social isolation and physical or mental health conditions. Ensuring that appropriate services are available for this age group would be a legitimate aim.

4.80 At the time of the alleged discrimination, service providers, those exercising public functions and associations are not required to have in mind the aim that they put forward in justification. However, it is good practice for them to keep a record of their aim and justification, including any supporting evidence, at the time they adopt a rule or practice that treats certain service users less favourably than others because of age.

What is proportionate

4.81 It is not enough just to have a legitimate aim; it is also necessary for the means of achieving the legitimate aim to be proportionate. Proportionality requires a balancing exercise between the aim sought to be achieved and the discriminatory effect it may have. The disadvantages caused must not be disproportionate to the aims pursued.

4.82 Proportionality is explained in more detail in Chapter 5 (read paragraphs 5.52 to 5.57).

Example

4.83 With the aim of providing safe flying lessons, a flying club picks 59 as an upper age limit. The club will need to be able to show that imposing this age limit was proportionate to achieve the legitimate aim of safety. As the aircraft used for the lessons are dual control machines and people taking lessons are accompanied by an instructor, the means adopted are unlikely to be proportionate to achieve the aim of maintaining safety.

4.84 The greater financial cost of using a less discriminatory approach cannot by itself provide a justification for less favourable treatment because of age[31].

The Public Sector Equality Duty and justification of less favourable treatment of age

4.85 Where a public authority is seeking to justify less favourable treatment because of age, evidence of how they have had regard to the issues under their public sector equality duty is likely to be relevant (section 149).

4.86 To comply with the duty, a relevant body needs to have sufficient evidence of the impact of its policies and practices on people with different protected characteristics, including age. Evidence can be qualitative or quantitative. It may include internal and external evidence such as:

- information about similar policies implemented in the past and the impact they had on service users
- the views of those with relevant expertise or experience, including formal and informal groups of service users representing the interests of people with particular protected characteristics
- research conducted by experts, academics, think tanks or other impartial organisations on issues relevant to people with protected characteristics likely to be affected by the relevant body's policy options – this might include reports by national bodies, including inspectorates and regulators
- statistics and trends that are relevant to that policy area

Having a reliable evidence base allows a body that is subject to the duty to consider whether there are ways of mitigating any adverse impact that the evidence identifies.

More favourable treatment of disabled people

4.87 In relation to direct disability discrimination, the Act only protects disabled people, so it is not direct discrimination to treat a disabled person more favourably than a non-disabled person (section 13, paragraph 3).

For information on indirect discrimination provisions, read **Chapter 11**.

Example

4.88 For a special exhibition, a museum offers a concessionary entrance fee for disabled people. On Tuesdays and Thursdays, it has advance viewing sessions so disabled people and their carers can enter the exhibition 30 minutes before other ticket holders. This would not amount to direct discrimination because of disability.

Advertising an intention to discriminate

4.89 If a service provider advertises that in offering a service they will treat applicants less favourably because of a protected characteristic, this would amount to direct discrimination. The question of whether an advertisement is discriminatory depends on whether a reasonable person would consider it to be so. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition.

Example

4.90 A nightclub announces on local radio that women will be admitted free that evening, but men will still pay the normal £5 entry fee. A reasonable person is likely to consider this as advertising an intention to discriminate because of sex.

Direct discrimination on the grounds of religion or belief

4.91 Less favourable treatment which is either because a person holds a religious or other protected belief, or because they have expressed such a belief, will normally constitute unlawful direct discrimination. This is the case even if the service provider, body exercising public functions or association, or a third party, objects to the belief or expression of the belief.

Example

4.92 A Christian group meet every Tuesday evening in a restaurant for Bible study where they discuss a wide range of topics. One evening the group chooses to discuss Biblical perspectives on sex and marriage. A customer overhears the discussion and complains to the restaurant owner that he does not want to be surrounded by these "religious fundamentalists" and asks that the owner refuse to serve the group.

When the group re-book their usual table, the restaurant owner cancels their reservation on the basis that their attendance may cause reputational damage to his restaurant if he is associated with them and their beliefs. This is likely to be unlawful direct discrimination.

4.93 However, a Court of Appeal judgment in the employment context is likely to affect the way that direct discrimination on the grounds of religion or belief is addressed by courts in the context of services, public functions and associations.

4.94 The Higgs v Farmor's School case[32] determined that a party may plead 'objective justification' as a defence to direct discrimination on the grounds of religion or belief in certain circumstances. Although this case is an employment case and does not directly apply outside the employment context, it is likely to inform the approach adopted by courts and tribunals in other contexts.

4.95 The court in the Higgs v Farmor's School case found that, where an employer dismisses an employee due to something objectionable or inappropriate in the way the employee expresses their belief (but not because of the expression of the belief itself), then the dismissal is lawful provided the employer can prove it was a proportionate response to the objectionable conduct. 'Objectionable' or 'inappropriate' does not mean simply an expression of belief that the employer or a third party objects to, but one 'to which objection could justifiably be taken'. This must be determined objectively, considering the forum, context, manner and content of the expression.

4.96 If this approach is applied to the provision of services, public functions and the conduct of associations, less favourable treatment because of something objectionable in the way a protected religious or other belief is expressed may be lawful provided the service provider, body exercising public functions or association can show it was a proportionate response to the objectionable conduct.

Example

4.97 A local community club (which is an association under the Act) helps vulnerable young people, including gay young people, with pastoral and practical needs. The community club organises events and runs an online forum for young people to use.

One member of the club is an individual with strong religious beliefs and he regularly shares posts and petitions online expressing his religious views. In one post, the member shared a petition started by his church to the online forum which criticised local authorities for funding youth groups designed for gay people. Along with the petition, the member included his own message describing gay people as 'evil' and their relationships as 'disgusting'.

The post is reported to the community club. The club has an online conduct policy for use of its forum which says that it does not allow members to post content that promotes violence, hatred or prejudice against individuals or groups based on any protected characteristic under the Equality Act 2010, or which is offensive, or could bring the club into disrepute.

In accordance with its policy, the community club removes the post and bans the member from the club for a month while it discusses their future conduct with them. The club determined that this was necessary to limit reputational damage, and that the member breached its online conduct policy. The member brought a claim of direct discrimination on the grounds of religion or belief.

Assuming that a court accepted that the member's conduct was a manifestation of a protected religious or other belief, it would be likely to find that this less favourable treatment was a proportionate response. This is because of the objectionable way the member shared his beliefs on a public online forum which was designed to assist vulnerable young people, including gay members of the club.

4.98 The Higgs v Farmor's School case also makes clear that if the less favourable treatment is because of the conscious or unconscious application of a stereotype, or the adoption of a stereotype applied by a third party (for example, in an objection or complaint) this will constitute unlawful direct discrimination.

4.99 The focus must be on what the words used mean or necessarily imply, and evidence about the individual whose expression of belief is in issue, rather than any stereotype associated with the relevant belief that the individual holding or manifesting that belief may not possess.

4.100 Examples of stereotypes in relation to religion or belief are that persons who hold or manifest certain gender-critical beliefs necessarily have negative attitudes towards trans people, or that persons who hold or manifest the belief that same-sex sexual activity is sinful necessarily have negative attitudes towards gay people. The judgment explains that: 'it may be that some persons who hold / manifest such beliefs have such animus, but it is stereotyping to assume that all do.'[32]

Example

4.101 In the example in paragraph 4.97, instead of the message in the post, the member at the community club shared the same petition but described community club funding measures as "undermining traditional values and making it in practice forbidden to teach fundamental Christian beliefs related to the creation of men and women and marriage".

A member reported the post and complained that it was homophobic. In this case, if the club removed the post and banned the member, it is likely to be liable for direct discrimination if it acted based on the complaining member's stereotype that persons who hold Christian beliefs about marriage or sexual activity have negative attitudes towards gay persons, rather than an objective assessment of the words used.

Chapter 5

Indirect discrimination

Introduction

5.1 This chapter of the code of practice (the Code) explains indirect discrimination and 'objective justification'. Objective justification applies to indirect discrimination, discrimination arising from disability, positive action and to some of the exceptions permitted by the The Equality Act 2010 (the Act) (section 19).

5.2 Indirect discrimination applies to all the protected characteristics except pregnancy and maternity (though indirect sex discrimination may apply in some pregnancy and maternity situations). In relation to the protected characteristic of sex, the definition is as set out in paragraph 2.88.

5.3 Indirect discrimination refers to rules, practices, policies and other provisions which appear to apply to everybody in the same way but which, in practice, have a different impact on different groups of people.

What the Act says

5.4 Indirect discrimination may occur when a service provider, person exercising a public function or an association applies an apparently neutral provision, criterion or practice which puts persons sharing a protected characteristic at a particular disadvantage (section 19, paragraph 1 and 2).

Example

5.5 A GP practice only allows appointments to be booked using an online system. An 80-year-old woman points out that she cannot book an appointment as she does not have a home internet connection, device or the skills to get online. This is likely to be indirect age discrimination unless it can be justified. The GP surgery should have considered providing alternative ways to access appointments, such as allowing patients to book appointments over the telephone or in person.

5.6 Indirect discrimination can also now extend to those who do not share the same protected characteristic as the disadvantaged group, provided they experience substantially the same disadvantage as the group. This is known as 'same disadvantage' indirect discrimination.

5.7 This chapter will firstly consider 'ordinary' indirect discrimination (read paragraphs 5.8 to 5.57) (section 19) and then consider 'same disadvantage' indirect discrimination (read paragraphs 5.58 to 5.62) (section 19A).

5.8 In summary, for 'ordinary' indirect discrimination to take place, the following four requirements must be met (section 19).

1. A provision, criterion or practice is applied equally: the service provider, person exercising a public function or association applies, or would apply, the provision, criterion or practice equally to everyone within the relevant group including a particular individual (read paragraphs 5.9 to 5.18).

2. Using a comparative approach shows there is disadvantage (often referred to as the requirement to show 'group disadvantage'): the provision, criterion or practice puts, or would put, people who share the individual's relevant protected characteristic at a particular disadvantage when compared with people who do not have that characteristic (read paragraphs 5.19 to 5.41).

3. There is individual disadvantage: the provision, criterion or practice puts, or would put, the individual at that disadvantage (read paragraphs 5.42 to 5.45).

4. The provision criterion or practice cannot be justified: the service provider, person exercising a public function or association cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim (read paragraphs 5.46 to 5.57).

A provision, criterion or practice is applied equally

Definition of 'provision, criterion or practice'

5.9 The first step in establishing indirect discrimination is to identify the relevant provision, criterion or practice (section 19, paragraph 1). The phrase 'provision, criterion or practice' is not defined by the Act but it should be interpreted widely to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It is not necessary to specify whether something is a provision, criterion or practice, so long as the relevant policy, rule, practice or decision can be properly said to be one of, or a combination of, those three things[33].

5.10 A provision, criterion or practice may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied. A 'one-off' or discretionary decision can also amount to a provision, criterion or practice if, to some extent, it reflects the way in which things generally are or will be done, or there is some element of repetition[34].

Example

5.11 A chain of shops is worried about security and instructs its staff to require people coming into the shop to remove any headgear. A security guard explains to a Rastafarian that it is the policy of the shop that he must remove his hat. Unless the shop can justify this policy, it will be indirect discrimination because of religion.

The provision, criterion, or practice must be neutral

5.12 The provision, criterion or practice must be neutral on its face, which means that it cannot be about a specific protected characteristic or characteristics. If it is not neutral and expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination.

Example

5.13 A GP practice decides that it will not see Albanians as patients. This would be direct discrimination against a racial group.

Example

5.14 An optician allows customers to pay for their glasses by instalments but restricts eligibility to people who are in full time employment. A customer points out that this puts her and other women at a disadvantage as they are less likely to be working full time. The requirement to be in full time work is a neutral one but is likely to put women at a particular disadvantage. As such, this could be indirect sex discrimination unless it can be justified.

Meaning of 'would put'

5.15 It is a requirement of the Act that the provision, criterion or practice puts or would put people who share the individual's protected characteristic at a particular disadvantage, when compared with people who do not have that characteristic (section 19, paragraph 2(c)). The Act also requires that it puts or would put the particular individual at that disadvantage. This allows challenges to provisions, criteria or practices which have not yet been applied, but which would have a discriminatory effect if they were.

5.16 However, for a claim of indirect discrimination to succeed, the individual must show that they would experience a disadvantage if the provision, criterion or practice was applied to them (read also paragraph 5.42 and example 5.43).

Example

5.17 A local authority consults with residents on its proposed plans for building renovations. It announces renovations will be carried out on a block of flats, which means the ramped entrances will be closed during the works. As women are more likely to be the carers of young children, a woman points out that this plan will make it more difficult for women using a pushchair, including herself, to get in and out of the block. Although the work has not yet started, this will be indirect sex discrimination unless the council can justify its decision.

Example

5.18 A practising Muslim person wishes to join a yoga class held on a Wednesday evening, but the joining instructions state that all new members must first take part in an induction session, which is only available from 12 noon until 2pm on Friday. He is therefore deterred from joining the class because he attends Friday prayers at his local mosque. This will be indirect discrimination unless the policy can be justified.

Disadvantage and the comparative approach

5.19 The second requirement in an indirect discrimination claim is to establish whether the provision, criterion or practice puts, or would put, an individual at a particular disadvantage when compared with others who do not share the individual's protected characteristic. Although, for ease, we discuss disadvantage and the comparative approach separately in this section, it is important to note that these are not separate tests. The test is a holistic one: whether the individual experiences a particular disadvantage in comparison with persons who do not have that characteristic. In other words, the question is whether the individual experienced comparative disadvantage, not disadvantage in the abstract.

What disadvantage is for these purposes

5.20 'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about. An unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable. It does not have to involve actual loss (economic or otherwise). It is enough that a person can reasonably say that they would have preferred to be treated differently.

Proving the reason for the disadvantage

5.21 Indirect discrimination requires that there is a causal link between the provision, criterion or practice and the particular disadvantage experienced by the group and the individual[35]. The individual does not have to establish the reason why the provision, criterion or practice puts them or the group at that disadvantage. It is enough that it does[36].

Group and individual disadvantage

5.22 As explained in paragraph 5.15, the individual must show both that the provision, criterion or practice puts or would put people who share their protected characteristic at a particular disadvantage ('group disadvantage'), and that it puts them personally at that disadvantage ('individual disadvantage').

Deciding if the group is put at a disadvantage

5.23 Sometimes, a provision, criterion or practice is inherently likely to disadvantage a group with a particular protected characteristic. However, there is no requirement that the provision, criterion or practice puts every member of the group at a disadvantage. It is a typical feature of indirect discrimination that some members of the group will not experience the particular disadvantage[37].

Example

5.24 A local council holds all its consultation meetings on the same weekday evening. It discovers that fewer women than men attend. A woman complains that this is because some women, including herself, cannot come because of caring responsibilities. Although some women can attend the meetings, it is likely that the woman will be able to show that there is group disadvantage.

5.25 As explained previously (read paragraph 5.21), there is no requirement to show why a provision, criterion or practice puts one group sharing a particular protected characteristic at a disadvantage when compared with others. However, it is necessary to demonstrate a causal link between the provision, criterion or practice and the particular disadvantage experienced. The essential question is whether the disadvantage is caused by the provision, criterion or practice. In some situations, the causal link between the provision, criterion or practice and the disadvantage might be obvious; for example, a dress code may create a disadvantage for individuals with particular religious beliefs. In other situations, it will be less obvious how the provision, criterion or practice puts or would put people sharing a protected characteristic at a disadvantage. In this case, statistics, expert evidence or personal testimony may help to demonstrate that a disadvantage exists. Read paragraphs 5.36 to 5.41 for more information about carrying out a formal comparative exercise.

Example

5.26 A gym imposes a fitness test which includes a requirement to be able to do 30 press-ups for people wanting to join. A 70-year-old man provides statistical evidence from a reputable source that people in his age group are unlikely to be able to do 30 press-ups as upper body strength decreases with age. If the gym cannot objectively justify the requirement, it will be unlawful.

The comparative approach

5.27 When considering a comparison between individuals with the protected characteristic and those without it (section 19, paragraph 2(b)), the circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances (section 23, paragraph 1).

5.28 It is important to be clear which protected characteristic is relevant. In the case of disability, this would not be all disabled people, but disabled people with a particular impairment, for example, an equivalent visual impairment. For race, it could be all Africans or only Somalis, for example.

Example

5.29 A nursing home has a policy to refuse care to anyone with sickle cell disease. This excludes a larger number of people from certain European ethnic groups and certain African ethnic groups but does not exclude all African ethnic groups. If the comparison is made between Africans and non-Africans, the court may mistakenly think that no particular disadvantage to the group is revealed. However, if the comparison is between those from the commonly affected ethnic groups and those who are not affected, the racial consequences of the policy will become apparent and the nursing home will have to justify it.

It should be noted that if a person with sickle cell disease was refused care by the nursing home, provided that their condition meets the definition of disability in the Act (read paragraphs 2.19 to 2.35), they would likely also have claims for disability discrimination, direct discrimination or discrimination arising from disability (read paragraphs 4.42 to 4.45). They probably would not have a claim for indirect disability discrimination, however, because the provision, criterion or practice is not neutral. It expressly applies to people with a specific protected characteristic: disability (read paragraph 5.12).

The 'pool for comparison'

5.30 The people used in the comparative exercise are usually referred to as the 'pool for comparison'.

In general, the pool should consist of the group which the provision, criterion or practice affects, or would affect, either positively or negatively, while excluding people who are not affected by it, either positively or negatively. This means that identifying the provision, criterion or practice will usually also identify the pool for comparison[38]. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the court will decide which pool is most appropriate to use to realistically and effectively test the allegation of indirect discrimination being made[39].

Example

5.31 A local authority plans on introducing an information leaflet about its services for local residents. To save money, it does not produce an Easy Read version of the document. A person with learning disabilities complains that, because the leaflets are not available in accessible formats, he would not be able to access council services.

He complains that the policy of producing information leaflets without Easy Read versions places people with learning disabilities at a particular disadvantage, thereby indirectly discriminating against them. The pool within which the comparison is made is all those who might reasonably use the local authority's services, rather than the national population, as most of the national population would have no interest in using the local authority's services.

It should be noted that the local authority is also under a duty to make reasonable adjustments and should have anticipated this reasonable adjustment by making the information available in an Easy Read format.

Example

5.32 A local authority provides information about its mobile library service by distributing leaflets to day centres. These are normally used by people aged over 65. A resident who is 55 years old complains that the method of distribution indirectly discriminates against those under the age of 65. The pool for comparison is those living in the local authority's area who may be interested in using the mobile library. It is not the national population or the population of the local authority in general.

Making the comparison

5.33 Looking at the pool, a comparison must then be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic, and its impact on people with the protected characteristic.

5.34 Whether there is group disadvantage in a claim for indirect discrimination can be established in several ways.

For example:

- there may be statistical or other evidence of disadvantage
- group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case
- the disadvantage may be inherent in the provision, criterion or practice in question
- there may be relevant factors, such as the gender profile in regard to primary responsibility for childcare, which the court will take into account[40]

5.35 The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned (section 19, paragraph 2(c)). It may, in some circumstances, be necessary to carry out a formal comparative exercise using statistical evidence.

Carrying out a formal comparative exercise

5.36 Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. It may also be possible to use national or regional statistics to demonstrate the nature and extent of the particular disadvantage.

5.37 However, a statistical analysis may not be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison. In this situation, the court may find it helpful for an expert to provide evidence on whether there is any disadvantage and, if so, the nature of it.

5.38 There are other instances where it may be useful to have evidence (including, if appropriate, from an expert) to help the court understand the nature of the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principles of a particular religious belief.

Example

5.39 A person has a belief that pork renders them ritually unclean for the purposes of the rites of their religion for a certain time period. They have a medical condition requiring medication. They claim that their GP is indirectly discriminating against them by only prescribing generic label tablets which contain pork gelatine, even though there are branded label tablets available which have the same active ingredients but which are free from pork products. The court would be assisted by evidence of the significance of this belief in the person's religion to establish that prescribing generic label tablets containing pork gelatine amounted to a particular disadvantage.

5.40 Essentially, it needs to be established that the provision, criterion or practice puts a greater proportion of those with the relevant protected characteristic at a disadvantage, compared to the proportion of those without the protected characteristic who are disadvantaged. It needs to be shown that the group with the protected characteristic experiences a 'particular disadvantage' in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the actual numbers behind the proportions. As explained in paragraph 5.23, it is not necessary to show that all, or a majority of those within the pool who share the protected characteristic, are placed at a disadvantage.

Example

5.41 A local authority makes a hall available for residents' meetings for those living in the local authority ward. It is only made available on Friday evenings. Making the hall available on a Friday evening is a neutral practice. In an indirect discrimination claim, a court must carry out a comparative exercise to decide whether the policy puts, or would put, Jewish residents, for example, at a particular disadvantage when compared with other religious groups.

1. The court looks at the information on the religious make-up of the 'pool'. 5,000 residents live in the ward. Of these, 1,000 state that they are of the Jewish religion, which is a protected characteristic. The proportion of the pool with the particular protected characteristic is one-fifth.

2. The court knows that most non-Jewish residents are unlikely to be prevented from using the hall on a Friday evening by their religious beliefs. Based on the information it has about residents' religious beliefs, it estimates that most of the 4,000 non-Jewish residents will not be disadvantaged by this practice.

3. However, at least 500 Jewish residents – those holding Orthodox beliefs – will be prevented by their religion from using the hall.

4 Therefore, 50% of Jewish residents will be disadvantaged by the practice.

5. The court then compares the proportion of Jewish people who are disadvantaged by the practice (half of them) with the proportion of those who are disadvantaged but are not Jewish (very few). From this comparison, the court concludes that the group with the protected characteristic of being of the Jewish religion experiences a particular disadvantage, and recognises that the local authority must justify the practice or change it to avoid acting unlawfully. The local authority chooses to make the hall available on another evening instead of Friday.

Individual disadvantage

Deciding if the individual concerned is put at that disadvantage

5.42 It is not enough that the provision, criterion or practice puts, or would put, a group of people who share a protected characteristic at a particular disadvantage. It must also have that effect (or be capable of having it) on the individual concerned. So, it is not enough for an individual merely to establish that they are a member of the relevant group. They must also show they have personally experienced (or could experience) the particular disadvantage as an individual (read paragraph 5.15 and paragraph 5.16). As with group disadvantage (read paragraph 5.21), the individual does not have to prove the reason for the disadvantage they personally experience, only that it results from the application of the provision, criterion or practice.

Example

5.43 A venue requires customers to go through a metal detector before entering. A Sikh complains that this policy indirectly discriminates against Sikhs by preventing them from wearing the Kara bracelet. However, he no longer observes this article of the Sikh faith. He is therefore not put at a particular disadvantage. He could not successfully bring a claim for indirect discrimination.

The intention behind the provision, criterion or practice is irrelevant

5.44 Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. If a service provider, person exercising a public function or association applies the provision, criterion or practice without the intention of discriminating against the individual, the court may decide not to order a payment of compensation (read **Chapter 14** on Enforcement) (section 119, paragraph 5 and 6).

Example

5.45 A provider of legal services creates a website to enable the public to easily access its services. However, the website has all its text embedded within graphics. Although it did not intend to discriminate indirectly against those with a visual impairment, this places those with a visual impairment at a particular disadvantage because they cannot change the font size or apply text-to-speech recognition software and so cannot access the website. As well as giving rise to an obligation to make a reasonable adjustment to their website, this practice will be indirect disability discrimination unless the provider can justify it.

Objective justification

Objectively justifying a provision, criterion or practice

5.46 If the person applying the provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination (section 19, paragraph 2(d)). This is often known as the 'objective justification' test. The test applies to 'same disadvantage' indirect discrimination (read paragraphs 5.58 to 5.62) and to other areas of discrimination law, for example, discrimination arising from disability.

5.47 If challenged in the courts, it is for the service provider, person exercising a public function or association to justify the provision, criterion or practice and to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for the justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the service provider, person exercising a public function or association can set out the justification to the court.

5.48 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in stages:

1. Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?

2. If the aim is legitimate, is the means of achieving it proportionate?

Legitimate aims

5.49 The concept of a 'legitimate aim' is not defined by the Act. However, case law has established that to be legitimate, the aim of the provision, criterion or practice should be legal, should not be discriminatory in itself and it must represent a real, objective consideration.

5.50 Although reasonable business needs and economic efficiency may be legitimate aims, a service provider, person exercising a public function or association solely aiming to reduce costs cannot expect to satisfy the test[41]. For example, they cannot simply argue that to discriminate is cheaper than not to discriminate.

5.51 Examples of legitimate aims include:

- ensuring that services and benefits are targeted at those who most need them
- the fair exercise of powers
- ensuring health and safety, for example, the health and safety of those using a service or accessing a public function, provided risks are clearly specified
- preventing fraud or other forms of abuse and / or inappropriate use of services or public functions
- ensuring the wellbeing or dignity of members of an association or of people using a service or accessing a public function

Proportionality

5.52 Even if the aim is a legitimate one, the means of achieving it must be proportionate.

5.53 Proportionality requires a balancing exercise between the aim sought to be achieved and the discriminatory effect it may have. The disadvantages caused must not be disproportionate to the aims pursued.

The courts have broken this down into a four-stage test. For a measure to be proportionate[42]:

1. The aim must be sufficiently important to justify limiting a protected right.

2. The measure must be rationally connected to the aim being pursued. This means its implementation can reasonably be expected to contribute towards the achievement of that aim[43].

3. The means chosen must be no more than necessary to accomplish the aim. The court will consider whether a less intrusive measure could have been used without unacceptably compromising the achievement of the aim.

4. The impact of the rights infringement must be proportionate to the likely benefit of the measure.

5.54 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice[44]. Cost can only be considered as part of the service provider, person exercising a public function or association's justification, if there are other good reasons for adopting it.

Example

5.55 An outdoor centre provides a variety of activities, from walks on gravelled areas to those involving strenuous physical effort. On safety grounds, it requires a medical certificate of good health for all participants in any activity they offer, even if they might not be considered strenuous. This policy has the effect of excluding many disabled people from the centre. Although ensuring health and safety is a legitimate aim, the application of the policy to everyone is likely to be unjustified because it may exclude disabled people who have conditions which doctors may not classify as 'good health' but would not, in practice, prevent them from safely undertaking both the strenuous and less strenuous activities. Therefore, the certificate of good health would not be a justifiable way of achieving the legitimate aim.

5.56 In a case involving disability, if the service provider, person exercising a public function or association has not complied with their duty to make relevant reasonable adjustments, it will be difficult for them to show that the treatment was proportionate.

5.57 The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be.

Indirect discrimination: same disadvantage

5.58 Indirect discrimination may also occur when an individual without the relevant protected characteristic experiences disadvantage alongside persons with the relevant protected characteristic. Provided that the discriminatory provision, criterion or practice puts, or would put, them at substantively the same disadvantage as people who share the relevant protected characteristic[45], such an individual may bring a claim for 'same disadvantage' indirect discrimination (section 19A). Objective justification applies to same disadvantage indirect discrimination (read paragraphs 5.46 to 5.57).

5.59 Although this type of indirect discrimination is sometimes referred to as 'associative indirect discrimination', it is not necessary for there to be any relationship or association between the group with the relevant protected characteristic and the individual who does not share it. Rather, the individual without the relevant protected characteristic must be able to show that the disadvantage they experience is essentially the same as that experienced by the group sharing the protected characteristic.

Example

5.60 A local council holds its public consultation meetings on a weekday evening and discovers that fewer women than men attend. A woman complains that this is because women cannot come because of childcare responsibilities, including herself. This kind of disadvantage is more likely to apply to women as a group and will amount to indirect discrimination against women, unless the council can justify its policy. People who do not share the same protected characteristic but who also have childcare responsibilities could experience disadvantage that is essentially the same. For example, a man with childcare responsibilities who is unable to attend consultation meetings on weekday evenings would also have a claim for indirect discrimination, if the council is unable to justify its policy.

5.61 In the example in 5.60, the man experiences the same disadvantage that would apply to women as a group, because of his caring responsibilities, despite not sharing the sex protected characteristic with women as a group. The man does not need to wait for a woman to complain before making a complaint.

Example

5.62 A local authority uses an algorithm to help identify housing benefit fraud. The algorithm identifies a higher incidence of housing benefit fraud in a specific postcode area. Based on this, the council introduces extra checks and verification steps on applications received from residents living in that particular postcode area. This results in delays in those applications being processed.

The area has a large population of residents of Bangladeshi heritage who are put at a disadvantage by the additional, postcode-specific fraud detection checks when applying for housing benefit. Unless the local authority can justify the policy, they may have a claim for indirect discrimination.

A White woman from an Irish background who lives in the same postcode area is subjected to the new fraud checks and her application also gets delayed. Unless the local authority can justify the policy, the woman may also have a claim for indirect discrimination.

Public authorities and justification of indirect discrimination

5.63 Where a public authority is seeking to justify indirect discrimination, evidence of how they have had regard to the issues of potential discriminatory impact and justification under their public sector equality duty is likely to be relevant.

5.64 In the previous example (paragraph 5.62), the local authority must, under its public sector equality duty, have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between protected characteristic groups. Evidence of how it has carried out this duty is likely be relevant when considering any justification of the policy.

Indirect discrimination and the duty to make reasonable adjustments for disabled persons

5.65 As well as having an obligation not to indirectly discriminate against disabled people, service providers, those exercising public functions and associations also have an anticipatory duty to make reasonable adjustments for disabled people. More detail about this is given in Chapter 7. These two duties frequently overlap, and it is sensible to consider them together.

5.66 When planning, service providers, those exercising public functions and associations will need to consider whether their practices indirectly discriminate against disabled people. If a practice indirectly discriminates against disabled people, then the service provider, person exercising a public function or association must consider whether the practice can be justified.

Example

5.67 A stately home has guided tours of its grounds and gardens which depart at 30-minute intervals. The guides are told to follow a strict timetable and to complete the tours within 45 minutes. Disabled people with mobility impairments are put at a disadvantage by this practice. When challenged by a group of disabled people, the stately home management realise:

- that the practice is indirectly discriminating against disabled people with mobility impairments and that they need to consider whether there is any justification for the practice
- that making reasonable adjustments by permitting one group more time would be incompatible with the policy, as groups following on from the slower group would be delayed
- they could achieve the same level of profit from guided tours by removing the strict timetable and permitting tours to overlap
- the indirectly discriminatory effect on people with a mobility impairment is unnecessary because they can achieve their business aim of profit by adopting other means of achieving the tour group volumes they seek

As a result, they change their practice and start running all their tours on an overlapping basis, as well as extending their duration.

5.68 If the service provider, person exercising a public function or association plans to make reasonable adjustments for disabled people and makes those adjustments, then it will not have to change the practice for non-disabled persons, unless the provision, criterion or practice has a discriminatory impact related to another relevant protected characteristic.

5.69 In many cases, when the service provider, person exercising a public function or association considers whether a practice is justifiable despite its impact on disabled persons, they will discover ways in which anticipatory reasonable adjustments can be made.

Chapter 6

Discrimination arising from disability

Introduction

6.1 This chapter of the code of practice (the Code) explains the duty on service providers, those exercising public functions and associations to not treat disabled people unfavourably for a reason connected with disability under the Equality Act 2010 (the Act) (section 15). Protection from this type of discrimination, which is known as 'discrimination arising from disability', only applies to disabled people (section 15).

Discrimination arising from disability

What the Act says

6.2 The Act says that treatment of a disabled person amounts to discrimination arising from disability if all three of the following conditions are met (section 15).

- A service provider, person exercising a public function or association treats the disabled person unfavourably.
- This treatment is because of something arising in consequence of the disabled person's disability.
- It cannot be shown that this treatment is a proportionate means of achieving a legitimate aim.

Treatment does not amount to discrimination arising from disability if the service provider, person exercising a public function or association does not know, and could not reasonably be expected to know, that the person has the disability (section 15, paragraph 2).

Example

6.3 A local nature community group is seeking to appoint two members to run a gardening project in the local park. The members will lead a group of volunteers and act as spokespeople for the project. The community group rejects a member who applies to lead the project because she is very direct and honest when communicating and the community group worries that this may be perceived as being insensitive or rude. The member has an autism diagnosis.

The member has been rejected to lead the project because of something arising in consequence of her disability – how she communicates verbally. This will be unlawful unless the group can show that the treatment is a proportionate means of achieving a legitimate aim. The group's actions would not be unlawful if it did not know, and could not reasonably be expected to know, that the applicant had a disability.

How it differs from direct discrimination

6.4 Direct discrimination occurs when a service provider, person exercising a public function or association treats someone less favourably because of disability itself. In discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

Example

6.5 A mother seeks admission to a privately run nursery for her son. Her son has epilepsy and experiences seizures. The nursery says they cannot admit her son because the nursery staff are not trained to deal with seizures and therefore they are unable to meet his care needs. The refusal to admit the boy is not because of his disability itself, but he is being treated unfavourably because of something arising in consequence of his disability: his seizures. This could be discrimination arising from disability, unless the nursery can show that its refusal to admit him is a proportionate means of achieving a legitimate aim.

How it differs from indirect discrimination

6.6 Indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) people sharing the disabled person's disability at a particular disadvantage compared to others, and which puts (or would put) the disabled person at that disadvantage (read paragraph 5.4).

6.7 In contrast, discrimination arising from disability only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability. However, as with indirect discrimination, the service provider, person exercising a public function or association may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (read paragraph 6.18).

Comparators and discrimination arising from disability

6.8 Indirect discrimination and, in most cases, direct discrimination require a comparative exercise (read **Chapter 4** and **Chapter 5**). When considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of their disability.

Example

6.9 A disabled person is refused service at a bar because they are slurring their words, because 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 irrelevant whether other potential customers would be refused service if they slurred their words. It is not necessary to compare the treatment of the disabled customer with that of any comparator. This will amount to discrimination arising from disability, unless it can be justified or the bar manager did not know, and could not reasonably be expected to know, the person was disabled.

Unfavourable treatment

6.10 For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably' (section 15, paragraph 1(a)). This means that they must be put at a disadvantage. Often the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable. For example, a person may have been denied a service or given a poorer service. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment. Sometimes the unfavourable treatment may be less obvious. Even if a service provider, person exercising a public function or association thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

6.11 If a person complains that they have not been treated favourably enough, this might not fall within the scope of 'unfavourable' treatment and so might not be unlawful[46].

Example

6.12 A council provides community care services to people within its area. The council is entitled to seek a financial contribution from anyone accessing such services but will reduce that financial contribution to consider disability-related expenses a disabled person incurs.

A disabled person entitled to community care services applies for their financial contribution to be reduced to account for their disability-related expenditure. The council applies a reduction, but the disabled person considers the reduction is not enough and a greater discount should have been applied.

The disabled person argues they have been treated unfavourably because of something arising as a consequence of their disability. This may not amount to unfavourable treatment. The council is already treating the disabled person favourably by reducing their financial contribution to account for disability-related expenses.

The meaning of 'something arising in consequence of disability'

6.13 The unfavourable treatment must be because of something that arises in consequence of a disability (section 15, paragraph 1(a)). This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

6.14 The consequences of a disability include anything which is the result, effect, or outcome of a person's disability. The consequences will be varied and will depend on the individual effect of a disability upon a person. Some consequences may be obvious, such as an inability to walk unaided. Others may not be obvious, such as an inability to understand the implications of a financial agreement.

6.15 To determine whether unfavourable treatment is because of something that arises in consequence of disability, it is important to consider the issue in two stages. Firstly, does a person's disability cause, or result in, 'something'? Secondly, was the person treated unfavourably because of that 'something'[47]? The 'something' need not be the sole reason for the unfavourable treatment, but it must be a significant, or at least more than trivial, reason[48].

Example

6.16 A disabled person has a condition that impacts their speech and language. They apply to a golf club for membership. As part of the application process, they must provide two references. The golf club is not satisfied with one of the references because it is very short and does not answer all their questions. The golf club is also concerned about whether the applicant will 'fit in' with their members because of their speech and language difficulties.

The golf club decides to turn down the application. This could be discrimination arising from disability. The person's speech and language difficulties are 'something' arising in consequence of their disability. They are not the sole reason for the golf club deciding to turn down their application for membership, but they are a significant cause.

Example

6.17 A member of the public attends a job centre to complete an application for unemployment benefit. A member of staff refuses to interview him because he is swearing. He has been attending the job centre for a few weeks. His swearing is a result of him having Tourette syndrome.

The refusal to interview is likely to be discrimination arising from disability unless the staff member can show they did not know, and could not be reasonably expected to have known, about the applicant's impairment. Given the ongoing relationship between the job centre and the member of the public, the job centre should have taken some steps to establish whether the member of the public has a disability. For further information, read paragraphs 6.24 to 6.35.

When discrimination arising from disability can be justified

6.18 Unfavourable treatment will not amount to discrimination arising from disability if the service provider, person exercising a public function or association can show that the treatment is a 'proportionate means of achieving a legitimate aim' (section 15, paragraph 1(b)). This 'objective justification' test is explained in paragraphs 5.46 to 5.57.

6.19 It is for the service provider, person exercising a public function or association to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on generalisations.

Example

6.20 An art exhibition is taking place in a local community hall. The community hall manager turns away a wheelchair user because she assumes that he could be in danger in the event of a fire. Ensuring the health and safety of customers may be a legitimate aim. Whether the refusal of entry is a proportionate means of achieving that aim will depend on what means of escape are or could be available in the event of a fire, and whether they are adequate for the wheelchair user. If there are adequate means of escape, then the refusal of admission is likely to be disproportionate and unlawful.

Role of reasonable adjustments

6.21 Service providers, those exercising public functions and associations can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments. The duty to make reasonable adjustments for disabled people is a separate legal obligation and is explained in further detail in **Chapter 7**.

6.22 If there is a failure to make a reasonable adjustment, which would have prevented or minimised the unfavourable treatment, it will be very difficult to show that the treatment was objectively justified for the purposes of a discrimination arising from disability claim[49]. Objective justification is explained in paragraphs 5.46 to 5.57.

6.23 Where a service provider, person exercising a public function or association has made reasonable adjustments for a disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

When the service provider, person exercising a public function or association does not know that the person is disabled

6.24 If the service provider, person exercising a public function or association can show that they did not know that the disabled person had the disability in question, and could not be reasonably expected to know, then the unfavourable treatment does not amount to discrimination arising from disability (section 15, paragraph 2).

6.25 They only need to know about the facts of the individual's impairment to be liable for discrimination arising from disability. They do not need to realise that those particular facts meet the legal definition of disability[50]. For further information on the definition of disability, read paragraphs 2.19 to 2.35.

6.26 They also do not need to know that the 'something' which led to the unfavourable treatment was a consequence of the disability[51].

6.27 It is not enough for the service provider, person exercising a public function or association to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.

6.28 When deciding if an individual is likely to be considered to be disabled, a service provider, person exercising a public function or association must form their own judgement. They should take all relevant circumstances into account which would include a medical adviser's opinion. However, they should not unquestioningly accept a medical adviser's opinion as determinative of whether an individual is disabled[52].

Example

6.29 A café is approaching closing time and has closed its seating area. A customer orders some take-away food and sits in the closed seating area. A café employee asks the customer to leave the area and states that they must stand to wait for their order because the seating area is closed. However, the customer has Chronic Fatigue Syndrome and explains she is sitting down because she needs to as a result of her disability. The café employee refuses to accept her explanation or make an exception to allow the customer to sit down until her order is ready. As the café employee was informed of the customer's disability, the café as the service provider could reasonably have been expected to know that she was disabled. As a result, the café is likely to be liable for discrimination arising from disability unless it can show that the treatment is objectively justified.

6.30 A service provider, person exercising a public function or association must do all they can reasonably be expected to do to find out if a person has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. It is not necessary to make every enquiry where there is little or no basis for doing so[53]. When making enquiries about disability, issues of dignity and privacy should be considered and personal information must be dealt with confidentially.

6.31 Where a service provider, person exercising a public function or association has an ongoing relationship with a disabled person – for example, the provision of banking services or the collection of council tax – they should take steps to find out if a person has a disability, for example, by checking a customer registration form.

Example

6.32 A council tax benefit office sends out questionnaires to people claiming benefits asking if they have any needs related to a disability that they wish to advise the office of and whether the office can take any related steps to make their claiming easier.

6.33 Where there is no ongoing relationship, consideration should still be given as to whether an individual has a disability. This may be as simple as giving a person the opportunity to disclose their disability by asking them if there is any reason for their behaving in a particular way.

Example

6.34 In a busy café with only counter service, one of the staff notices a customer is sitting at a table without ordering. It is the café's policy to ask people who are taking up tables without having ordered anything to leave. The staff member goes up to the customer's table and asks if she needs any help. The customer discloses that she has arthritis and her legs are hurting her, meaning that it would be difficult for her to go up to the counter and order food and drink herself.

6.35 If an employee, agent or member knows of an individual's disability, the service provider, person providing a public function or association will not usually be able to claim that they do not know of the disability. It would therefore be difficult for them to argue they cannot have subjected the individual to discrimination arising from disability.

Treating a disabled person more favourably

6.36 The Act does not prohibit treating a disabled person more favourably than a non-disabled person in relation to direct discrimination. This exception applies only to disabled people. Therefore, it is not direct discrimination for service providers, those exercising public functions and associations to treat a disabled person more favourably than a non-disabled person.

Chapter 7

Disabled people: reasonable adjustments

Introduction

7.1 This chapter of the code of practice (the Code) explains the duty to make reasonable adjustments for disabled people in relation to services to the public, public functions and associations. **Chapter 11** and **Chapter 12** explain the circumstances in which it is unlawful to discriminate against a disabled person by not making reasonable adjustments and the specific wording of the reasonable adjustment duty in respect of these three areas under the Equality Act 2010 (the Act).

7.2 Services to the public includes services to a section of the public and the provision of goods and facilities, whether or not for payment. Read paragraphs 11.4 to 11.9 for more detail.

Public functions are functions of a public nature which are not services. Read paragraphs 11.13 to 11.16 for more detail.

Associations are bodies which have at least 25 members, membership criteria and a process of selection for members. Read paragraphs 12.2 to 12.12 for more detail.

7.3 The principles relating to the duty to make reasonable adjustments in relation to these three areas are similar. However, where the duty is different we have provided further detail in this chapter.

7.4 The duty to make reasonable adjustments requires service providers, those exercising public functions and associations to take positive steps to ensure access for disabled people. This goes beyond avoiding discrimination. It requires service providers, those exercising public functions and associations to anticipate the needs of disabled people and make reasonable adjustments in advance of providing the service, exercising the public function or the activities of the association.

7.5 The purpose of the duty to make reasonable adjustments is to provide disabled people with access in relation to services, public functions and associations, and for their experience to be as close as reasonably possible to the standard offered to non-disabled people.

The duty to make reasonable adjustments

7.6 One form of unlawful discrimination against a disabled person occurs where a service provider, person exercising public functions or association fails to comply with the duty to make reasonable adjustments required of it in relation to that disabled person (section 21, paragraph 2).

7.7 The duty to make reasonable adjustments comprises three requirements.

7.8 For service providers, those exercising public functions and associations, the requirements are:

- to take reasonable steps to avoid any substantial disadvantage that a provision, criterion or practice creates for disabled people (section 20, paragraph 3)
- to take reasonable steps to avoid any substantial disadvantage that a physical feature creates for disabled people, or adopt a reasonable alternative (section 20, paragraph 4), and
- to provide an auxiliary aid where not doing so puts disabled people at a substantial disadvantage (section 20, paragraph 5)

For each requirement, the substantial disadvantage created by the lack of reasonable adjustment is measured by comparison with a non-disabled person's experience.

7.9 For associations, the requirements set out in paragraph 7.8 apply in relation to:

- access to a benefit, facility or service
- members or associates retaining their rights, or avoiding having them varied
- being admitted to membership or invited as a guest (schedule 15)

Definition of a provision, criterion or practice

7.10 There is no definitive list of what a provision, criterion or practice is. Further details can be found in paragraphs 5.9 to 5.11 in this Code.

Disadvantage that gives rise to the duty

7.11 For each of the three requirements set out at 7.8, the Act states that disadvantage must be substantial, which is defined as more than minor or trivial (section 212, paragraph 1).

7.12 In the context of a person being subjected to a detriment in the exercise of a public function, substantial disadvantage (schedule 2, paragraph 2(5)(a) and (b)) means:

- being placed at a substantial disadvantage in relation to obtaining a benefit (such as receiving a grant), or
- having an unreasonably adverse experience when being subjected to a detriment (for example, when under arrest)
- The disadvantage created by the lack of a reasonable adjustment is measured by comparison with a non-disabled person's experience[54].

7.13 For service providers and those exercising public functions, the question is whether disabled people generally are put to a substantial disadvantage by a provision, criterion or practice (schedule 2, paragraph 2). As a result, one should look at the effect it is likely to have on people 'who are disabled in the same way' rather than solely on the individual themselves[55]. Even if a provision, criterion or practice applies equally to disabled people and non-disabled people, if it is more likely to substantially disadvantage a disabled person due to their disability, there will be a duty to make reasonable adjustments[56].

Example

7.14 A person exercising public functions introduces a process for assessing claims for employment support allowance that requires those applying to complete a self-assessment questionnaire. This applies to all applicants, both disabled and non-disabled, but the nature of this means the process may not be accessible to people with a severe mental health condition. There is a substantial disadvantage caused in these circumstances because:

- this group may not be able to answer some questions fully because they lack insight into their condition or cannot describe it properly, so that they find parts of the process stressful or confusing, and
- the process may lead the decision-maker to have inadequate or false information about those applicants which means they would be less likely to be granted the employment support allowance

Therefore, there is a duty on the person exercising public functions to make reasonable adjustments to avoid that substantial disadvantage.

Limits on the duty to make reasonable adjustments

7.15 Where the duty to make reasonable adjustments arises, a service provider, person exercising public functions or association cannot justify a failure to make a reasonable adjustment. However, the Act does place specific limits on the duty.

7.16 A service provider (including a person providing a service in the exercise of public functions) will not be required to take any steps which would fundamentally alter the nature of the service or the nature of the provider's trade or profession (schedule 2, paragraph 2(7)).

7.17 Those exercising public functions will not be required to take any steps which are outside their powers (schedule 2, paragraph 2(8)).

7.18 Associations will not be required to take any steps which alter the nature of the benefit, facility or service, or the nature of the association itself (schedule 15, paragraph 2(7)).

7.19 Where meetings take place in the houses of members or associates of associations, those members or associates are not required to make adjustments to any physical feature of their house. Read **Chapter 12** for further details (schedule 15, paragraph 2(8)).

Who the duty to make reasonable adjustments is owed to

7.20 In relation to services and public functions, the duty to make reasonable adjustments is owed to disabled people generally (schedule 2, paragraph 2(2)). It is not simply a duty that is applied in relation to each individual disabled person who wants to access services or who is affected by the exercise of a public function.

7.21 In relation to associations, the pool of disabled people to whom the duty is owed is smaller, but still includes members, those seeking membership, associates and guests, as well as those who might wish to become members and those who are likely to be guests (schedule 15, paragraph 2(2)).

An anticipatory duty: the point at which the duty to make reasonable adjustments arises

7.22 In relation to all three areas (services, public functions and associations) the duty is anticipatory (schedule 2 and schedule 15). This means that service providers, those exercising public functions and associations must proactively consider the barriers that disabled people could face and take action to address those barriers. This should happen before an individual disabled person seeks to use a service, benefit from or be subject to a function, or participate in the activities of an association.

7.23 Service providers, those exercising public functions and associations should therefore not wait until a disabled person wants to use a service, benefit from or be subject to a function, or participate in the activities of an association before they consider their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense or render it too late to comply with the duty to make the adjustment.

Example

7.24 An individual with a visual impairment regularly receives printed letters regarding his welfare benefits from a person exercising public functions, despite the fact that on previous occasions he has indicated his need for Braille and this has been provided. He finds this repeated need to telephone to ask for Braille frustrating and inconvenient, but is told that the software, which generates communications, does not enable a record to be kept of individuals' needs for alternative formats.

The failure to provide Braille letters may constitute a failure to make reasonable adjustments if it is judged to have left the disabled person at a substantial disadvantage and there was a reasonable adjustment that could have been made. Even if Braille documents were provided after a request from the individual, this may constitute a failure to anticipate the needs of people with visual impairments by failing to have a mechanism in place to record an individual's need for an alternative format and so a failure to make reasonable adjustments.

How the duty to make reasonable adjustments applies when the service provider, person exercising public functions or association does not know that the person is disabled

7.25 Because the duty is anticipatory, it applies regardless of whether the service provider, person exercising public functions or association knows that a particular person is disabled or whether it currently has, for example, disabled customers or members.

7.26 When a disabled person seeks to use a service, benefit from or be subject to a function, or participate in the activities of an association, the service provider, person exercising public functions or association must already have taken all reasonable steps to provide access.

Anticipating barriers for people with different kinds of disability

7.27 Service providers, those exercising public functions and associations are not expected to anticipate the needs of every individual who may use a service, benefit from or be subject to a function, or participate in the activities of an association. They are required to think about and take reasonable steps to overcome barriers that may impede people with different kinds of disability. For example, people with dementia, mental health conditions or mobility impairments may face different types of barriers.

7.28 Disabled people are a diverse group with different requirements – for example, visually impaired people who use guide dogs will be prevented from using services with a 'no dogs' policy, whereas visually impaired people who solely use white canes will not be affected by this policy. The duty will still be owed to members of both groups. As a result, a service provider in this case will need to anticipate how its services might need to be adjusted for both groups.

7.29 Once a service provider, person exercising public functions or association has become aware of the requirements of a particular disabled person, it might then be reasonable to take a particular step to meet those requirements. This is especially so where a disabled person has pointed out the difficulty that they face in access or has suggested a reasonable solution to that difficulty.

Example

7.30 A disabled person attending the annual general meeting of an association experiences a flare-up of their medical condition, which means they would have experienced severe back pain when sitting on the hard chairs provided for the meeting. Despite the lack of notice, those organising the meeting were able to find a more suitable chair and make this available to the association member.

7.31 Therefore, there are two components to the duty to make reasonable adjustments: the duty to make anticipatory adjustments for a class of people, as well as the continuing duty to make adjustments in individual cases[57].

How long the duty continues

7.32 The duty to make reasonable adjustments is a continuing duty. Service providers, those exercising public functions and associations should keep the duty and the ways they are meeting the duty under regular review, considering their experience with disabled people wishing to be provided with access. In this respect it is an evolving duty, and not something to be considered once and then forgotten. What was originally a reasonable step to take might no longer be sufficient, and the provision of further, or different, adjustments might then have to be considered.

Example

7.33 A large sports complex amends its 'no dogs' policy to allow entry to assistance dogs. It offers assistance dog users a tour of the complex to acquaint them with routes. This is likely to be a reasonable step for it to take at this stage. However, the complex then starts building work and this changes routes around the complex, making it difficult for assistance dog users to find their way around. Consequently, offering an initial tour is no longer an effective adjustment for assistance dog users. The service provider therefore decides to offer assistance dog users appropriate additional assistance from staff while the building work is being undertaken. This is likely to be a reasonable step for the service provider to take.

7.34 Equally, a step that might previously have been an unreasonable one for a service provider, person exercising public functions or association to take could subsequently become a reasonable step given the changed circumstances. For example, technological developments may provide new or better solutions to the problems of inaccessible services.

Example

7.35 A library has a small number of computers for the public to use. When the computers were originally installed, the library investigated the option of incorporating text-to-speech software for people with a visual impairment. It rejected the option because the software was very expensive and not particularly effective. It would not have been a reasonable step for the library to have to take at that time. The library proposes to replace the computers. It makes enquiries and establishes that text-to-speech software is now efficient and within the library's budget. The library decides to install the software on some of the replacement computers and to give priority access to those computers to visually impaired users. This is likely to be a reasonable step for the library to take at this time.

The meaning of 'reasonable' steps

7.36 The duty to make reasonable adjustments places service providers, those exercising public functions and associations under a responsibility to take such steps as is reasonable in all the circumstances to take. The Act does not specify that any particular factors should be considered. What is a reasonable step for a particular service provider, person exercising public functions or association to take depends on all the circumstances of the case. It will vary according to:

- the type of service being provided, public function being exercised or activity of an association
- the nature of the service provider, person exercising public functions or association, its size and resources, and
- the effect of the disability on the individual disabled person

7.37 The following are some non-exhaustive examples of the factors which might be considered when assessing what is reasonable:

- whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in being provided with access
- the extent to which it is practicable for the service provider, person exercising public functions or association to take the steps
- the financial and other costs of making the adjustment
- the extent of any disruption which taking the steps would cause
- the extent of the financial and other resources of the service provider, person exercising public functions or association
- the amount of any resources already spent on making adjustments
- the availability of financial or other assistance

Example

7.38 Customers in a busy post office are served by staff at a counter after queuing in line. A disabled customer with severe arthritis wishes to post a parcel. He experiences pain when standing for more than a couple of minutes. Other customers would not expect to have to undergo similar discomfort to post a parcel. Thus, the post office's queuing policy places the disabled customer at a substantial disadvantage. Consideration will have to be given to how the queuing policy could be adjusted to accommodate the requirements of such disabled customers.

Depending on the size of the post office, staff could ask the customer to take a seat and then serve him in the same way as if he had queued. Alternatively, it might provide a separate service desk with seating for disabled customers.

7.39 It is more likely to be reasonable for a service provider, person exercising public functions or association with substantial financial resources to have to make an adjustment with a significant cost than it would be for such a body with fewer resources.

Example

7.40 A large shopping centre decides to set up one of its units as a dedicated sensory room, to give people with conditions such as autism and ADHD a space to feel calmer and more regulated. This is likely to be a reasonable step for this service provider to take.

If an individual complained about the lack of a sensory room in a small shopping precinct owned by independent traders, the financial resources of these service providers, along with the costs of such a dedicated space, would be relevant when determining whether such a step is reasonable.

7.41 The resources available to the service provider, person exercising public functions or association as a whole should be considered, as well as other demands on those resources. Where the resources of the service provider, person exercising public functions or association are spread across more than one business unit or profit centre, the demands on them all are likely to be taken into account in assessing reasonableness.

Example

7.42 A small retailer has two shops near to each other. It has conducted an audit to identify what adjustments for disabled people will be needed. At one of its shops, customers with mobility impairments cannot use all the services provided. The other shop can be easily reached by such customers and offers the same services, all of which are accessible to disabled people. Although the retailer originally hoped to make its services in both shops equally accessible, it is constrained by its limited resources. Therefore, for the present, it decides not to make all the services at the first shop accessible to customers with mobility impairments. In these circumstances, it is unlikely to be in breach of the Act.

7.43 The question of the reasonableness of an adjustment is an objective one for the courts to determine.

7.44 Service providers, those exercising public functions and associations should understand that there are no fixed or definitive solutions. Action which may result in reasonable access for some disabled people may not necessarily be effective for others.

Example

7.45 The organiser of a large public conference provides qualified British Sign Language (BSL) interpreters to enable deaf delegates to follow and participate in the conference. However, this does not assist delegates with mobility or visual impairments to access the conference, nor does it help those delegates with hearing impairments who do not use BSL but can lip-read. The conference organiser will also need to consider the requirements of these delegates.

7.46 The purpose of taking the steps is to ensure that disabled people are not placed at a substantial disadvantage compared with non-disabled people when using a service, benefitting from or being subject to a public function or participating in the activity of an association. Where there is an adjustment that the service provider, person exercising a public function or association could reasonably put in place, and which would remove or reduce the substantial disadvantage, it is not sufficient for them to take a different step if that would be less effective in providing access.

7.47 Similarly, a service provider, person exercising public functions or association will not have taken reasonable steps if it attempts to provide an auxiliary aid or service which in practice does not provide disabled people with access.

7.48 In all cases it is important to use, as far as is reasonable, a means of communication which is itself accessible to disabled people.

Example

7.49 In the example at 7.45, the conference organiser provides qualified BSL interpreters for deaf delegates who use BSL and arranges for the interpreters to be seated in a well-lit area. However, the organiser fails to ensure that those delegates have the option to be seated near and in full view of the interpreters. As a result, not all those delegates are able to follow the interpretation. The auxiliary service provided has not been effective in making the conference fully accessible to those deaf delegates.

7.50 In some circumstances, compliance with the duty to make reasonable adjustments will involve placing non-disabled people at an inconvenience[58].

Example

7.51 A train company has a provision, criterion or practice that train conductors should request non-wheelchair users to vacate a wheelchair space if it is required by a wheelchair user. However, the provision, criterion or practice provides that if the non-wheelchair users refuse, the train conductor is not required to do anything further and the wheelchair user will not be allowed to board the train. The train company may be in breach of its duty to make reasonable adjustments, as it is not enough for the train company to instruct its conductors to make the request and then do nothing further if the request is rejected. Although moving may inconvenience non-wheelchair users, the train conductors should be required to take further steps to encourage the service user making an unreasonable refusal to vacate the space to meet the duty to make reasonable adjustments in this case. Wheelchair users should have priority access to wheelchair spaces.

7.52 If, having considered the issue thoroughly, there are genuinely no reasonable steps for a service provider, person exercising public functions or association to take to ensure access for disabled people, it is unlikely to be in breach of the law if it makes no changes. Such a situation is likely to be rare.

Costs of providing reasonable adjustments

7.53 The Act prohibits service providers, those exercising public functions and associations who are under a duty to make reasonable adjustments for a disabled person from requiring those individuals to pay any of the costs of making those adjustments (section 20, paragraph 7). The cost of making any particular adjustment may affect the extent to which that step is a reasonable one for a service provider, person exercising public functions or association to take.

Example

7.54 A library service provides a free creative writing class. It provides materials to all participants but charges a photocopying fee for enlarging materials used in the class for a participant who has a visual impairment. This is likely to be unlawful.

Not complying with the duty to make reasonable adjustments

7.55 Where a service provider, person exercising public functions or association does not comply with the duty to make reasonable adjustments in the circumstances outlined in **Chapter 11** and **Chapter 12**, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this, which could include damages to compensate for any loss suffered, and an injunction or interdict (in Scotland), which is an order to perform, or refrain from performing, a particular act. Read **Chapter 14** for more detail about claims.

7.56 An individual claimant seeking to recover damages for an unlawful act of discrimination arising out of a breach of the duty to make reasonable adjustments should also try to show that they have suffered some detriment as a result of the breach of duty[59].

Burden of proof

7.57 Once an individual claimant has shown that they were substantially disadvantaged and has identified the need for one or more potential reasonable adjustments, then the burden shifts to the service provider, person exercising a public function or association to prove that making those adjustments would not be reasonable.

For the burden to shift, there needs to be sufficient detail about a potential reasonable adjustment to enable a service provider, person exercising a public function or association to assess whether the potential adjustment could reasonably be made. This does not require detailed specifics of the adjustment but should include enough information for a service provider, person exercising a public function or association to understand the broad nature of the adjustment proposed. The individual need not have identified a potential reasonable adjustment at the point in time it should have been made, but needs to have done so by the time of a hearing[60].

The duty to change a provision, criterion or practice

7.58 A service provider, person exercising public functions or association might have a provision, criterion or practice which – perhaps unintentionally – places disabled people at a substantial disadvantage in using its services, benefitting from or being subject to a public function or participating in the activity of an association. In such a case, as described in paragraph 7.8 and paragraph 7.9, the service provider, person exercising public functions or association must take those steps that it is reasonable for it to have to take, in all the circumstances, to change the provision, criterion or practice so that it no longer causes the substantial disadvantage. This may simply mean instructing staff to waive a criterion, amending a practice to allow exceptions or abandoning it altogether. Often, such a change involves little more than an extension of the courtesies which most service providers already show to their customers.

Provision of information: provision, criterion or practice

7.59 The Act states that where a provision, criterion or practice places a disabled person at a substantial disadvantage, and this relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format (section 20, paragraph 6).

Example

7.60 A museum is reviewing the accessibility of its information literature for customers. It decides to change the print size and redesign the appearance of its pamphlets and literature. This makes the information more accessible to its partially sighted customers. It ensures that information is provided using clear accessible language. This makes it easier for people with hearing impairments, learning disabilities or those who speak English as an additional language to access it. These are likely to be reasonable steps for the museum to take. Depending on the size and resources of the museum it may also need to provide auxiliary aids or services, such as Braille or Easy Read versions of the information, for people with other impairments, as outlined in paragraph 7.61.

Auxiliary aids or services

The duty to provide auxiliary aids or services

7.61 A service provider, person exercising public functions or association must take such steps as it is reasonable for it to take to provide auxiliary aids or services as described in paragraphs 7.8 (and, for associations, paragraph 7.9) to remove the disadvantage experienced by disabled people.

7.62 Service providers, those exercising public functions and associations should ensure that any auxiliary aids they provide are properly maintained. It would also be advisable to have in place contingency arrangements, in case of an unexpected failure of an auxiliary aid. A failure to ensure the auxiliary aid is in operation may itself constitute a failure to make an adjustment.

What an auxiliary aid or service is

7.63 An auxiliary aid or service is anything which provides additional support or assistance to a disabled person. Examples include:

- portable ramps or handrails
- signage or notices
- a special piece of equipment or assistive technology
- the provision of a sign language interpreter, lip-speaker or deaf-blind communicator
- extra staff assistance to disabled people
- electronic transcription services
- an induction loop or infrared broadcast system
- video interpreting services
- audio-visual fire alarms
- screen readers or in-person readers for people with visual impairments
- assistance with guiding
- telephone services to supplement other information

Example

7.64 A woman with both learning disabilities and mobility impairments needs to move to a more accessible property. The local authority choice-based letting scheme uses a weekly paper to advertise properties which are available to people with different categories of assessed need. The properties are allocated on a first-come, first-served basis. The local authority agrees with the disabled person that it will allocate a staff member to provide the necessary assistance to enable her to have equal access to housing choice. This is likely to be a reasonable step for the local authority to have to take.

Provision of information: auxiliary aids

7.65 The Act states that where the absence of an auxiliary aid or service places a disabled person at a substantial disadvantage, the steps which it is reasonable for a service provider, person exercising public functions or association to take include steps to ensure that the information is provided in an accessible format (section 20, paragraph 6).

Example

7.66 A cinema chain ensures that subtitled performances of films are shown in all its branches, and that the times of these are advertised prominently. It also purchases equipment to provide audio description of films for visually impaired customers. These are likely to be reasonable steps for the cinema chain to take.

7.67 The Act does not require a service provider, person exercising public functions or association to provide an auxiliary aid or service to be used for personal purposes unconnected to the service, function or activity or to be taken away by the disabled person after use.

Example

7.68 A solicitors' firm lends a digital recorder to a disabled client with multiple impairments who is unable to communicate in writing or attend the firm's office. The client uses this auxiliary aid to record his instructions or witness statement and returns it afterwards. The firm is not required by the Act to let the client borrow the digital recorder for his personal use.

7.69 The Act does not state which particular auxiliary aids or services might be provided in specific circumstances. The duty remains with the service provider, person exercising public functions or association to determine what reasonable steps it might need to take.

Physical features

What a 'physical feature' is

7.70 Physical features of a building or premises include:

- any feature arising from the design or construction of a building
- any feature on the premises of any approach to, exit from, or access to a building
- any fixtures, fittings, furnishings, furniture, equipment (or other moveable property in Scotland) in or on premises
- any other physical element or quality

All these features are covered by the duty, whether the feature in question is temporary or permanent. A building means an erection or structure of any kind.

7.71 Physical features include:

- steps and stairways
- kerbs, exterior surfaces and paving
- parking areas
- building entrances and exits (including emergency escape routes)
- internal doors, external doors and gates
- toilet and washing facilities
- public facilities (such as telephones, counters or service desks)
- lighting and ventilation
- lifts and escalators
- floor coverings, signs, furniture and temporary or movable items (such as equipment and display racks)
- the scale of premises (for example, the size of a shopping centre)

This is not an exhaustive list.

Example

7.72 A large out-of-town shopping centre provides motorised mobility scooters as a reasonable adjustment for people with mobility impairments who would otherwise experience a substantial disadvantage in accessing the shopping centre.

7.73 Where physical features within the boundaries of the premises of a service provider, person exercising public functions or association are placing disabled people at a substantial disadvantage, then the duty to make reasonable adjustments will apply (section 20, paragraph 4 and schedule 2, paragraph 1 and schedule 15, paragraph 1). This will be the case even if the physical features are outdoors, for example, the paths and seating in a pub garden (section 20, paragraph 10).

7.74 A physical feature includes features brought by, or on behalf of, the service provider, person exercising public functions or association onto premises that it does not usually occupy (schedule 2, paragraph 2(6) and schedule 15, paragraph 2(6)).

Example

7.75 An outdoor theatre group brings its own terraced seating to the venues where it performs. The seating would be a physical feature for the purposes of the Act.

The duty to make reasonable adjustments to physical features

7.76 A service provider, person exercising public functions or association must take such steps as it is reasonable to take to avoid putting disabled people at a substantial disadvantage caused by a physical feature.

Avoiding substantial disadvantage

7.77 The Act (section 20, paragraph 9, schedule 2, paragraph 1 and 2 and schedule 15, paragraph 1, 2(3) and 2(5) to 2(8)) states that avoiding a substantial disadvantage caused by a physical feature includes:

- removing the physical feature in question
- altering it, or
- providing a reasonable means of avoiding it

Removing the physical feature

7.78 Removing the physical feature may be a reasonable step, and the most effective one, for a service provider, person exercising public functions or association to take.

Example

7.79 Display units at the entrance of a small shop restrict the ability of wheelchair users to enter the shop. The owner decides that, without any significant loss of selling space, the display units can be removed and repositioned elsewhere in the shop. This is likely to be a reasonable step for the shop to take.

Altering the physical feature

7.80 Altering the physical feature so that it no longer causes disabled people substantial difficulty with access may also be a reasonable step for a service provider, person exercising public functions or association to take.

Example

7.81 A private members' club has a high bar that puts wheelchair users at a substantial disadvantage when wanting to be served at the bar. The club lowers a section of the bar so that wheelchair users can be served more easily. This is likely to be a reasonable step for the club to take.

Providing a reasonable means of avoiding the physical feature

7.82 Providing a reasonable means of avoiding the physical feature may also be a reasonable step for a service provider, person exercising public functions or association to take.

Example

7.83 A probation service holds meetings in its offices with offenders who have been given community rehabilitation orders. The meeting room has two steps into it, which means that people who are wheelchair users or people with mobility impairments cannot use the room. The probation service decides to install a permanent ramp at the side of the two steps to enable disabled offenders to attend meetings. This is likely to be a reasonable step for the probation service to take.

Example

7.84 In the example in paragraph 7.75, the club explores the possibility of lowering the bar but concludes that it is not practicable to carry out the work needed. It decides to offer table service to wheelchair users instead. This is likely to be a reasonable step for the club to take.

7.85 The Act requires that any means of avoiding the physical feature must be a 'reasonable' one. Relevant considerations in this respect may include whether the provision of the service, exercise of the function or activity of the association in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience or anxiety.

Example

7.86 The entrance to a local authority's planning office is up a flight of stairs. At ground level there is a bell and a sign saying 'Please ring for disabled access'. However, the bell is not answered promptly, even in bad weather. Disabled people who are meeting officials often have to wait for an unreasonable amount of time before gaining access to the building. This is unlikely to be a reasonable means of avoiding the feature.

Providing a reasonable alternative method of access

7.87 Where the substantial disadvantage caused by a physical feature cannot be avoided, service providers, those exercising public functions and associations should consider whether there is a reasonable alternative method of providing access for disabled people (schedule 2, paragraph 2(3)(b) and schedule 15, paragraph 2(3)(b)). The Act requires that any alternative method of providing access must be a 'reasonable' one. Relevant considerations in this respect may include whether the provision of the service, exercise of the function or activity of the association in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience or anxiety.

Example

7.88 The changing facilities in a gym are located in a room that is only accessible by stairs. The service provider suggests to disabled users of the gym with mobility impairments that they can change in a corner of the gym itself. This is unlikely to be a reasonable alternative method of making the service available, since it may significantly infringe their dignity.

7.89 Where there is a physical barrier, the aim of the service provider, person exercising public functions or association should be to make its services, functions or activities accessible to disabled people and for their experience to be as close as reasonably possible to the standard offered to non-disabled individuals.

When considering which option to introduce, service providers, those exercising public functions and associations must balance and compare the alternative options available by having regard to the intention of the Act which is, as far as is reasonably practicable, to provide the same access to disabled people as to non-disabled people.

7.90 If a service provider, person exercising public functions or association decided to provide access through an alternative method, and a disabled person brought a claim against it for a failure to make reasonable adjustments, the court determining the claim would be able to consider the other options that could have been introduced to avoid the substantial disadvantage to the disabled person. For example, arranging to provide an in-person service to a disabled person virtually due to accessibility issues will only be a reasonable alternative if there is no reasonable way of providing the disabled person physical access to the service[61].

Example

7.91 An estate agent is marketing a new residential property development. It decides to hold detailed presentations for prospective buyers at the company's premises, at which there will be a talk illustrated with slides. However, the only meeting room available in the building is along a narrow corridor and up a short flight of stairs, making access impossible for some and difficult for others. The estate agent obtains a quotation to make its premises more accessible, but the cost is more than it anticipated and it delays making the alterations.

Some disabled people, who are unable to attend a presentation because the room is inaccessible to them, make enquiries. They are sent copies of comparatively brief promotional literature. This is unlikely to be a reasonable alternative method of making the service available and may leave these disabled people at a substantial disadvantage.

If an issue arose under the Act as to whether the estate agent had failed to comply with its obligations to disabled people, consideration would be given to whether it would have been reasonable to avoid the substantial disadvantage by altering, removing or avoiding the relevant physical features, for example, by holding the meeting at another venue. Consideration would also be given to whether a more effective alternative method of providing the service could reasonably have been adopted. Arranging to meet virtually may have provided an effective alternative method of providing the service if there was no reasonable way of giving the disabled person physical access to the company's premises.

Leases, binding obligations and reasonable adjustments

What happens if a lease says that certain changes to premises cannot be made

7.92 Special provisions apply where a service provider, person exercising public functions or association occupies premises under a lease or tenancy agreement, the terms of which prevent it from making an alteration to the premises (schedule 21, paragraph 3).

7.93 In such circumstances, if the alteration is one which the service provider, person exercising public functions or association proposes to make to comply with a duty to make reasonable adjustments, the Act enables the lease to be read as if it provided:

- for the service provider, person exercising public functions or association to make a written application to the landlord for that consent
- for the landlord not to withhold the consent unreasonably
- for the landlord to be able to give consent subject to reasonable conditions, and
- for the service provider, person exercising public functions or association to make the alteration with the written consent of the landlord

7.94 In this situation, the service provider, person exercising public functions or association should make a written application to the landlord for consent to the alteration. It cannot simply rely upon the lease term preventing it from making alterations to the premises to defend a failure to make an alteration. In deciding whether it was reasonable for the service provider, person exercising public functions or association to have made the alteration, anything in the lease preventing the alteration being made must be ignored.

7.95 Whether a landlord withholding consent will be reasonable or not will depend on the specific circumstances. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the landlord's interest in the premises, the landlord is likely to be acting reasonably in withholding consent. The landlord is also likely to be acting reasonably if it withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).

7.96 A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the landlord's interests and so it would generally be unreasonable to withhold consent for them.

7.97 If the service provider, person exercising public functions or association has written to the landlord for consent to make an alteration and the landlord has refused consent or has attached conditions to its consent, the service provider, person exercising public functions or association or a disabled person who has an interest in the proposed alteration may refer the matter to a County Court (or, in Scotland, to the Sheriff) (schedule 21, paragraph 4). The court will decide whether the landlord's refusal, or any of the conditions, are unreasonable. If it decides that they are, the court may make an appropriate declaration or authorise the service provider, person exercising public functions or association to make the alteration under a court order and may impose conditions.

7.98 In any legal proceedings in a claim involving a failure to make a reasonable adjustment, the disabled individual concerned, or the service provider, person exercising public functions or association, may ask the court to direct that the landlord is made a party to the proceedings (schedule 21, paragraph 5). The court will grant that request if it is made before the hearing begins. It may refuse the request if it is made after the hearing begins. The request will not be granted if it is made after the court has decided the claim.

7.99 Where the landlord has been made a party to the proceedings, the court may determine whether the landlord has refused to consent, or has consented to the alteration subject to a condition. In each case it may decide whether the refusal or condition was unreasonable.

7.100 If the court finds that the refusal or condition was unreasonable it can:

- make an appropriate declaration
- make an order authorising the service provider, person exercising public functions or association to make a specified alteration (subject to any conditions it may specify)
- order the landlord to pay compensation to the disabled person

7.101 If the court orders the landlord to pay compensation, it cannot also order the service provider, person exercising public functions or association to do so.

What happens if a binding obligation other than a lease prevents a building being altered

7.102 The service provider, person exercising public functions or association may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant or, in Scotland, a feu disposition) under which it cannot alter the premises without someone else's consent.

7.103 In these circumstances, the Act provides that it is always reasonable for the service provider, person exercising public functions or association to have to request that consent, but that it is never reasonable for it to have to make an alteration before having obtained that consent (schedule 21, paragraph 2).

The need to obtain statutory consent for some building changes

7.104 A service provider, person exercising public functions or association might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning permission, building regulations approval or a building warrant in Scotland, listed building consent, scheduled monument consent or fire regulations approval. The Act does not override the need to obtain such consents.

7.105 Service providers, those exercising public functions and associations should plan for, and anticipate, the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or alternative adjustment that does not require consent in the meantime.

7.106 The need to obtain statutory consents will be one factor that feeds into the assessment of reasonableness when considering the duty to make reasonable adjustments. However, this factor will not necessarily be decisive, unless consents which are required are refused[62].

Service providers, those exercising public functions and associations should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to consider providing access by a reasonable alternative means.

Special provisions regarding transport vehicles

7.107 The duty to make reasonable adjustments applies to the use of certain transport vehicles. As explained at paragraph 3.31, this Code does not cover these provisions (schedule 2, paragraph 3).

Reasonable adjustments in practice

7.108 When a service provider, person exercising public functions or association is considering making reasonable adjustments, the following measures constitute good practice that may help avoid acts of discrimination. In some circumstances, they may either be a means to identify reasonable adjustments or constitute reasonable adjustments themselves:

- planning in advance for the requirements of disabled people and reviewing the reasonable adjustments in place
- conducting access audits on premises
- asking disabled people for their views on reasonable adjustments
- consulting local and national disability groups
- drawing disabled people's attention to relevant reasonable adjustments so they know they can use the service, benefit from or be subject to a function, or participate in the activities of an association
- properly maintaining auxiliary aids and having contingency plans in place in case of the failure of the auxiliary aid
- training employees how to respond to requests for reasonable adjustments
- encouraging employees to develop additional skills for disabled people, for example, communicating with hearing impaired people
- ensuring that employees are aware of the duty to make reasonable adjustments and understand how to communicate with disabled people so that reasonable adjustments can be identified and made

7.109 It would be advisable for service providers, those exercising public functions and associations to keep a record of any steps they take in relation to those set out in paragraph 7.108.

Chapter 8

Harassment

Introduction

8.1 This chapter of this code of practice (the Code) explains the general test for harassment in the Equality Act 2010 (the Act). It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment and the provisions on less favourable treatment of people who reject or submit to harassment. In relation to the protected characteristic of sex, the definition is as set out in paragraph 2.88

What the Act says

8.2 The Act prohibits three types of harassment. These are:

- harassment related to a 'relevant protected characteristic' (section 26, paragraph 1)
- sexual harassment (section 26, paragraph 2)
- less favourable treatment of an individual because they submit to or reject sexual harassment or harassment related to sex or gender reassignment (section 26, paragraph 3)

These are explained in detail in this chapter.

8.3 The 'relevant protected characteristics' for this Code (section 26, paragraph 5) are:

- age
- disability
- gender reassignment
- race
- sex

8.4 The Act does not prohibit harassment by a service provider or person exercising a public function of people who are under 18 years old (section 28, paragraph 1). This exception does not apply to associations: those under the age of 18 are protected from harassment in this context.

8.5 Pregnancy and maternity are not protected directly under the harassment provisions (section 26, paragraph 5). However, pregnancy and maternity harassment would amount to harassment related to sex.

8.6 The prohibition of harassment as described in this chapter does not protect individuals who have the protected characteristics of sexual orientation or religion or belief (section 29, paragraph 8, section 103, paragraph 2). However, where unwanted conduct related to either of these protected characteristics results in a person suffering a detriment, that person may be able to bring a claim of direct discrimination (section 212, paragraph 5) (read **Chapter 4**).

Harassment related to a protected characteristic

8.7 This type of harassment occurs when a service provider, person exercising a public function or association engages in unwanted conduct which is related to a relevant protected characteristic (section 26, paragraph 1(a)), and which has the purpose or the effect of:

- violating an individual's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for an individual (section 26, paragraph 1(b))

8.8 Conduct that has one of these effects can be harassment even if the effect was not intended. For more information, read about 'purpose or effect' in paragraphs 8.16 to 8.22.

Example

8.9 A publican continually refers to an older man as 'dinosaur' in front of other customers when serving him in a pub.

It is likely that the man would succeed in a harassment claim if he was able to persuade the court that the conduct had the purpose or effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In determining whether the conduct has had such an effect, it would be necessary to consider the perception of the customer, whether it is reasonable for the conduct to have that effect and the other circumstances of the case.

The meaning of 'unwanted conduct'

8.10 Unwanted conduct covers a wide range of behaviour, including:

- spoken or written words or abuse
- 'banter' (teasing or joking talk that is intended to be humorous or friendly)
- imagery
- graffiti
- physical gestures
- facial expressions
- mimicry
- jokes
- pranks
- acts affecting a person's surroundings or other physical behaviour

8.11 This behaviour could be face-to-face, on the phone, in text messages or online, for example through social media or online chat. Unwanted conduct also includes inaction by a service provider, person exercising a public function or association, if that inaction is related to a protected characteristic[63].

Example

8.12 A leisure centre manager is at reception with a colleague. A gym user arrives and the colleague makes fun of their afro hairstyle in front of other gym users. The gym user looks upset and walks away. The manager doesn't say anything because they consider the comment was banter.

The manager's failure to do anything about their colleague's comments could amount to harassment. Hairstyles adopted by specific ethnic groups may be related to race. The manager's inaction could have contributed towards violating the gym user's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

8.13 The word unwanted means essentially the same as 'unwelcome' or 'uninvited' and means 'unwanted by the recipient'. It should be considered from their subjective point of view. However, external factors may be considered by a court in deciding whether it accepts that, subjectively, the conduct was unwanted.

8.14 It is not necessary for any objection to be made to the conduct for it to be 'unwanted'. However, when determining whether conduct was unwanted, a court may take account of whether there was an objection (amongst other things). A serious one-off incident can amount to harassment.

Example

8.15 Two male shop assistants loudly commented on the size of a female shopper's breasts. This could amount to harassment. Such comments could be self-evidently unwanted, and she would not have to object to it before it was deemed to be unlawful harassment.

‘Purpose or effect’

8.16 Regardless of any intended purpose, for all three types of harassment set out in paragraph 8.2, if subjecting the individual to the unwanted conduct has the effect of violating the individual’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, this will be sufficient to establish unlawful harassment. The intended purpose or motive behind the conduct is irrelevant.

Example

8.17 Racist jokes among hospital staff while on duty may violate the dignity of, or create a hostile, degrading or humiliating environment for, a hospital patient or a visitor to the hospital who overhears these comments, even though this conduct was not directed at the patient or visitor themselves.

Example

8.18 A club has an instant messaging group for its committee members. The club manager sends some jokes in the messaging group that are derogatory towards women. It is not the club manager’s purpose to offend or humiliate anyone in the group. However, this may amount to harassment where the effect of the jokes creates a humiliating or offensive environment for a man or woman in the group.

8.19 In deciding whether conduct has the effect of creating any of the circumstances defined in paragraph 8.16, the following points 1) to 3) must be considered (section 26, paragraph 4).

1. The perception of the individual (section 26, paragraph 4(a)); did they regard it as violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them? This part of the test is a subjective question and depends on how the individual regards the conduct. If the individual does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have the effect described in paragraph 8.7[64].

2. The other circumstances of the case (section 26, paragraph 4(b)). Circumstances that may be relevant and need to be considered can include:

    - the personal circumstances of the individual experiencing the conduct, for example, their health, including mental health, their mental capacity, cultural background, race or ethnicity, religion, belief or previous experience of harassment
    - the environment where the conduct took place, for example, where the service provider, person exercising a public function or association is in a position of trust with the individual, or holds any other form of power over them
    - whether the conduct was within an organisation or institution where there is a regular and continuing relationship between that organisation or institution and the individual, such as a hospital or residential care establishment, community home or a prison
    - whether the conduct was intended to cause offence, as conduct that is obviously intended to cause offence is much more likely to be found to have the effect described in paragraph 8.7[65]

3. Whether it is reasonable for the conduct to have that effect (section 26, paragraph 4(c)); this is an objective test.

Courts are unlikely to find that the unwanted conduct has the effect of, for example, offending a service user if the court considers the service user to be hypersensitive and that another person subjected to the same conduct would not have been offended.

8.20 It is relevant to consider whether the alleged harasser is exercising any other rights. For example, if they are expressing an opinion related to a religious or philosophical belief, they may be protected from discrimination and harassment because of or related to that belief. For further information about the protected characteristic of religion and belief, read paragraphs 2.70 to 2.86.

8.21 It is also relevant to consider whether the alleged harasser was exercising any of their convention rights protected under the Human Rights Act 1998. For example, the right to freedom of thought, conscience and religion, or the right to freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case.

8.22 Public authorities also have a duty under the Human Rights Act 1998 not to act incompatibly with rights under the European Convention on Human Rights. Even where the alleged harasser is not a public authority, the court or tribunal must ensure that it interprets the Act compatibly with Convention rights where it can (read paragraphs 1.18 to 1.21).

The meaning of 'related to'

8.23 Unwanted conduct 'related to' a relevant protected characteristic has a broad meaning. It can include many situations, such as those described in paragraphs 8.24 to 8.34.

8.24 Harassment can be related to an individual's own protected characteristic.

Example

8.25 A woman using the gym equipment in her local leisure centre is subjected to comments from male staff members such as 'watch what you say in front of her, it's her time of the month again'. This could amount to harassment.

8.26 Protection from harassment also applies where a person is generally abusive, but, in relation to a particular individual, the form of the unwanted conduct relates to that individual's protected characteristic.

Example

8.27 A hairdresser is often rude to his customers but regards his comments as friendly banter. For example, he often makes rude comments about customers' jobs, weight, height and where they are from. Comments about jobs, weight or height are unlikely to be unlawful because they are unlikely to relate to a protected characteristic. However, a rude comment about where someone is from could relate to race and may amount to harassment if a customer finds the comments humiliating or offensive. It does not matter that the hairdresser is rude to all his customers and did not intend to offend a particular individual.

8.28 An individual does not have to possess the relevant protected characteristic themselves for protection from harassment to arise. This can happen in several different situations.

1. An individual may be associated with someone who has a protected characteristic.

Example

A party of adults with learning difficulties have a meal in a restaurant accompanied by their support workers. Some of the restaurant staff make fun of the party with gestures and silently mimicking them. The support workers are very upset by the conduct of the staff for creating a degrading and humiliating environment for them, as well as for the adults they support. The support workers could bring a claim of harassment related to disability.

2. An individual may be wrongly perceived as having a particular protected characteristic.

Example

A trans woman using the gym equipment in her local leisure centre is subjected to comments from male staff members such as 'watch what you say in front of her, it's her time of the month again'. As with the example at 8.25, this could amount to harassment. However, in this example, the harassment would be related to the trans woman's perceived sex.

3. An individual may be known not to have a particular protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example

A member of staff at a local shop mocks a teenage boy with long hair for being trans when he comes in. The boy now really dislikes going to the shop, especially with his friends as he dreads being insulted and verbally abused. The staff member knows the boy is not trans, and he regards this name calling as just a joke, but this could amount to harassment related to gender reassignment.

8.29 Protection from harassment can arise where the unwanted conduct related to a protected characteristic is not directed at a particular individual, but at another person or nobody.

Example

8.30 A waiter in a restaurant racially abuses a Black customer. As a result of the racial abuse, a White customer is offended and could bring a claim of racial harassment.

8.31 Protection from harassment applies where conduct is not overtly because of a protected characteristic but is associated with it.

Example

8.32 A Sikh man wearing a Kara bracelet walks past two young staff members stacking shelves in a shop. They stare at him as he walks past and then speak to each other making fun of the fact he is wearing a bracelet, within earshot of the Sikh man. The Kara bracelet is related to his Sikh ethnicity, so this could amount to harassment related to race.

8.33 Protection from harassment applies where conduct is not overtly because of a protected characteristic, but the motives of the harasser mean that it is related to it.

Example

8.34 A male library user complains to the library manager that a female librarian has made sexual advances towards him. The manager decides not to conduct a formal investigation into the complaint. She does not take the complaint seriously because it has been raised by a man. The manager's failure to conduct a formal investigation is related to the offender's sex and could amount to harassment related to sex[66].

Sexual harassment

8.35 Sexual harassment occurs when a person engages in unwanted conduct of a sexual nature, which has either the purpose or effect described in paragraph 8.7 (section 26, paragraph 2). The concept of 'unwanted conduct' is explained in paragraphs 8.10 to 8.15.

8.36 Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct, including:

- unwelcome sexual comments or questions
- sexual advances
- staring or leering
- touching
- gestures
- sexual assault
- sexual jokes
- displaying sexual or erotic videos, photographs, drawings or images

8.37 Sexual harassment can happen face-to-face, in phone calls, text messages or online, such as on social media or online chat.

8.38 Conduct of a sexual nature can be from someone of the same or opposite sex. Conduct that was welcomed in the past may become unwanted, for example where two people had a sexual relationship in the past, which has now ended.

Example

8.39 A woman enters a car garage to find three male staff members sitting at a computer watching a social media video with topless women in it. The video is in full view of the customer and the garage staff are laughing and making lewd comments about the video. This could create an offensive, intimidating or degrading environment for the female customer and could therefore amount to sexual harassment.

Less favourable treatment for rejecting or submitting to unwanted conduct

8.40 The third type of harassment occurs when an individual is treated less favourably by a service provider, person exercising a public function or association, because that individual has submitted to, or rejected, unwanted conduct of a sexual nature, or unwanted conduct which is related to sex or gender reassignment, and the unwanted conduct creates any of the circumstances defined in paragraph 8.7 for them (section 26, paragraph 3).

8.41 Under this type of harassment, it may be the same person who is responsible for the initial unwanted conduct and subsequent unfavourable treatment, or it may be a different person (section 26, paragraph 3(a)).

Example

8.42 A female prisoner rejects sexual advances and unwanted touching by a male prison officer. The prison officer subsequently recommends to the assistant governor that her hours of paid work be reduced and the assistant governor acts on the recommendation. This could amount to less favourable treatment for rejecting unwanted conduct.

Example

8.43 A female member of an athletics club tolerates or accepts the sexual joking of another member, even though it is unwanted. The club's social secretary decides not to invite her to social events after observing her accept the sexual joking. This could amount to less favourable treatment for submitting to unwanted conduct.

Statutory defence

Liability of employers and principals

8.44 Employers and principals (as service providers, persons exercising a public function or associations) can comply with the Act and so avoid liability for harassment carried out by their employees or agents if they take all reasonable steps to prevent harassment occurring (section 109, paragraph 4). Read paragraphs 3.36 to 3.49 for further detail.

Chapter 9

Victimisation and other unlawful acts

Introduction

9.1 This chapter of this code of practice (the Code) explains what the Equality Act 2010 (the Act) says about the unlawful acts of:

- victimisation
- instructing, causing and inducing discrimination
- aiding contraventions

Victimisation

9.2 Victimisation does not cover treatment connected to a person's protected characteristic but is intended to protect those who use their rights under the Act or help others to do so.

What the Act says

9.3 The Act prohibits victimisation. It is considered victimisation for a service provider, person exercising a public function or association to subject a person to a detriment because the person has done a 'protected act' (read paragraph 9.5). It is also considered victimisation if the service provider, person exercising a public function or association believes that the person has done or may do a protected act in the future (section 27, paragraph 1).

9.4 An individual need not have a particular protected characteristic to be protected against victimisation under the Act. To be unlawful, victimisation must be linked to a protected act. Only individuals, not organisations, are protected from victimisation.

What a 'protected act' is

9.5 A protected act is any of the following (section 27, paragraph 2):

- bringing proceedings under the Act (section 27, paragraph 2(a))
- giving evidence or information in connection with proceedings brought under the Act (section 27, paragraph 2(b))
- doing anything which is related to the provisions of the Act (section 27, paragraph 2(c))
- making an allegation, whether express or not, that another person has done something in breach of the Act (section 27, paragraph 2(d))

Example

9.6 A trans man sues a pub owner for discrimination on the basis that she makes persistent derogatory remarks to other customers about him being trans. The pub owner bars him from the pub altogether because he has brought a claim. This would be victimisation.

9.7 In the example in paragraph 9.6, if another customer complains to the pub owner about the unfair treatment of the trans customer because of him being trans and the owner then bars this second customer, this would also be victimisation. Whether the second customer is trans would be irrelevant.

9.8 Protected acts can occur in any field covered by the Act and in relation to any part of the Act. For example, a service provider must not victimise a person who has done a protected act in the field of employment.

9.9 Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation (section 27, paragraph 2(c) and (d)).

Example

9.10 The mother of a two-year-old disabled child complains to the staff at a Family Hub that her daughter's physical and social needs are not being properly met. As the Family Hub is provided by the local authority children's services department, the mother also complains to her councillor and to the Director of Children's Services. The Family Hub's staff invite her to a meeting, after which the care of her daughter improves.

The following summer, she applies to go on a trip to the seaside for parents with their disabled children, organised by the department, but is turned down. She believes that she has been victimised because of her complaint about the care of her daughter. Although she did not refer explicitly to the Act when she complained, she asserted that her daughter had been treated less favourably because of a protected characteristic. That is sufficient for her complaint to be a protected act.

9.11 In the case in paragraph 9.10, if the mother's complaint had not referred to her daughter's disability, for example, if she complained that the rooms were dirty or that the food for the children contained too much sugar, that would not be a protected act because the less favourable treatment complained about was not because of a protected characteristic of her daughter.

What a 'detriment' is

9.12 'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider has changed their position for the worse or put them at a disadvantage compared to others.

9.13 For example, the denial of an opportunity can be a detriment. In the example in paragraph 9.10, the mother experiences the detriment of being denied the opportunity of a trip to the seaside with her daughter.

9.14 It does not matter that someone else might not consider the same treatment to be a detriment, provided that the individual concerned does and that at least some people might reasonably consider the treatment to be a detriment[67].

9.15 A detriment might also include a threat made to the individual which they take seriously, and which it is reasonable for them to take seriously. There is no need to demonstrate any physical or economic consequences. However, the treatment must be such that the individual concerned, and at least some other, although not all, reasonable individuals might consider it to be a detriment. An unjustified sense of grievance alone would not be enough to establish detriment[68].

Example

9.16 A woman claims sex discrimination when her political party refuses to nominate her as a councillor. She loses the case, as the court accepts the party's explanation that under its rules, she was ineligible to stand because of her rent arrears.

At a party meeting after this ruling, she again asserts that she was not selected because she is a woman. She is upset when people point out that she lost her case, and the matter is over. Her grievance does not constitute a detriment.

'Because of' a protected act

9.17 Victimisation requires that any detrimental treatment must be 'because of' a protected act. This is the same causal test that applies in direct discrimination[69] (read paragraphs 4.18 to 4.31) except that a protected act rather than a protected characteristic must be the cause of the detriment.

9.18 Victimisation does not require a comparator. The individual need only show that the service provider, person exercising a public function or association subjected them to a detriment because they have done a protected act, or because the service provider, person exercising a public function or association believes, rightly or wrongly, that they have done or intend to do a protected act.

9.19 A protected act needs to be a reason, conscious or unconscious, for the detrimental treatment but it does not need to be the only reason.

9.20 There is no time limit within which victimisation must occur after an individual has done a protected act. However, the individual must be able to show that the detriment was because of the protected act.

Example

9.21 Three years ago, a customer helped an employee of a bank in a sex discrimination claim against the local branch of that bank. Last week, that customer was refused an overdraft facility by the local bank manager who says that he will never forget that tribunal claim. The customer can claim victimisation even though the protected act, giving information which was used in a discrimination claim, took place three years ago.

Bad faith

9.22 An individual cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information, or making a false allegation. Any such action would not be a protected act (section 27, paragraph 3).

Example

9.23 A customer assaulted the landlord of a pub in an unprovoked attack while drunk. In the magistrates' court, she falsely claimed that the landlord was trying to bar her for her behaviour and the landlord would not have done so if she had been a man. She is convicted and the magistrate found that she was an unreliable witness who had fabricated an allegation of sex discrimination to try to avoid conviction.

After the court case she visits the same pub, but the landlord tells her that she is banned for life. As her allegations were false and were made in bad faith, she cannot claim victimisation.

9.24 However, if an individual gives evidence, provides information or makes an allegation in good faith, but it turns out that it was factually wrong or provided in relation to proceedings which are unsuccessful, they will still be protected from victimisation.

Example

9.25 A woman with a hearing impairment who uses an induction loop complains that she has been denied access to conference rooms because the venue owners did not make a mobile induction loop immediately available on request. She brings a discrimination case for failure to make reasonable adjustments, which she loses. Her good faith in bringing the claim is accepted by everyone.

A few weeks later, the woman visits the venue again and tries to book a room but is told that there are no rooms available. As she leaves, she notices another booking being made, so it is clear that conference rooms are available. She believes she is being victimised because of her complaint of disability discrimination. Although she lost her original discrimination claim, she would be able to make a claim of victimisation.

Instructing, causing or inducing discrimination

What the Act says

9.26 It is unlawful to instruct someone to discriminate against, harass or victimise another person, or to instruct a person to help another person to do an unlawful act (section 111, paragraph 1), provided that there is a relevant relationship between the person giving the instruction and the recipient of that instruction (section 111, paragraph 7). Read paragraph 9.35 for further details on what counts as a 'relevant relationship'. Such an instruction would be unlawful, even if it is not acted on.

Example

9.27 A butcher successfully brings a claim for race discrimination against a member of the local business association. In response, the association's organising committee asks its members not to serve the butcher in their businesses. The people on the organising committee could be liable for unlawful instructions to victimise even if their members disregard their instruction.

9.28 The Act also makes it unlawful to cause (section 111, paragraph 2) or induce (section 111, paragraph 3), or to attempt to cause or induce (section 111, paragraph 8), someone to discriminate against, harass or victimise a third person.

9.29 Inducement may involve the offer of some benefit or the threat of some detriment, but that is not necessarily required; the term should not be construed narrowly. If someone has sought to persuade another person to discriminate against, harass or victimise a third person, that may amount to inducement[70]. Nor does the inducement have to be applied directly, it may be indirect (section 111, paragraph 4).

Example

9.30 A sports club has been sponsored by a local sports shop for some years. As part of the sponsorship arrangement, the retailer also gives the club a discount on equipment.

When the new manager of the club discusses the renewal of the sponsorship deal, the shopkeeper makes homophobic comments and says he will only continue the arrangement if no gay people will be selected for the football and cricket teams. The shopkeeper makes a particular remark about a player on the club's football team who is openly gay.

The new manager feels pressured by the threat of the loss of the income and the equipment discount. He removes the player the shopkeeper referred to from the football team.

The player could claim direct discrimination related to sexual orientation against the sports club manager and make a claim for inducement against the shopkeeper.

9.31 In certain circumstances, it is also unlawful for a person to instruct, cause or induce another person to commit an act of discrimination or harassment in relation to a third person in the context of a relationship between the second and third person which has come to an end.

Example

9.32 A play group is insured through the local council and cannot find another insurer. The local council says that it will not insure the group for disabled children who wish to attend. The play group turns away several disabled children who previously attended as a result. The local authority has caused the playgroup to discriminate directly against these disabled children.

9.33 The Act also prohibits a person from causing (section 111, paragraph 2) or inducing (section 111, paragraph 3) someone to help another person to do an unlawful act (section 112, paragraph 1).

9.34 For the purposes of this section of the Act, it does not matter whether the person who is instructed, caused or induced to commit an unlawful act carries it out or not (section 111, paragraph 6). This is because instructing, causing or inducing an unlawful act is in itself unlawful.

When the Act applies

9.35 For the Act to apply, the relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient of the instruction or inducement must be one in which discrimination, harassment or victimisation is prohibited (section 111, paragraph 7). This will include employment relationships, the provision of services or exercising of public functions and other relationships governed by the Act.

Example

9.36 A local authority runs children's social care services in its area. It instructs its social workers, who work as independent contractors, that they must not recommend to the fostering panel any fundamentalist Christian families as being suitable to foster. The relationship between the local authority and the social workers is one in which discrimination is prohibited, under the provisions of Part 5 of the Act relating to contract workers. Therefore, the provisions in regard to instructing, causing or inducing discrimination will apply. Read paragraph 9.39 for more detail about who could bring a claim in this scenario.

Who is protected

9.37 Whether or not the instruction is carried out, but provided that they experience a detriment as a result, the Act provides a remedy for:

- the person who is the recipient of the instruction, causing or inducement
- the intended subject of the discrimination, harassment or victimisation (section 111, paragraphs 5 and 6)

9.38 In addition, the Equality and Human Rights Commission has the power to bring proceedings, regardless of whether anyone has actually experienced a detriment.

9.39 Therefore, in the example at paragraph 9.36, in which the social workers are instructed to discriminate by the local authority, both the social workers and the families affected may have a remedy against the local authority for giving the instruction. If the social workers experience a detriment as a result of this instruction, including a detriment for refusing to comply, they may bring a claim against the local authority. If the social workers comply with the local authority's instruction, families who are denied fostering opportunities as a result may bring claims against the local authority, as well as against the social workers.

Aiding contraventions

What the Act says

9.40 The Act makes it unlawful to knowingly help someone discriminate against, harass or victimise another person (section 112).

9.41 It is also unlawful to help a person to discriminate against or harass another person after a relationship covered by the Act has ended, where the discrimination or harassment arises from and is closely connected to the relationship.

9.42 The Act also makes it unlawful to help with an instruction to discriminate against, harass or victimise another person or with causing or inducing discrimination, harassment or victimisation.

Example

9.43 A GP surgery shares its premises with a dental practice. The dental practice is happy for the GP surgery to recommend the dentists to patients, but asks the surgery's practice manager not to refer any disabled patients because the dentists do not want the cost, or effort, of making any reasonable adjustments.

The GP practice manager complies with the request and when disabled patients make enquiries about the dentist, they are told that the practice is full, which is untrue. A disabled patient could claim for 'instruction to discriminate' against the dental practice and for 'aiding an unlawful act' against the GP surgery.

9.44 The prohibition of aiding discrimination, harassment or victimisation applies to all the areas covered by this Code.

What it means to help someone commit an unlawful act

9.45 'Help' should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible[71].

What the helper needs to know to be liable

9.46 For the help to be unlawful, the person giving the help must know at the time they give the help that discrimination, harassment or victimisation is a probable outcome. But the helper does not have to intend that this should result from the help.

Reasonable reliance on another's statement

9.47 If the helper is told that they are assisting with a lawful act, and it is reasonable for them to rely on this statement, then the help they give will not be unlawful (section 112, paragraph 2), even if it transpires that it assisted with a contravention of the Act. However, it is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of an act (section 112, paragraphs 3 and 4).

9.48 'Reasonable' means having regard to all the circumstances, including the nature of the act and how obviously discriminatory it is, the authority of the person making the statement and the knowledge that the helper has, or ought to have.

Chapter 10

Positive Action

Introduction

10.1 This chapter in this code of practice (the Code) explains the positive action provisions in the the Equality Act 2010 (the Act) (section 158).

What positive action is

10.2 Some people may face barriers in accessing certain services, public functions or associations or have specific needs linked to factors relating to their protected characteristic.

People who share a protected characteristic may also experience disadvantage or disparities in social and economic outcomes that have been partially shaped by economic, social and political factors linked to historic or current discrimination. The causes of these structural inequalities are multiple and complex and can include past or present discriminatory attitudes, behaviours and cultural norms.

10.3 Organisations in the public, private and voluntary sectors often want to take action to address these disparities and improve their services and engagement with particular groups within the community. Steps taken can include providing additional or bespoke services, separate facilities, accelerated access to services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.

10.4 The Act contains provisions which enable service providers, those exercising public functions and associations to take proportionate action to:

- overcome or minimise disadvantage experienced by people who share a protected characteristic
- meet their different needs
- enable and encourage their participation in activities where they are underrepresented

These are known as the ‘positive action’ provisions.

What the Act says

The statutory conditions and stated aims

10.5 A service provider, person exercising public functions or association may take any action which is a proportionate means of achieving the aims stated in the Act ('the stated aims') where they reasonably think that people who share a protected characteristic:

- experience a disadvantage connected to that characteristic (section 158, paragraph 1(a))
- have needs that are different from the needs of persons who do not share that characteristic (section 158, paragraph 1(b))
- have disproportionately low participation in an activity compared to those who do not share that protected characteristic (section 158, paragraph 1(c))

The stated aims

10.6 The stated aims are:

- enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage (referred to in this chapter as 'action to remedy disadvantage') (section 158, paragraph 2(a))
- meeting those needs (referred to in this chapter as 'action to meet needs') (section 158, paragraph 2(b))
- enabling or encouraging persons who share the protected characteristic to participate in that activity (referred to in this chapter as 'action to encourage participation in activities') (section 158, paragraph 2(c))

What 'reasonably think' means

10.7 To take positive action, a service provider, person exercising public functions or association must reasonably think that one of the statutory conditions described in paragraph 10.5 applies, namely, 1) disadvantage, 2) different need or 3) disproportionately low participation.

This means that some indication or evidence will be required to show that one of these statutory conditions applies. That indication or evidence does not, however, have to be sophisticated statistical data or research. For example, it may simply involve looking at the profiles of service users or making inquiries of other service providers in the area. Or, it could involve looking at different rates of take-up of benefits or services, or access to memberships or different rates of exclusions or rejections.

10.8 A decision to take positive action could be based on qualitative evidence, such as consultations with users and non-users or surveys showing poor experiences of a service, public function or association related to a protected characteristic. It may include, for example, evidence from focus groups, complaints, inspection reports, discrimination claims or evidence of similar problems gathered by other organisations.

Example

10.9 A recent prisons inspection report highlighted significant health problems experienced by prisoners who were foreign nationals, due in part to delayed diagnosis and treatment. The report detailed certain diseases to which people from certain countries are particularly vulnerable. Health records showed that few foreign national prisoners sought medical advice until they were seriously ill. This analysis of the health records led the prison authorities to reasonably think that foreign national prisoners had different healthcare needs to those of other prisoners. In addition to improving the training of prison health staff, a monthly medical check-up scheme was established for all foreign national prisoners.

This would be an example of positive action. Although foreign national prisoners were being given a preferential level of treatment, in the form of the monthly medical check-ups, the prison authorities had evidence that one of the statutory conditions described in paragraph 10.5 applies. The aim of introducing the check-ups was to meet that identified need, which is one of the ‘stated aims’ described in paragraph 10.6. Provided the actions taken were considered to be a proportionate means to meet that aim, it would be lawful.

What 'proportionate' means

10.10 To be lawful, any action taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' described in paragraph 10.6.

10.11 Proportionality requires a balancing exercise between the aim sought to be achieved and the less favourable treatment of others it may result in. The disadvantages caused must not be disproportionate to the aims pursued. The courts have broken this down into a four-stage test, which is explained in paragraph 5.53[72].

For a measure to be proportionate:

- The aim must be sufficiently important to justify limiting a protected right.
- The measure must be rationally connected to the aim being pursued. A measure is rationally connected to an aim if its implementation can reasonably be expected to contribute to the achievement of the aim.
- The means chosen must be no more than necessary to accomplish the aim. The court will consider whether another less intrusive measure could have been used without unacceptably compromising the achievement of the aim.
- The impact of the rights infringement must be proportionate to the likely benefit of the measure.

10.12 When considering proportionality in relation to positive action, the factors taken into account will vary depending on the stated aim, as set out in paragraph 10.6. Relevant factors will include:

- the objective of the action taken or to be taken, including the cost of that action
- the seriousness of the relevant disadvantage
- the degree to which the need is different
- the extent of the low participation in the particular activity

Example

10.13 Figures from competition records show that fewer women than men engage competitively in judo and this is because of their lower overall participation in the sport. A national judo organisation considers two options to meet its aim of encouraging women's participation in the sport and thereby increasing their engagement in competitive judo.

One option is to stage a major judo competition with prize money for women that is twice the amount than for men.

The second option is to run a six-month publicity campaign which includes a limited number of free judo taster sessions for women only to encourage women to try out judo.

The first option is unlikely to be a proportionate means of achieving greater participation by women. It would discriminate against men who compete in judo and it would only benefit women already active in the sport. As such, it is unlikely to meet the third and fourth stages of the proportionality test.

The second option is more likely to be a proportionate way to meet the organisation's aim. Although it would involve less favourable treatment of men (both in terms of more limited promotion of men within the sport and exclusion from the free taster sessions), this action could be both appropriate and necessary. It is likely to be effective in attracting more women to the sport, and the less favourable treatment of men would only be short-term.

Action to remedy disadvantage

What disadvantage is for these purposes

10.14 'Disadvantage' is not defined in the Act. It may, for example, include exclusion, rejection, lack of opportunity, lack of choice, barriers to accessing services or disparities in social and economic outcomes (read paragraph 5.20). Disadvantage may be obvious from statistical sources, such as national data. In other cases, it may be shown by qualitative evidence or from the results of monitoring that has been carried out.

Action taken to enable or encourage people to overcome or minimise the disadvantage

10.15 The Act does not limit the action that could be taken, provided it satisfies the statutory conditions and is a proportionate means of achieving this stated aim (section 158, paragraph 2(a)). For example, such action could include identifying possible causes of the disadvantage through consultation, surveys or a review of data, and then:

- targeting services at specific disadvantaged groups, for example, by advertisements, outreach programmes or special arrangements
- providing services or certain types of memberships specifically aimed at a disadvantaged group
- providing services or exercising public functions in a different way, for example, at different times or locations

10.16 The Act allows action to be taken where people who share a protected characteristic experience a disadvantage connected to that characteristic, to overcome or minimise the disadvantage. The action can be both enabling, such as providing group specific services, and / or encouraging, such as advertising a service in a publication aimed at a particular group.

Example

10.17 A local crime survey found that Muslims in the area had a significantly greater fear of crime than any other group, and police data suggested that Muslims were more likely than other groups to be victims of crime.

The police consulted with members of the community, including holding meetings in Muslim community centres, about what actions could be taken to help people feel safer. Taking account of the feedback from the meetings, the police developed a programme of actions to address the concerns raised. This included actions such as visiting Muslim shopkeepers to advise them on crime prevention, and uniformed female police officers meeting groups of Muslim women to discuss personal safety for them and their children. Provided there was a reasonable belief that the disadvantage existed, and that the action was considered to be proportionate, this would be lawful positive action.

Action to meet needs

What 'different' or 'particular' needs are

10.18 A group of people who share a particular protected characteristic have 'different needs' if, due to past or present discrimination, disadvantage or factors that especially apply to people who share that characteristic, they have needs that are different from the needs of others. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered 'different'. Needs may also be different because, compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

10.19 For example, all pregnant women need good antenatal care. However, the high rate of infant mortality among Gypsies, Roma and Travellers may indicate that they have different needs for antenatal, maternity and child health services, such as requiring more frequent antenatal health checks.

Action taken to meet 'different' or 'particular' needs

10.20 The Act does not limit the action that service providers, those exercising public functions or associations can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving this stated aim (section 158, paragraph 2(b)). Such action could include:

- reallocating resources to provide services in a particular geographical location or at a particular time, for example, increased police patrols outside gay clubs to improve protection against homophobic hate crime
- adopting ways of providing a service or public function to meet the different needs of a particular group, for example, providing additional clinics for members of a racial group known to have particular health needs
- providing services specifically aimed to meet particular needs, for example, English language classes, training, or culturally or religiously appropriate mental health services

Example

10.21 A voluntary organisation runs support groups for prospective adoptive parents. To improve its work, the organisation surveyed past and current group participants. It found that lesbian and gay participants were less satisfied than other parents because, though they shared all the same concerns as the other parents, they had additional issues and anxieties that they had not felt able to raise in the mixed groups. To meet their particular needs, the organisation added a separate support group for lesbian and gay prospective adopters to its programme, which they could attend in addition to the mixed support group.

Action to encourage participation in activities

What activities can action apply to

10.22 This provision applies to participation in any activity where the participation of those who share a protected characteristic is disproportionately low. It includes activities undertaken, organised or facilitated by a service provider, person exercising public functions or association. It might include sporting activities, membership of a local patients committee, or attendance at educational, cultural or entertainment venues or events. It might include voting in national or local elections. It may also involve low take-up of membership or benefits of an association, or of services and facilities such as libraries, leisure services and services for children, disabled people or older people.

What 'disproportionately low' means

10.23 The Act says that action can only be taken where the service provider, person exercising a public function or association reasonably thinks that participation in an activity by people sharing a particular protected characteristic is 'disproportionately low' (section 158, paragraph 1(c)). This means that the service provider, person exercising a public function or association will need to have some reliable indication or evidence that participation by that protected group is low compared with that of other groups or, compared with the level of participation that could reasonably be expected for people from that protected group. The service provider, person exercising a public function or association may base their opinion on empirical evidence including statistical data or, where this is not available, more qualitative forms of evidence derived from, for example, consultations, surveys or reviews.

Action that can be taken

10.24 The Act does not limit the action service providers, those exercising a public function or associations can take to enable or encourage people who share the protected characteristic to participate in an activity. This is on the condition that the action satisfies the statutory conditions and is a proportionate means of achieving the stated aim of enabling or encouraging participation. Such action could include:

- providing training targeted at people with the protected characteristic
- extending or changing locations or times for activities to take place
- providing activities in different ways
- improving or making more relevant the content and forms of information, advertisements and advice
- using outreach programmes and mentoring

Example

10.25 A youth orchestra, which is run by the local authority education services, has no African-Caribbean musicians even though there is a large local African-Caribbean population. Historically, the orchestra had problems with racism among some of its members. To gain support within the African-Caribbean community, the local authority made their absolute intolerance of racist behaviour clear to its members and staff and made diversity training mandatory for all staff.

Taking account of the very low level of participation amongst members of the African-Caribbean community in the orchestra, and the historical reasons for this, the local authority then decides to go further and use the positive action provisions under the Act. It collaborates with prominent African-Caribbean musicians to search for talented young African-Caribbean musicians. It holds open trials for young people from this community, offering the most talented musicians limited free tuition aimed at helping them prepare to audition for places in the orchestra the next time there are vacancies.

Provided there is a reasonable belief that participation by African-Caribbean musicians is disproportionately low and the actions the local authority takes are a proportionate means of achieving the aim of encouraging more participation, this would be lawful positive action.

Taking action when one or more of the statutory conditions apply

10.26 Action may be taken when any one or all of the statutory conditions listed in paragraph 10.5 apply. Sometimes the conditions will overlap, for example, people sharing a protected characteristic may be at a disadvantage which may also give rise to a different need or may be reflected in their low level of participation in particular activities.

Example

10.27 Research indicates that women experience significant disadvantages in pursuing successful careers in science as reflected in their low participation in the profession, their under-representation in senior roles within it and their having fewer articles published in prominent science journals. One of the factors contributing to this is the lack of visible role models. A leading publisher of science journals establishes an annual award for science writing by women to raise the profile of women currently working in science and encourage girls to consider it as a career.

The action taken here would be taken in accordance with both aims (a) and (c) of section 158(2), which overlap in this scenario. Provided it was reasonable to think that there was a disadvantage to women, disproportionately low participation and the action was considered to be proportionate, the creation of the women's science writing award would be lawful positive action.

Example

10.28 A local police force was aware of the under-reporting of antisemitic hate crime. They were advised by Jewish organisations that many of their members had low levels of trust in the police and several felt that complaints about antisemitic crime were not taken seriously. Research demonstrated that other groups with protected characteristics in the local area were not as concerned about under-reporting within their communities.

To provide better protection for the Jewish community, the police established a dedicated specially trained investigation team and, in conjunction with local organisations, set up several different reporting points for antisemitic crime. Monitoring showed increased rates of crime reporting and prosecution as well as greater trust in the police and an improved sense of safety among the Jewish community.

This would be an example of positive action because the police service took action that would potentially favour one religious group over other religious groups. The action would be to address two aims set out in section 158(2): minimising the disadvantage that members of the Jewish community had experienced in relation to reporting crime, and to enable or encourage participation in the reporting of crime. Provided it was reasonable to think that there was a disadvantage to members of the Jewish community in reporting crime, and that there was low crime reporting, then the actions of the police, if proportionate in that context, would be lawful positive action.

Voluntary nature of positive action

10.29 Positive action is optional, not a requirement. However, service providers and those exercising public functions that take positive action often see broader benefits to their organisations, such as improved quality and take-up of services or increased effectiveness and quality of public functions. Associations can strengthen their membership base and improve the benefits and services they provide to all their members.

Time-limited positive action

10.30 If positive action continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been the basis for positive action in accordance with the statutory conditions. This could make it unlawful to continue to take the action.



10.31 Therefore, when undertaking measures under the positive action provisions, it is advisable for service providers, those exercising public functions and associations to indicate that they intend to take the action only while the relevant statutory condition(s) apply, rather than indefinitely. During that period, they should monitor the impact of their action and review progress towards their aim.

Example

10.32 A private beauty college noted that although they had tried different forms of advertising, very few of their students were from the large local Bangladeshi community. The college principal went out to meet Bangladeshi groups and community clubs to promote the college. The college decided to offer a two-hour free 'taster' course for Bangladeshi people only. This resulted in an increased number of Bangladeshi students. As Bangladeshi enrolment is no longer disproportionately low, there is no longer a basis under the Act for the college to continue this positive action measure.

Positive action and disability

10.33 The Act does not prohibit treating a disabled person more favourably than a non-disabled person in relation to direct discrimination (section 13, paragraph 3). This exception applies only to disabled people. Therefore, it is not direct discrimination for service providers, those exercising public functions and associations to treat a disabled person more favourably than a non-disabled person. This means that a service provider, person exercising a public function or association can choose to only provide services to disabled people and this will be lawful.

10.34 However, the positive action provisions may still be appropriate to achieve equality of opportunity between disabled people with different impairments. This means that a service provider, person exercising public functions or association can implement positive action measures to overcome disadvantage, meet different needs or increase participation of people with one impairment but not those with other impairments.

Example

10.35 A theatre has carried out an analysis of theatre goers and has identified that attendance by Deaf people among their audiences is disproportionately low. To meet its reasonable adjustment duty, the theatre schedules a British Sign Language signer for certain performances of a new play. During the first two weeks, Deaf customers, but not customers with other impairments, are offered a 15% discount for the performances with a signer. This is publicised to the Deaf community.

Provided there is a reasonable belief that Deaf people's attendance is disproportionately low and the action the theatre takes to encourage their greater participation is proportionate, this would be lawful positive action.

Positive action and the public sector equality duties

10.36 Public authorities and those exercising public functions who are subject to the public sector equality duties may wish to consider using positive action to help them comply with those duties (section 149, paragraphs 1 and 3).

Political parties and positive action

10.37 The Act recognises that certain groups who share particular protected characteristics are underrepresented among elected decision-makers. The Act includes special provisions enabling political parties to take proportionate action in selecting candidates to reduce inequality in their representation in relevant elected bodies (section 104). This is discussed in paragraphs 12.83 to 12.89.

Implementing positive action lawfully

10.38 To identify possible causes of disadvantage, different needs and underrepresentation, and to develop appropriate positive action measures, service providers, those exercising public functions and associations will benefit from the involvement of members of groups sharing a relevant protected characteristic. The contribution of such groups will also benefit the evaluation of positive action measures.

10.39 To ensure that any potential positive action measures they propose to take are lawful, service providers, those exercising public functions and associations should consider creating an action plan which sets out:

- evidence of the disadvantage, particular needs or disproportionately low levels of participation, as appropriate, and an analysis of the causes
- which stated aim the service provider, person exercising public functions or association is seeking to achieve detailing the anticipated specific outcomes
- the specific action(s) they propose to take to achieve the desired outcome, in line with the relevant stated aim(s)
- an assessment of the proportionality of the proposed action(s) steps
- the steps the service provider, person exercising public functions or association decides to take to achieve the stated aim(s)
- measurable indicators of progress towards those stated aims, set against a timetable
- Service providers, those exercising public functions and associations are advised to keep some form of written record with this information.

10.40 To ensure that there is understanding and support for their action, it is important that service providers, those exercising public functions and associations explain why positive action is being taken and is lawful. That explanation should include the basis on which they are proposing particular, time-limited, positive action steps.

Example

10.41 In response to evidence about bisexual women and lesbians' negative experiences with health professionals, a hospital looked at how to improve the health services for this group of women. They produced a series of posters designed to encourage lesbian and bisexual women to access health services, including information on what to do if they have a bad experience. The aims of the poster campaign and how to respond to any queries or complaints from other patients were explained to staff in surgeries displaying the posters. This enabled staff to deal effectively with any questions or concerns raised by service users.

Chapter 11

Services and Public Functions

Introduction

11.1 This chapter of the code of practice (the Code) explains how the Equality Act 2010 (the Act) applies to the provision of goods, facilities and services and to the exercise of public functions. It explains what is meant by unlawful discrimination and the duty to make reasonable adjustments in these areas. In practice, the duties under the Act on persons providing a service and on those exercising public functions are essentially the same. The Act applies differently to associations and this is explained in **Chapter 12**.

11.2 The provisions on services and public functions apply to all protected characteristics apart from:

- marriage and civil partnership
- age, so far as a person is under 18 (section 28, paragraph 1)

What discrimination means in this chapter

11.3 Any reference to 'discrimination' in this chapter is a reference to any or all of these forms of discrimination, unless indicated otherwise:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- pregnancy and maternity discrimination
- failure to make a reasonable adjustment

Services

What a service is

11.4 A provider of services is anyone who is concerned with the provision of services to the public, or to a section of the public, whether or not for payment (section 29, paragraph 1). Services include the provision of goods and facilities (section 31, paragraph 2).

11.5 A range of services are covered by the Act, including giving access to and use of any place which members of the public are permitted to enter. Among the services covered are those provided to the public, or a section of the public, by:

- local authorities, government departments and their agencies
- charities, voluntary organisations
- hotels, restaurants, pubs
- post offices, banks, building societies
- solicitors, accountants, advice agencies
- telecommunications organisations, public utilities (such as gas, electricity and water suppliers)
- services provided by bus and train operators, railway stations, airports
- public parks, sports stadia, leisure centres
- theatres, cinemas, hairdressers, shops, market stalls, petrol stations, telesales businesses
- hospitals and clinics

This list provides examples only and does not cover all the services covered by the Act.

11.6 Services are covered regardless of whether they are provided by a private, voluntary or public body. For example, the provision of nursery and day care or the running of residential homes and leisure centre facilities will be subject to these provisions whether provided by a private body or local authority.

11.7 It is important to remember that it is the provision of the service that is subject to the Act. In many cases, a service provider is providing a service in several different ways. In some cases, those ways might be so distinct that each is regarded as a service in itself and subject to the Act[73].

Example

11.8 A bus company provides timetables for its bus services. It provides both printed copies and, for visually impaired people, it provides a free phone line where details of the bus times are given. The provision of timetables is the relevant service which will be subject to the provisions of the Act. The different formats used to provide the service are not so distinct from each other to amount to separate services.

Example

11.9 A bank provides face-to-face and online banking services. Although these are different methods of banking, the way in which they are provided are so distinct that they each amount to a separate service and are each subject to the provisions of the Act.

Liability for discrimination where services are provided to the public by more than one provider

11.10 A service to the public might appear to be provided by more than one service provider. In such a case, it may be important to identify who is responsible for providing whichever aspect of the service has caused the alleged discrimination. In some cases, liability under the Act may be shared among several service providers. It is possible, for example, for two service providers to both be responsible for providing a service and therefore to share obligations under the Act in respect of that service. It is irrelevant how they decide between them what to do to meet their duties, but the obligations under the Act must in fact be met. This is likely to be of particular importance in relation to the duty to make reasonable adjustments for disabled people.

Example

11.11 A disabled passenger at an airport requires use of a wheelchair to get to the departure gate after checking in. Both the airline and the owner manager of the airport could be responsible for ensuring passengers have access to and use of the 'airside' area of an airport between the check-in desks and the departure gates. If the disabled passenger is not provided with a wheelchair free of charge to assist them to get to their departure gate, this may amount to a failure to make a reasonable adjustment in respect of the service that both the airline and the owner manager of the airport are providing. In this situation, both the airline and the owner and manager of the airport could be liable for discrimination.

Example

11.12 A bank has a cash machine inside a supermarket. Although the cash machine is located on the supermarket's premises, the service is being provided by the bank. The bank is likely to be responsible for any duties that may arise under the Act in respect of the cash machine. However, both the bank and the supermarket are likely to be responsible for ensuring that the cash machine is physically accessible to disabled customers using the supermarket's premises.

Public functions

What a public function is

11.13 For the purposes of the Act, only those functions of a public authority which are not services and which do not fall within Part 4 (premises), Part 5 (work) and Part 6 (education) of the Act are covered by the public function provisions. Often, the public authority will be acting under a statutory power or duty when performing such a function. Examples of such activities would be law enforcement or the collection of taxes.

11.14 However, public functions are not only carried out by public authorities. They may also be carried out by private or voluntary organisations, for example, when a private company manages a prison or when a voluntary organisation takes on responsibilities for child protection.

11.15 The Act states that a public function has the same meaning as a 'function of a public nature' for the purposes of the Human Rights Act 1998 (section 31, paragraph 4). In relation to private or voluntary organisations, this would cover activities carried out on behalf of the State which are not similar in kind to services that could be performed by private persons (section 6, paragraph 3(b) Human Rights Act 1998).

11.16 The term 'public function' may cover a wide variety of actions such as:

- determining frameworks for entitlement to benefits or services
- law enforcement
- receiving someone into a prison or immigration detention facility
- planning control
- licensing
- enforcement of parking controls, trading standards, environmental health
- exercise of statutory powers under mental health and child protection legislation
- regulatory functions
- investigation of certain complaints

This list is for example only and does not include all functions which fall under this part of the Act.

Interaction with the service provisions

11.17 Whether or not an activity is a service to the public, or a public function, will depend on the circumstances of the case. Many of the activities that a public authority carries out are services to the public, for example, the provision of library or leisure services. Such activities will be subject to the provisions of the Act relating to the provision of a service to the public (section 31, paragraph 3).

Example

11.18 A police officer is organising a community safety meeting and prepares literature to share about crime prevention. In giving this information to the community, the police are likely to be providing a service.

Example

11.19 Where a police officer is carrying out a search as part of a criminal investigation, they are likely to be exercising a public function, and not a service.

Unlawful discrimination in relation to services

11.20 The Act says that it is unlawful for a service provider to discriminate against a person requiring, or seeking to obtain or use, a service by not providing that person with the service.

11.21 In this context, a reference to a service provider not providing a service (section 29, paragraph 1) includes:

- the service provider refusing to provide the person with the service
- the service provider not providing the person with the quality of service that is usually provided to the public (or the section of the public that includes that person) (section 31, paragraph 7(a))
- the service provider not providing the person with the service in the manner, or on the terms, which are usually provided to the public (or the section of the public that includes that person) (section 31, paragraph 7(b))

11.22 It is also unlawful for a service provider to discriminate against a person:

- in relation to the terms on which the service is provided to that person
- by terminating the service to that person
- by subjecting that person to any other detriment (section 29, paragraph 2)

11.23 These provisions may overlap so that, for example, rude or offensive behaviour towards a customer or potential customer will constitute a lower standard of service or a detriment. A lower standard of service might constitute not providing the service in the manner and the terms on which the service is normally provided (section 31, paragraph 7).

11.24 Discrimination in the terms of service could include charging more for goods or services or imposing extra conditions for using a facility or service.

11.25 'Detriment' is not defined by the Act and is a very broad term, which may take many forms. For an explanation of 'detriment' read paragraphs 9.12 to 9.16.

Example

11.26 A bed and breakfast owner insists that a lesbian couple have separate single rooms when they had booked a double room, even though a double room is available. By being denied access to the room they had booked, the lesbian couple would have been discriminated against in two ways. Firstly, by being subjected to a detriment: the less favourable treatment they receive could amount to direct discrimination because of sexual orientation. Secondly, being denied access to the room would also constitute discrimination in the terms of the service and refusal of service.

Example

11.27 The owner of a café asks a woman who is breastfeeding her baby to feed him in the toilets, stating that it might offend other customers. When she refuses, he asks her to move from her window seat to an empty corner and to finish her drink quickly. This could amount to discrimination because of pregnancy and maternity, as the woman is unable to use the service in the same way as others are able to.

Example

11.28 A utility company has a policy of speaking only to the named account holder and not to a third party. This could amount to indirect discrimination against a deaf person who uses a registered interpreter to call the company.

Example

11.29 A man who wants to book a restaurant table for his 21st birthday party is asked to pay a 50% deposit because the restaurant owner believes that younger customers are less likely to honour the booking. This is likely to be direct age discrimination in the terms of service unless it can be justified (read paragraphs 4.74 to 4.84).



11.30 Even if a service provider thinks that they are acting in the best interests of a service user, their action may still create a detriment for that person (section 29, paragraph 2).

Example

11.31 An assistant in a small shop refuses to serve a disabled person with a mobility impairment, arguing that a nearby larger shop can offer better access. This is a refusal of service and is likely to be against the law, even if the shopkeeper had the best interests of the person in mind.

11.32 It is lawful for a service provider to provide services or sell goods which by their nature are likely to be used or purchased by people who share a protected characteristic, provided that the service provider does not refuse to provide the service to persons who do not share that characteristic. For example, it would be discrimination if a Kosher butcher with a mainly Jewish clientele refused to sell their Kosher meat to people who are not Jewish.

Unlawful discrimination in relation to the exercise of public functions

11.33 The Act prohibits discrimination in the exercise of a public function (section 29, paragraph 6). This provision would cover, for example, refusing to allow someone to benefit from the exercise of a function or treating someone in a worse manner in the exercise of a function. For example, refusing a licensing application or stopping and searching an individual because of a protected characteristic.

Example

11.34 A disabled person with Tourette's syndrome makes involuntary noises during an interview about their claim for a Council Tax reduction. The interviewer says the interview cannot be continued while they are making such noises, and that they will have to return on another day. This is likely to amount to discrimination arising from disability. It will be unlawful unless it can be justified or the council can show that it did not know, and could not reasonably be expected to know, that the person had a disability.

Example

11.35 A breastfeeding mother is asked to sit behind a screen in a planning inquiry hearing because a councillor is uncomfortable with her breastfeeding her baby in public. She cannot see the person running the meeting, ask questions or communicate with other members of the audience. This is likely to amount to discrimination because of pregnancy and maternity and will be unlawful.

Example

11.36 A couple in their early 20s buy a market stall from the previous owners who are retiring after 50 years. The local authority street trading service begins to make unannounced visits to the stall because they believe young people are more likely to break street trading laws. These visits affect the couple's business reputation. This treatment is likely to be direct age discrimination unless it can be objectively justified.

Failure to make a reasonable adjustment in service provision and in the exercise of a public function

11.37 Discrimination also occurs when a service provider or a person exercising a public function fails to comply with the duty to make reasonable adjustments. The duty arises where a disabled person is put at a substantial disadvantage compared with non-disabled people by a provision, criterion, practice, a physical feature or the lack of an auxiliary aid or service. The duty to make reasonable adjustments is explained in more detail in **Chapter 7**.

Example

11.38 A museum has procedures for the evacuation of the building in the event of a fire or emergency. Visitors are required to leave the building by designated routes. If the museum does not ensure its procedures enable visitors with mobility or sensory impairments to be evacuated safely, this is likely to be a failure to make a reasonable adjustment.

Example

11.39 A prison has a policy of opening its library and health centre every morning from 10am until 11am This means that disabled prisoners who have morning medical appointments at the health centre are not always able to use the library. The prison adjusts the library's opening times so that it is open for an hour in the evening as well. This is likely to be a reasonable adjustment for the prison to make.

11.40 In relation to the exercise of a public function, the Act says that being placed at a substantial disadvantage (schedule 2, paragraph 2(5)) means:

- If a benefit is or may be conferred in the exercise of the function, the person being placed at a substantial disadvantage in relation to the conferment of the benefit, or
- If a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

Example

11.41 An ombudsman has a policy that all requests for it to use its regulatory powers must be made in writing. This policy places some disabled people, for example, those with learning disabilities or visual impairments, at a substantial disadvantage in making a complaint. The ombudsman amends the policy to permit disabled people and others who cannot use a written procedure to make their request over the telephone. This is likely to be a reasonable adjustment for the ombudsman to have to make.

11.42 'Unreasonably adverse' is not defined in the Act. The exercise of some functions may in fact have an adverse effect on the person who is subject to them – for example, being arrested. These are 'negative' functions. The aim of the reasonable adjustment duty in these circumstances is to ensure that, in so far as is reasonably possible, disabled people do not have a substantially worse experience in relation to the exercise of these functions than other people. 'Unreasonably adverse' is intended to represent the same level of difficulty as 'substantial' disadvantage. Read paragraphs 7.11 to 7.14 for more detail.

Example

11.43 A police force has a policy of not carrying any civilian dogs in police cars. This practice makes the experience of being arrested worse for disabled people who require guide or assistance dogs compared with those who do not. The police force amends its policy so that in these circumstances a dog can be carried in the car with the disabled person. This is likely to be a reasonable step for the police force to have to take.

11.44 Where a benefit is, or could be, conferred by the exercise of a public function, substantial disadvantage can arise both in relation to the conferment or refusal of the benefit (the outcome) and the process of acquiring or seeking to acquire it. This means that if an individual experiences a detriment in the process of acquiring a benefit, this can give rise to legal claim, even if the benefit is conferred[74].

Example

11.45 A man applying for social security benefits has mental health problems which mean he has difficulty concentrating and answering questions during a lengthy interview. He asks for additional time for the interview, including a short break, but that adjustment is not made. As a result, he finds the interview process very stressful. It is likely that the way the interview was conducted, as part of the process of acquiring the benefit, would amount to a substantial disadvantage. The fact that his benefit application is ultimately successful does not affect his claim that he was subjected to a detriment during the application process.

If his application was unsuccessful, he could also bring a claim on the grounds that he was subject to a disadvantage regarding the outcome of his application.

Physical features

11.46 In relation to physical features, the duty requires that service providers and those exercising public functions take such steps as it is reasonable to have to take to avoid the disadvantage, or to adopt a reasonable alternative method of exercising the function (section 20, paragraph 4 and section 29, paragraph 7).

Limitations on the duty to make a reasonable adjustment

11.47 Those exercising public functions are not required to take any steps which are beyond their powers to take (schedule 2, paragraph 2(8)).

Example

11.48 A person with a spinal injury wishes to take part in jury service but requires a support worker for assistance with day-to-day activities. While disabled people are not prohibited from jury service, the court cannot allow the support worker into the jury room as a reasonable adjustment because criminal law does not permit there to be an 'extra' person in the jury room other than those providing BSL services. In these circumstances, the public authority does not have the power to take the steps required to enable the person to take part in jury service.

11.49 In relation to services, a service provider will not be required to take any steps which would fundamentally change the nature of the service or the nature of the provider's trade or profession (schedule 2, paragraph 2(7)).

Example

11.50 A restaurant that offers a 'dining in the dark' experience is unlikely to have to turn its lights on for a deaf customer who needs to be able to lip read to communicate, as this would fundamentally change the nature of the service being offered.

Other prohibited conduct

Harassment

11.51 The Act also makes it unlawful for a person to do anything that amounts to harassment when providing a service or exercising a public function (section 29, paragraph 3 and 6).

Harassment is explained in more detail in **Chapter 8**.

Example

11.52 A Black woman goes into a pub to watch a football match. While the match is in progress, the bartender makes racist remarks about some of the footballers on the pitch. The woman is offended by the remarks. She could complain of harassment to the pub and she could also complain of direct discrimination because of race, as the pub is providing a worse service to her than it is to other customers.

11.53 The prohibition on harassment in the provision of a service or in the exercise of a public function covers the following protected characteristics: age (where an individual is 18 or over), disability, gender reassignment, race and sex (section 26, paragraph 5 and section 28, paragraph 1). Harassment of individuals who have the protected characteristics of sexual orientation or religion or belief are not protected (section 29, paragraph 8). However, 'unwanted conduct' because of either sexual orientation or religion or belief, which causes someone a detriment amounting to less favourable treatment, could constitute direct discrimination (section 212, paragraph 5). **Chapter 4** explains direct discrimination in detail. Pregnancy and maternity are also not protected under the harassment provisions of the Act (section 26, paragraph 5). However, pregnancy and maternity harassment would amount to harassment related to sex. **Chapter 8** explains the harassment provisions in detail.

Example

11.54 A bed and breakfast owner makes derogatory remarks related to sexual orientation to a lesbian couple. The couple could bring a claim of direct discrimination.

Victimisation

11.55 The Act also makes it unlawful for a person to victimise a person when exercising a public function or when providing a service (section 29, paragraph 4 and section 29, paragraph 6) by:

- not providing that person with the service (section 29, paragraph 4)
- providing the service to that person on less favourable terms (section 29, paragraph 5)
- terminating the provision of the service to that person (section 29, paragraph 5)
- subjecting that person to another detriment (section 29, paragraph 5)

Example

11.56 A woman makes a complaint that a sales assistant at a coffee shop is sexually harassing her. A month later when she tries to use her loyalty card for existing customers she is told the scheme is no longer in operation. However, she finds out that this is not true because a friend claims a discount with her loyalty card later that same day. She believes that she has been victimised because of her complaint and could have a remedy under the Act.

11.57 Victimisation and other prohibited conduct, such as aiding an act of discrimination, is explained in **Chapter 9**.

Relationship of Part 3 to other Parts of the Act

11.58 As explained in Chapter 3, the disposal and management of premises, employment, education and certain aspects of transport are addressed by other Parts of the Act (Parts 4, 5, 6 and 12 respectively) and are not covered by this Code. However, where those Parts do not apply, related activities may constitute services or public functions and therefore come within Part 3. For example, Part 4 applies where an estate agent is letting or managing property on behalf of an owner, but not where an estate agent is advertising or providing information about properties. Instead, the latter activities would constitute services to the public.

Interaction with the education provisions

11.59 Part 6 of the Act prohibits discrimination in relation to education provided by specified 'responsible bodies'. Those bodies are the governing bodies and proprietors of schools and institutions of further and higher education.

11.60 However, certain activities and functions of these responsible bodies are outside the scope of Part 6. These activities may be subject, therefore, to the services and public functions provisions in Part 3 of the Act as outlined in this chapter. Examples could include:

- non-educational services provided by schools to people other than pupils, such as the provision of information to parents
- services provided by colleges or universities for non-students

11.61 Generally, where a decision is made or an action is carried out by a school or institution of further or higher education that relates to pupils or students, it will be covered by the education provisions at Part 6. Where the service is provided by or the action or decision is made by a local authority or education authority, not acting in its capacity as a 'responsible body', it will be a service or public function.

Example

11.62 A privately run 'business college' that offers computer courses to the public is providing a service which is likely to be subject to Part 3 of the Act.

Example

11.63 A university organises a conference that is aimed at both students and the general public. Even if most of the people who attend are students, putting on the conference will constitute the provision of a service to the public, and also be subject to Part 3 of the Act.

Example

11.64 A parent wishes to complain about a school's policy that refuses girls the opportunity to do woodwork. As this relates to the way a responsible body of the school provides education to a pupil, or affords access to a benefit, facility or service, it is covered by the education provisions at Part 6 of the Act.

11.65 Part 6 also prohibits discrimination by general qualifications bodies and in specified aspects of the provision of recreational and training facilities for children and young people by local authorities. The services and public functions provisions in Part 3 may apply where Part 6 does not. For example, youth clubs run by voluntary organisations would be a service.

Interaction with the premises provisions

11.66 Part 4 of the Act prohibits discrimination in relation to the disposal and management of premises. This covers, for example, those who provide premises for rent and those who manage rented properties. This Code does not deal with Part 4 of the Act.

11.67 Parts 3 and 4 are mutually exclusive: where the premises provisions do not apply, the services or public functions provisions will apply. The Act specifies two situations which will fall outside Part 4 and where this Code will apply:

- where the provision is generally for the purpose of short stays by individuals who live elsewhere, for example, letting a holiday flat (section 32, paragraph 3(a))
- where accommodation is provided solely for the purpose of providing a service or exercising a public function, for example, a hotel or a prison cell (section 32, paragraph 3(b))

11.68 Otherwise, anything relating to the sale or management of premises (unless it involves a service such as advertising a property) will fall under the premises provisions and is outside the scope of this Code.

Interaction with the work provisions

11.69 Part 5 of the Act is concerned with work. Where Part 5 applies, the Part 3 services and public functions provisions will not.

11.70 However, the Act states that where an employer arranges for another person to provide a service only to the employer's employees, these employees will be regarded as a section of the public (section 31, paragraph 5). That means that if the service provider discriminates against members of that group, the prohibitions described in this chapter apply. The employer would not be regarded as a service provider in this situation. Instead, their conduct in facilitating the service would be governed by the provisions in Part 5 of the Act and covered in our **Employment Code of Practice**.

11.71 The exception to this is where an employer makes provision for financial services to their employees as a consequence of their employment (schedule 3, paragraph 20) (read **Chapter 13**).

Example

11.72 An employer arranges for employees to attend a bespoke residential training course provided by another company. During this course, an offensive remark is made by a trainer to a disabled employee. This would potentially be direct discrimination or harassment by the training company in the provision of services. If the employer had barred the disabled employee from attending the course because of their disability this would potentially be covered by the provisions of Part 5 (work).

Transport services

11.73 Part 3 of the Act applies to certain transport infrastructure (such as stations and airports), services (for example, ticketing) and vehicles.

Part 12 of the Act has been amended by the Taxis and Private Hire Vehicles (Disabled Persons) Act 2022. This makes provision for specific duties on the drivers of taxis and private hire vehicles.

However, this Code does not cover these provisions.

Remote provision of goods and services

11.74 Some goods and services are provided remotely through mediums like websites or apps, for example, where they are delivering information, products or entertainment to the public.

A remote service provider is subject to the usual rules of territorial jurisdiction, therefore the Act will apply to conduct in Great Britain (section 29, paragraph 10).

Example

11.75 A theatre sells tickets, and customers have the option to book tickets either at the box office or remotely through an app. The theatre refuses to take bookings from wheelchair users. Whether the booking takes place via the app or not, the theatre is likely to be committing direct disability discrimination contrary to the Act.

11.76 However, the Act contains express provisions regarding its territorial extent in relation to certain forms of remote services provided by 'information society service providers' (ISSPs) established in a European Economic Area (EEA) state or Great Britain (section 206, schedule 25, paragraph 1).

11.77 An ISSP (schedule 25, paragraph 7(2)) is any service provided:

- normally for remuneration
- at a distance
- by electronic means
- at the individual request of a recipient of services

A service being provided 'normally for remuneration' means the service is usually, but not necessarily, for payment.

'At a distance' means that the service is provided without the parties being simultaneously present.

'By electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

'At the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request, that is to say, the service is requested as opposed to being passively received.

11.78 Examples of an ISSP could include services such as:

- an email service
- an electronic platform which sells items online to people looking for those items
- a newspaper that is provided online

11.79 If an ISSP is established in Great Britain, Part 3 of the Act applies to the provision of the information society service. This means that the ISSP must abide by the provisions of the Act as they apply to service providers, as explained in this chapter.

Example

11.80 An internet holiday company established in Great Britain lists accommodation for people to pay and book. It is an ISSP. The company refuses to take bookings for shared accommodation from same-sex couples. In this instance, the Act applies and the ISSP is committing direct sexual orientation discrimination contrary to the Act.

11.81 Where the ISSP is established in an EEA state, the Act does not apply to anything done in providing the information society services, even if it happens in Great Britain (section 206 and schedule 25, paragraph 2).

Following the UK's withdrawal from the European Union, these rules about ISSPs may be subject to further changes and service providers should review the position regularly.

11.82 Chapter 13 describes exceptions to the Act that apply to ISSPs where they are regulated by the Act if they are mere conduits, or if they provide 'caching' or 'hosting'.

Exceptions to the services and public functions provisions

11.83 There are several exceptions which apply to the services and / or public functions provisions of the Act, for example, single-sex services. These are explained in Chapter 13.

Good practice on avoiding discrimination and improving the delivery of services and the exercise of public functions

Positive action

11.84 The Act permits service providers and those exercising a public function to take positive action measures designed to overcome disadvantage, to meet different needs or to increase participation of people who share a protected characteristic. Chapter 10 further explains these provisions.

Example

11.85 Following a review of the profile of users of their advice sessions, a housing advice service finds out that few lesbians or gay men use their services. They learn from existing research that lesbians and gay men experience particular patterns of housing need. They decide to form links with local lesbian and gay organisations to deliver advice sessions targeted at this group. This could be lawful as a positive action measure.

Treating disabled people more favourably

11.86 The Act does not prohibit treating a disabled person more favourably than a non-disabled person in relation to direct discrimination (section 13, paragraph 3). This exception applies only to disabled people. Therefore, it is not direct discrimination for service providers, those exercising public functions and associations to treat a disabled person more favourably than a non-disabled person.

Chapter 12

Associations

Introduction

12.1 This chapter of this code of practice (the Code) explains how the The Equality Act 2010 (the Act) (Part 7) applies to associations. It sets out what constitutes an association and what is unlawful under the Act in relation to an association's members, associates, guests, those seeking to be members or guests, as well as former members, former associates and former guests of an association, and the duty of an association to make reasonable adjustments.

This chapter explains when associations can restrict their membership to persons who share a protected characteristic and outlines how associations can use the positive action provisions in the Act. This includes measures that political parties, as associations, can take to reduce inequality in their representation in Parliament, local government and other publicly elected bodies.

Part 7 of the Act does not apply to the protected characteristic of marriage and civil partnership.

In relation to the protected characteristic of sex, the definition is as set out in paragraph 2.88.

What an association is

12.2 The provisions (section 107, paragraph 2) in Part 7 of the Act apply to any association of people if:

- the association has at least 25 members
- admission to membership is regulated by the association's rules and involves a selection process
- it is not a trade organisation, such as a business or professional organisation or a trade union

Part 5 of the Act applies to trade organisations, and the duties of trade organisations under the Act are outside the scope of this Code.

12.3 It does not matter if the association is incorporated or otherwise, or if any of its activities are carried out for profit or not (section 107, paragraph 4).

12.4 Associations that are charities are subject to additional provisions under the Act, related specifically to charities, which are discussed in paragraphs 13.46 to 13.53 (section 193).

12.5 The requirement for an association to have rules regulating admission to membership does not mean every association must have a formal set of written rules. It will normally be sufficient if the rules for admission of new members are known to all members involved in the selection process and regularly and consistently applied.

Example

12.6 A squash club with 35 members applies a rule that any potential member must play against two club members who will certify whether their game is of a sufficient standard before a decision is made on their membership application. This club is likely to come within the provisions on associations.

12.7 An organisation that merely requires members of the public to pay a fee to join it without any form of selection, such as a nightclub or a gym, is not an association under the Act. It does not matter whether it describes itself as a 'club' or refers to customers as 'members'. Such bodies are involved in the provision of services to the public or a section of the public, and their duties are discussed in **Chapter 11** of this Code.

12.8 There are also organisations that people join to support the objects of the organisation, such as a football team supporters' club or a campaigning organisation. If there is no selection process and membership is open to anyone on payment of a fee, then such organisations would not come within the Act's definition of an association.

12.9 A 'club' run by a group of friends without any formal structure or selection process, such as a book club or a walking group, is not an association under the Act.

12.10 Associations under the Act can include, for example:

- organisations established to promote the interests of their members, such as an association of local organic allotment gardeners or an association of amateur gymnasts
- political parties
- private clubs including sports clubs, clubs for ex-service personnel, working men's clubs, clubs for people with particular interests such as gardening or fishing or music
- young people's organisations such as the Scouts, the Guides, the Woodcraft Folk or Young Farmers' Clubs
- organisations like the Rotary and Inner Wheel Clubs, or the Grand Lodges of Freemasons

This list is for illustration only, and many more types of association are covered by the Act.

12.11 An association can also be a provider of services, an employer or training body. An association may be responsible for provision of education or the disposal or management of premises. The Act prohibits discrimination in all these areas and when an association carries out any of these additional functions, it will also be subject to other relevant parts of the Act.

Chapter 11 of this Code applies to any association when it is providing services to the public or a section of the public. The separate **Employment Code of Practice** applies to any association as an employer.

Example

12.12 A golf club which has at least 25 members and regulates its membership by way of a selection process could be an association. At the same time, the golf club would also be:

- a service provider if it opened its golf course, café, and shop to members of the public on certain days of the week
- an employer to the staff it employs, and
- a manager or disposer of premises if it let out commercial premises or residential premises above the club premises

Application of the Act to associations

12.13 The Act applies to the ways an association treats its members, those seeking to become members, associates or guests, or people seeking to become guests.

12.14 'Member' means any type of member of an association (section 107, paragraph 5). This could include, for example, a person who is a full member, a temporary member, an associate member or a student member.

12.15 'Associate' means a person who is not a member but who, according to the association's rules, has some or all of the rights of a full member as a result of being a member of another association (section 107, paragraph 6).

Example

12.16 Several separate exclusive health clubs in Great Britain regulate membership by way of a selection process and are affiliated to a single parent body which organises a reciprocal associate's scheme amongst its affiliates. Therefore, a member of a health club in one location would also be an associate of the other health clubs that are affiliated to the parent body and are part of the scheme.

12.17 A guest could be any person who is not a member but who is invited by the association or by a member of the association to enjoy or participate in some benefit, facility or service of the association.

Unlawful discrimination by association

12.18 The Act makes it unlawful for an association to discriminate against its members, associates, guests, those seeking to be members, those seeking to be guests, as well as former members, former associates and former guests

Discrimination means:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- pregnancy and maternity discrimination
- failure to make a reasonable adjustment

These provisions are explained in:

- **Chapter 4** - Direct discrimination
- **Chapter 5** - Indirect discrimination
- **Chapter 6** - Discrimination arising from disability
- **Chapter 7** - Disabled people: reasonable adjustments

12.19 Any reference to 'discrimination' in the following paragraphs of this chapter is a reference to all these forms of discrimination against the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, unless specifically indicated otherwise.

Other unlawful conduct

12.20 The Act also makes it unlawful for an association to harass or to victimise its members, people seeking to be members, its associates, guests and people seeking to be guests. It is also unlawful for an association to harass its former members, former associates and former guests (section 108).

Harassment is explained in **Chapter 8**.

12.21 The prohibition of harassment of members, associates and guests does not apply where the protected characteristic is religion or belief or sexual orientation (section 103, paragraph 2). In such cases, a person who has suffered a detriment in relation to the protected characteristics of religion or belief or sexual orientation may be able to bring a claim of direct discrimination (read **Chapter 4** and **Chapter 8**) (section 212, paragraph 5).

A member, associate, or guest could bring a claim of harassment if the harassment relates to age, disability, gender reassignment, race or sex. Likewise, former members, former associates and former guests can bring claims of harassment if the harassment relates to age, disability, gender reassignment, race or sex. Pregnancy and maternity are not protected directly under the harassment provisions (section 26, paragraph 5). However, pregnancy and maternity harassment would amount to harassment related to sex (read **Chapter 8**).

12.22 Protection from victimisation arises under the Act where someone has carried out a 'protected act'. Victimisation is explained in **Chapter 9**.

What is unlawful in relation to people seeking to become members

12.23 The Act makes it unlawful for an association to discriminate against, harass, or victimise a person seeking to become a member (section 101).

12.24 An association must not discriminate (section 101, paragraph 1):

- in the arrangements it makes for selecting new members
- as to the terms for admission
- by rejecting the person's application

12.25 An association must not harass a person seeking to become a member (section 101, paragraph 4(b)).

12.26 An association must not victimise a person seeking to become a member (section 101, paragraph 5):

- in the arrangements it makes for selecting new members
- as to the terms for admission
- by rejecting the person's application

Example

12.27 A person who previously supported a former member's claim for unlawful discrimination is seeking to become a member of an association. She needs two members to nominate her to be selected for membership. The association usually ensures that applicants are put in touch with two members, but on this occasion fails to do so because she assisted in the claim against it. This would amount to victimisation in the arrangements for selecting new members.

12.28 'Arrangements' can include how or to whom opportunities for membership are, or are not, publicised, forms of communication, application procedures, application forms, and the time of day, location and conduct of any selection process.

The arrangements an association makes for selecting new members might deter a person with a particular protected characteristic from applying, or even considering whether to apply.

12.29 'Terms for admission' can include level of joining fee, conditions and initiation procedures.

Example

12.30 A woman is told that she can join her local tennis club, but she must pay the women's joining fee which is £25 more than the men's fee. The club's explanation is that the extra amount is necessary to cover the additional demands that women make because of their higher expectations about changing facilities. This is likely to amount to direct sex discrimination regarding the terms for admission.

What is unlawful in relation to members

12.31 The Act makes it unlawful for an association to discriminate against, harass or victimise a member.

12.32 An association must not discriminate against a member (section 101, paragraph 2):

- in the way it affords or denies them access to a benefit, facility or service
- by depriving them of membership
- by varying their terms of membership
- by subjecting them to any other detriment

12.33 'Benefit, facility or service' describes the wide range of material and non-material advantages enjoyed by members of an association and can include invitation or admission to meetings or events, use of equipment or facilities, access to discount schemes, bar or restaurant services, or receipt of journals or newsletters.

12.34 'Terms of membership' can include fees or charges, voting rights, right to stand for office or to represent the association externally, conditions for use of facilities or participation in events.

12.35 For an explanation of 'detriment', read paragraphs 9.12 to 9.16.

12.36 'Subjecting a member to any other detriment' operates as a default category to cover a situation in which the member is put at a disadvantage in relation to their membership, but not in any of the ways specified in paragraph 12.32. Even if an association considers that they are acting in the best interests of a person, they may still be subjecting that person to a detriment.

Example

12.37 A female member of an association has a three-month-old baby whom she breastfeeds. She is advised that she should not attend the association's annual general meeting because her baby might need to be fed during the meeting and members would not be comfortable watching her breastfeeding her child. This could exclude her from voting on resolutions electing association officers and taking part fully in the activity of the association. This is likely to be maternity discrimination.

12.38 An association must not harass any of its members (section 101, paragraph 4(a)).

Example

12.39 The leader of a youth club on a camping trip makes fun of a boy with severe facial burns by calling him unkind names and the other children laugh. The disabled boy finds this insulting and humiliating and asks to go home early. This is likely to be unlawful harassment related to disability.

12.40 An association must not victimise a member (section 101, paragraph 6):

- in the way it affords or denies them access to a benefit, facility or service
- by depriving them of membership
- by varying their terms of membership, or by subjecting them to any other detriment

Example

12.41 When a woman was not accepted as a member of a local business association, she complained that her rejection was sex discrimination. Her husband, a long-serving member of the association, supported her in her complaint. Some months later, he was told that he would not be representing this association at a national event as he had previously done, without complaint, for the last five years. His treatment by the association is likely to be victimisation if it resulted from his support of his wife's complaint.

What is unlawful in relation to associates

12.42 An association must not discriminate against an associate (section 101, paragraph 3):

- in the way it affords or denies them access to a benefit, facility or service
- by depriving them of their rights as an associate
- by varying their rights as an associate
- by subjecting them to any other detriment

Example

12.43 Two sports clubs, Club A and Club B, agreed that members of each may be associates of the other with rights to use all facilities. Club B has a much higher proportion of Black members. When a group of Club B members, including some Black members, visited Club A, they were told that they could only use the gym and changing room before 8am or between 2pm and 3pm on Tuesdays. They learned that when an all-White group of Club B members went to Club A there were no restrictions on their use of Club A facilities. The first group from Club B, both White and Black, could complain of discrimination because of race.

12.44 An association must not harass an associate (section 101, paragraph 4(c)).

Example

12.45 A Black associate member of a former servicemen's club finds that bar staff make inappropriate and offensive comments related to his race. Unless the club takes all reasonable steps to tackle this behaviour, the associate member would have a claim for harassment related to his race against the club. He will also be able to make a claim against the employees.

12.46 An association must not victimise an associate (section 101, paragraph 7):

- in the way it affords or denies them access to a benefit, facility or service
- by depriving them of their rights as an associate
- by varying their rights as an associate
- by subjecting them to any other detriment

Example

12.47 An associate member of a cricket club who has given evidence in a discrimination case is told that he can only access one of several bars in a clubhouse so that he does not encounter those members against whom he gave evidence. This behaviour would likely amount to victimisation perpetrated by the cricket club against the associate member.

Guests and people seeking to be guests

12.48 The Act makes it unlawful for an association, in certain circumstances, to discriminate against, harass, or victimise a guest or person seeking to become a guest (section 102).

What is unlawful in relation to people seeking to be guests

12.49 An association must not discriminate (section 102, paragraph 1):

- in the arrangements it makes for deciding who to invite, or who to permit to be invited, as a guest
- as to the terms on which it invites a person, or permits that person to be invited, as a guest
- by not inviting, or not permitting the person to be invited, as a guest

Example

12.50 A club informs a gay member that he should not invite his husband and their child to a 'family night' event. This would be discrimination by the club because of sexual orientation.

12.51 An association must not harass a potential guest (section 102, paragraph 3(b)).

Example

12.52 A disabled guest with a learning disability has difficulty signing in on the guest register at a club. Club officials made fun of the guest by mimicking her and referring to her in derogatory terms. As a result, she felt offended by the conduct of the club's official, which violated her dignity, and so the guest left before entering the club. This is likely to amount to harassment.

12.53 An association must not victimise a person seeking to become a guest (section 102, paragraph 4):

- in the arrangements it makes for deciding who to invite, or who to permit to be invited, as a guest
- as to the terms on which it invites a person, or permits that person to be invited, as a guest
- by not inviting, or not permitting the person to be invited, as a guest

Example

12.54 A woman is invited to a club's annual dinner as a guest. Before entering, the door staff inform her that she will not be allowed to enter the snooker room at the club because she is a woman. She makes a complaint and as a result is not invited to the following year's annual dinner. This would amount to victimisation.

What is unlawful in relation to guests

12.55 An association must not discriminate against a guest (section 102, paragraph 2):

- in the way it affords or denies them access to a benefit, facility or service
- by subjecting them to any other detriment

Example

12.56 The guest at a club dinner is the full-time carer of a disabled child with learning difficulties. The club excludes her and the child from the association's main dining room. The carer could complain of direct discrimination based on the disability of the child with whom she is associated.

12.57 An association must not harass a guest (section 102, paragraph 3(a)).

Example

12.58 A Polish guest at a sailing club is treated with hostility. Staff serve him after British guests at the bar and make derogatory comments about foreign workers in Great Britain, which he finds insulting, offensive and hostile. This is likely to amount to harassment by the club unless it can show that it has taken all reasonable steps to prevent behaviour of this description.

12.59 An association must not victimise a guest (section 102, paragraph 5):

- in the way it affords or denies them access to a benefit, facility or service
- by subjecting them to any other detriment

Example

12.60 A chess club did not accept the membership application of a woman. Due to this, the woman made a formal complaint stating that her rejection was sex discrimination. Her husband, a long-serving member of the club, then invited her to attend an event at the chess club as a guest. However, because of her complaint, the club did not permit the woman to attend as a guest. This would be victimisation.

Reasonable adjustments

12.61 The Act makes it unlawful for an association to fail to comply with a duty to make reasonable adjustments (schedule 15).

This duty (section 103, paragraph 1) is anticipatory and is explained in more detail in Chapter 7. 'Anticipatory' means that associations are required to consider, and take action in relation to, potential barriers that impede disabled people. This applies both prior to an individual disabled person seeking to become a member or a guest, as well as for an existing member, associate or guest when they are seeking to enjoy the rights and the benefits, facilities or services the association provides, or is expected to provide (section 107, paragraph 8).

Example

12.62 A writers' association with 30 members normally meets in a room on the first floor of a pub, where there is no lift. The association recognises that disabled people with significant mobility impairments would not be able attend meetings and therefore could not fully participate as members. The pub has a ground floor room of similar size. Though the association prefers the privacy of the upstairs room, it changes its meeting venue to the downstairs room. This is likely to be a reasonable step for the association to have to make.

12.63 An association will not be required to take any steps that would fundamentally alter the nature of the association, or the nature of the benefit, facility or service concerned (schedule 15, paragraph 2(7)).

Example

12.64 A wine club meets specifically to drink and discuss the merits of different types of wine. A potential member has hepatitis B and is classified as having a disability. As a result of her disability, she cannot tolerate alcohol, but she wishes to join the wine club for social reasons. She asks that the wine club expand its activity to include the tasting of fruit juices. This would fundamentally alter the nature of the club and is therefore not a reasonable adjustment which the club is required to make.

12.65 If an association meets at the house of a member, there is no duty on that member to adjust the physical features of their house (schedule 15, paragraph 2(8)).

Associations may restrict membership to persons who share a protected characteristic

12.66 The Act permits associations of any size or character, other than political parties, to restrict their membership to persons who share a protected characteristic (schedule 16). The only exception is that membership can never be restricted based on colour (schedule 16, paragraph 1(4)).

Example

12.67 The constitution of an association called the Black Jazz Players Club states that all members must have national origins in Africa or the Caribbean. Despite the use of 'Black' in its name, because the restrictions on membership of the association are based on national origins and not colour, these restrictions would not be unlawful.

Example

12.68 A trans woman applies to join a women-only association and her application is refused. This would be lawful because membership is based on sex and restricted to women and, under the Act, she does not share that protected characteristic (paragraphs 2.87 to 2.89).

12.69 This provision does not apply to political parties (schedule 16, paragraph 1(5)). A registered political party is a party registered in the Great Britain register under Part 2 of the Political Parties, Elections and Referendums Act 2000. Under the Equality Act, it is never lawful for a registered political party to restrict its membership to persons who share a protected characteristic. For example, it would not be lawful for a political party to allow only persons who are Scottish, or only Christians, to be party members.

12.70 If an association restricts membership to persons who share a protected characteristic:

- the association may restrict the access of associates to a benefit, facility or service to associates who share the same protected characteristic (schedule 16, paragraph 1(2)), and
- the association may invite as guests, or permit to be invited as guests, only persons who share that same protected characteristic (schedule 16, paragraph 1(3))

Example

12.71 The constitution of a women's running club provides for the female members of local mixed-sex running clubs to be associates. This would be lawful under the Act.

12.72 Associations that restrict membership to persons who share a particular protected characteristic must not discriminate in relation to any other protected characteristic.

Example

12.73 A Christian association must not refuse to accept Irish Travellers who are Christian as members.

12.74 Section 6(c) of the Interpretation Act 1978 states that, in any act, words in the singular include the plural and words in the plural include the singular, unless the contrary intention appears. Applying this provision, the Equality Act 2010 (the Act) permits associations to be based on more than one protected characteristic.

12.75 This interpretation of the Act is consistent with the right to freedom of association under Article 11 of the European Convention on Human Rights (ECHR). Article 11 includes the right (subject to proportionate restrictions) for people to be able to associate with one another to the exclusion of others in appropriate circumstances.

An association may therefore restrict membership to people who:

- share one protected characteristic (for example women)
- share more than one protected characteristic (for example Muslim women)
- have any of more than one protected characteristic (for example lesbian, gay, bisexual or trans people)

Example

12.76 A Muslim women's walking club is set up as an association to encourage Muslim women to enjoy exercise and company without men being present. It is lawful to allow membership only to those who share the same protected characteristics of religion and sex.

Example

12.77 A lesbian, gay, bisexual and trans (LGBT) support group is set up to include gay, bisexual and trans people. Its membership is restricted to people with the protected characteristic of any of those sexual orientations, or gender reassignment. This is permitted under the Act.

12.78 There are other exceptions that apply to associations and their treatment of their members, associates and guests.

12.79 These include exceptions relating to national security, charities, single-sex services, services and membership of religious organisations. Further exceptions include different treatment due to pregnancy-related health and safety concerns and selection of people for participation in competitive sport (read **Chapter 13**).

Positive action by associations

12.80 The Act defines the circumstances in which an association may take positive action to overcome disadvantage, to meet different needs or to increase the participation of people sharing a protected characteristic (section 158). **Chapter 10** explains this more fully.

12.81 An association may wish to take positive action to enable people within all relevant sections of the community to be admitted as members or to be invited as guests with full access to the benefits, facilities and services enjoyed by members or guests.

Example

12.82 A local business owner's club recently revised its constitution so that it admits women on the same terms as men. The club is aware that its women members rarely attend club events and outings and therefore miss out on some of the benefits of membership. When asked, the female members said that because they were always outnumbered by the men, they did not feel confident to participate. The club reviewed its programme of activities and invited women members for pre-event briefings and offered women members an early booking scheme for all club outings.

Political parties: positive action in selection of candidates

12.83 The Act permits a registered political party (read paragraphs 12.90 to 12.93) to take certain steps in their selection of election candidates to reduce the inequality in the party's representation in the relevant elected body (section 104).

12.84 This applies to the following elections:

- elections to UK Parliament
- elections to the Scottish Parliament
- elections to the Senedd Cymru / Welsh Parliament
- local government elections

12.85 The Act provides that a registered political party may make arrangements (known as selection arrangements) (section 104, paragraph 2), for regulating the selection of its candidates for a relevant election (section 104, paragraph 3):

- if the purpose of the arrangements is to reduce inequality in the party's representation in the elected body concerned (section 104, paragraph 3(b)), and
- if these arrangements are a proportionate means of achieving that purpose (read paragraphs 5.46 to 5.48 for an explanation of 'proportionate') (section 104, paragraph 3(c))

The requirement that selection arrangements must be proportionate does not apply to all-women shortlists (read paragraph 12.94).

12.86 Inequality in a party's representation on an elected body means inequality between the number of a party's candidates elected as members of that body who share a protected characteristic compared to the number of the party's elected candidates who do not share that protected characteristic (section 104, paragraph 4). The comparison required by section 104, paragraph 4 is of the current composition of the elected body concerned.

12.87 For this purpose, persons share the protected characteristic of disability if they are disabled persons in general. Selection arrangements that are restricted to persons that have a particular disability (for example, blindness) are not permitted (section 104, paragraph 5).

Example

12.88 A political party identifies that in an area with a large Asian community it has too few councillors who are from an Asian background. It also has disproportionately low numbers of councillors who are women. It decides to adopt proportionate selection arrangements to increase the number of councillors with these characteristics. These measures include advertising its intentions to the local party membership and training for candidates with these protected characteristics.

12.89 It is unlikely to be proportionate for a political party to adopt selection arrangements that focus exclusively on improving the representation of one particular group sharing a protected characteristic which would reduce further the selection prospects for people in other under-represented groups.

Reserved places on political party shortlists

12.90 Where there is inequality in a party's representation, the Act permits a political party to adopt selection arrangements that would reserve a fixed number of places on their candidate shortlists for persons who share protected characteristics that are under-represented in the party's elected candidates on the relevant body (section 104, paragraph 7).

12.91 As a general rule, political parties cannot reserve all the places on an election shortlist for people who share a particular protected characteristic. There are exceptions to this rule for the protected characteristics of sex (read paragraph 12.94 and paragraph 12.95) and disability (read paragraphs 12.96 to 12.100).

Example

12.92 A party seeks to improve the diversity of its representation on the council. In selecting candidates for a particular ward, it opts to reserve four places on its shortlist of ten candidates for people from ethnic minorities that are under-represented among the party's councillors. The party could not reserve all of the places on its shortlist for people from ethnic minorities.

12.93 If a party achieves equality in respect of a particular protected characteristic in its representation on an elected body, it will not be able to continue to reserve shortlist places for people who share that protected characteristic or take any other measures under this provision, as it would no longer be a proportionate act.

Women-only shortlists

12.94 The Act maintains the provision, first introduced in the Sex Discrimination (Election Candidates) Act 2002, which permits registered political parties to select only women for their shortlist of candidates for election to a body, to reduce inequality between women and men in that party's representation in the elected body concerned (section 105).

12.95 The Act extends the application of this provision until 31 December 2030. After this date, women-only shortlists will be unlawful, unless the government makes an order extending this deadline.

Disability-only shortlists

12.96 Political parties can restrict shortlists to disabled candidates. This is because only those who meet the definition of disability under the Act are protected from disability discrimination and the Act specifically says that it is not direct discrimination to treat disabled people more favourably than someone who is not disabled (section 13, paragraph 3).

12.97 However, it would be direct disability discrimination if a party restricted a shortlist to disabled candidates with a particular impairment or type of impairment. This would be treating some disabled people more favourably than other disabled people because of their disability.

12.98 A disability-only shortlist will not be indirect discrimination if the political party can demonstrate that the arrangement is a proportionate means of reducing the inequality between its representatives who are not disabled and those who are disabled (section 104, paragraphs 3(b), 4 and 5).

Example

12.99 A party chooses to have a disability-only shortlist. A young person complains that this arrangement is indirectly discriminatory towards him in relation to his age. If the party can demonstrate that the disability-only shortlist is a proportionate means of reducing the inequality between its representatives who are not disabled and those who are disabled, the disability-only shortlist will be lawful.

12.100 Beyond the specific provisions described in paragraphs 12.83 to 12.99 that allow positive action in the selection or shortlisting of candidates, the general positive action provisions in the Act allow political parties to address disadvantage and under-representation in their membership and party structures (section 158). For further information, read **Chapter 10**.

Avoiding unlawful discrimination

12.101 Some steps that associations could take to avoid discrimination include:

- reviewing conditions or requirements for membership in their constitution or rules, to ensure they are not discriminatory
- making any person, including any officer, member or employee, who acts or may be deemed to act on behalf of the association aware of their duties under the Act, providing training as necessary
- identifying potential barriers for disabled people and making reasonable adjustments (**Chapter 7** explains this more fully)
- responding neutrally, promptly effectively and in an unbiased manner to any complaint of discrimination, harassment or victimisation and making appropriate changes to provisions, criteria or practices

Chapter 13

Exceptions

Introduction

13.1 The Equality Act 2010 (the Act) contains several exceptions which permit conduct that would otherwise be unlawful under the Act in the provision of services, the exercise of public functions and the activities of associations.

13.2 The exceptions in this chapter of the code of practice (the Code) are different from the Act's positive action provisions, which permit certain activities to benefit people who share a protected characteristic. These provisions are discussed in **Chapter 10**.

13.3 This chapter explains exceptions that apply generally to the provision of services, exercise of functions and activities of associations, and other exceptions that apply only to certain activities. Some exceptions are discussed in **Chapter 11** (Services and Public Functions) and **Chapter 12** (Associations) where they only apply to those activities.

13.4 In general, discrimination, harassment and victimisation by a service provider, person exercising public functions or association is unlawful under the Act unless an exception applies. Any exception should normally be interpreted restrictively, so that the wording used in the exception is read as giving its narrowest meaning.

13.5 Harassment related to the protected characteristics of religion and belief and sexual orientation is not prohibited under the Act in the areas covered by this code of practice (the Code) (section 29, paragraph 8). However, where unwanted conduct related to either of these protected characteristics results in a person suffering a detriment, that person may be able to bring a claim of direct discrimination (read **Chapter 4**).

In this chapter, the term 'harassment' is used to refer to harassment related to the protected characteristics of:

- age (for services and public functions, only those aged 18 and over)
- disability
- gender reassignment
- race
- sex

In relation to the protected characteristic of sex, the definition is as set out in paragraph 2.88

References to types of discrimination

13.6 As explained in **Chapter 1**, the term 'discrimination' is used to refer to direct discrimination, indirect discrimination and, where relevant, discrimination arising from disability, a failure to make a reasonable adjustment (section 25), and pregnancy and maternity discrimination (section 17).

Statutory exceptions

13.7 The following are all statutory exceptions under the Equality Act 2010.

Statutory authority

13.8 It is not a breach of the Act, as it applies to services, public functions and associations, to do anything that is required because of other legislation or another measure in relation to certain protected characteristics (explained in paragraph 13.9) (schedule 22, paragraph 1).

13.9 There are different exceptions, depending on who has the obligation and the relevant protected characteristic in a particular situation. These are set out in this table.

Who has the obligations	Protected characteristic	Requirement
Service providers, those exercising public functions and associations	Age	Anything required under an enactment
Service providers, those exercising public functions and associations	Disability	Anything required under an enactment A requirement or condition
Service providers, those exercising public functions and associations	Religion or belief	Anything required under an enactment A requirement or condition
Those exercising public functions and associations	Sex	Anything required under an enactment
Service providers, those exercising public functions and associations	Sexual orientation	Anything required under an enactment A requirement or condition

13.10 An enactment means:

- an act of Parliament or of the Scottish Parliament
- an act or measure of the Senedd Cymru / Welsh Parliament
- orders and regulations made under or for the purpose of such acts or measures
- measures of the General Synod of the Church of England

Example

13.11 The Concessionary Bus Travel Act 2007 requires English local authorities that are Travel Concession authorities to issue concessionary bus passes to older people of eligible age. A younger person excluded from this scheme would not be able to claim that this was age discrimination because the Act requires their local Travel Concession authority to issue concessionary bus passes only to older people of a certain age.

13.12 A requirement or condition in this context is one that is made by virtue of an enactment by:

- a Minister of the Crown
- a member of the Scottish Executive
- the Senedd Cymru / Welsh Parliament or the Welsh Ministers
- the First Minister for Wales or the Counsel General to the Welsh Government

Example

13.13 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 gives a power to the Lord Chancellor to decide which areas of the law legal aid is available for in England and Wales. As part of a programme to cut costs, the Lord Chancellor amends the criteria so that legal aid is no longer available for cases involving special educational needs. The Legal Aid Agency, which administers the legal aid scheme in England and Wales, would not be liable under the Act for disability discrimination that results from this decision because it had to apply the criteria set by the Lord Chancellor and could not have acted any differently.

13.14 This exception applies to such measures regardless of when they were passed or made.

Example

13.15 A woman with arthritis wishes to visit an old country house that is open to the public. However, she cannot get into the building as there is a steep flight of steps at the entrance with no ramp or handrail. She asks the owner why these have not been installed. The owner explains that she is unable to make any changes to the house as it is a listed building and her local planning authority refused to grant listed building consent for such alterations under the Planning (Listed Buildings and Conservation Areas) Act 1990. As the owner has been prevented by planning measures from being able to make the building more accessible, the exception would apply and she would not be liable under the Act for failing to make a reasonable adjustment.

13.16 If the service provider, person exercising public functions or association could still have complied with an enactment, requirement or condition without treating someone in a way that would breach the Act, then the exception would not apply.

Nationality discrimination authorised by statute or the executive

13.17 The Act (schedule 23, paragraph 1) does not prohibit the following in relation to services and public functions if done to comply with an enactment, an instrument made under an enactment, a requirement imposed under an enactment, or a Ministerial arrangement or condition:

- discrimination on the grounds of nationality
- indirect discrimination, where the provision, criterion or practice refers to a person's ordinary place of residence or the length of time a person has been present or resident in or outside the UK or an area within it

13.18 As explained in paragraph 13.15, it is only where an obligation under the measures listed in paragraph 13.17 leaves a service provider or a person exercising public functions with no choice other than to act in a particular way[75] – in relation to a person's nationality or residence in the UK – that the non-discrimination provisions of the Act may be overridden.

Example

13.19 The National Health Service (Charges to Overseas Visitors) Regulations 1989 (as amended) gives health authorities in England and Wales no choice regarding applying charges for healthcare to people not normally resident in the UK, the vast majority of whom will be non-UK citizens. This cannot be challenged as indirect discrimination because the exception applies.

13.20 There are separate exceptions which relate to immigration functions, and these are discussed in paragraphs 13.232 to 13.250.

Parliament and the legislative process

13.21 The Act's services and public functions provisions do not apply to a function of Parliament or a function exercisable in connection with official business of Parliament (schedule 3, paragraphs 1 and 2).

This exception also applies to any steps within the legislative process in Parliament, the Scottish Parliament or Senedd Cymru, including:

- preparing, making or considering an act, a bill for an act
- preparing, making, confirming, approving or considering an instrument under an act

The exclusion also covers any instrument by the General Synod, His Majesty in Council or the Privy Council.

Judicial functions

13.22 The Act's services and public functions provisions do not apply to a judicial function, including anything done on behalf of a person exercising a judicial function (schedule 3, paragraph 3).

This includes functions exercised by a person other than a court or tribunal, for example, certain functions of the Parole Board. The exclusion also covers a decision not to commence or continue criminal proceedings, and anything done in relation to that decision.

Armed forces

13.23 The Act does not prohibit age, disability, gender reassignment and sex discrimination in the exercise of public functions for the purpose of ensuring the combat effectiveness of the armed forces (schedule 3, paragraph 4).

Security services

13.24 The Act's (schedule 3, paragraph 5) services and public functions provisions do not apply to:

- the Security Service
- the Secret Intelligence Service
- the Government Communications Headquarters
- a part of the armed forces which is assisting the Government Communications Headquarters where this is required by the Secretary of State

National security

13.25 It is not a breach of the Act to do anything that it is proportionate to do for the purpose of safeguarding national security (section 192).

13.26 This exception applies on a case-by-case basis. To be lawful, the particular act must be a proportionate means of safeguarding national security.

13.27 Service providers, persons exercising public functions and associations should be aware that action that may be proportionate in one situation or at one time may not be proportionate in a different situation or at a different time.

13.28 For example, at a time of heightened national security risks, imposing a ban on all persons of a particular nationality using public transport is unlikely to meet the test of proportionality. However, at such times, conducting intelligence-led surveillance of particular individuals who have that nationality may be proportionate. When the security situation improves, it may no longer be proportionate to maintain such surveillance for safeguarding national security.

Religious or belief organisations

13.29 It is not a breach of the Act, as it applies to services, public functions and associations, for a religious or belief organisation to restrict services, membership and other activities if certain conditions are met (schedule 23, paragraph 2).

This exception only applies to the protected characteristics of religion or belief and sexual orientation.

13.30 As explained in paragraph 13.5, the prohibition of harassment does not apply where the conduct relates to the protected characteristics of sexual orientation or religion or belief (section 103, paragraph 2).

13.31 A religious or belief organisation is an organisation whose purpose is one of the following (schedule 23, paragraph 2(1)):

- to practise or advance a religion or belief or to teach its practices or principles
- to enable persons of a religion or belief to receive any benefit or engage in any activity within the framework of that religion or belief, or
- to foster or maintain good relations between persons of different religions or beliefs

13.32 This exception does not apply to an organisation whose only or main purpose is commercial (schedule 23, paragraph 2(2)).

Example

13.33 A gay couple use a travel company to book accommodation in the Scottish Highlands. They provide their names and request a double room. Instead, the company reserves two single rooms stating that, as a devout religious organisation, the company does not approve of same-sex relationships and has a policy always to provide separate rooms for adult guests of the same sex. The couple has been discriminated against because of their sexual orientation as the same restriction would not apply to a heterosexual couple. The organisation is a commercial company and therefore the exceptions for religious organisations do not apply. This would be unlawful direct discrimination.

13.34 In the case of religion or belief (schedule 23, paragraph 2(6)), each of the restrictions (read paragraph 13.36) is only permitted if imposed:

- because of the purpose of the organisation, or
- to avoid causing offence, on the grounds of the religion or belief to which the organisation relates, to persons of that religion or belief

13.35 In the case of sexual orientation (schedule 23, paragraph 2(7)), each of the restrictions (read paragraph 13.36) is only permitted if imposed:

- because it is necessary to comply with the doctrine of the organisation, or
- to avoid conflict with the strongly held religious convictions (or convictions relating to a belief) of a significant number of the followers of the religion or belief

13.36 In relation to religion or belief and sexual orientation (schedule 23, paragraph 2(3)), provided that one of the statutory conditions in paragraph 13.34 or paragraph 13.35 is met, the Act permits a religious or belief organisation to restrict:

- membership
- participation in activities undertaken by or on behalf of the organisation or under its auspices
- the provision of goods, facilities or services in the course of such activities
- the use or disposal of premises owned or controlled by the organisation

Example

13.37 An interfaith group, whose purpose is to foster and maintain good relations between followers of Christianity, Judaism, Islam, Sikhism and Hinduism, is planning a local day of prayer with an opportunity to discuss the role of prayer within different faiths. This exception would permit the interfaith group to exclude humanists and atheists.

13.38 In relation to religion or belief and sexual orientation, the Act permits a person to do any of the actions set out in paragraph 13.36 on behalf of, or under the auspices of, a religious or belief organisation, provided that one of the statutory conditions in paragraph 13.34 or paragraph 13.35 is met (schedule 23, paragraph 2(4)).

13.39 Provided that one of the statutory conditions in paragraph 13.34 or paragraph 13.35 is met, it is not a breach of the Act in relation to religion or belief and sexual orientation (schedule 23, paragraph 2(5)) for a minister to restrict:

- participation in activities carried out in the performance of their functions as a minister connected with a religious organisation
- the provision of goods, facilities or services in the delivery of such activities

For the purposes of this exception, the Act (schedule 23, paragraph 2(8)) defines a minister as a minister of religion or other person who:

- performs functions in connection with the religion or belief of the organisation, and
- holds an office or appointment or is accredited, approved or recognised for the purposes of the organisation

13.40 Sexual orientation discrimination remains unlawful in relation to a service or public function which is provided by a religious or belief organisation on behalf of one of the public authorities listed in schedule 19 of the Act, if that provision is under a contract with that authority. This includes arrangements where an organisation carries out a task that the public authority would otherwise have been required to do (schedule 23, paragraph 2(10)). The contractual relationship does not need to be one of principal and agent[76].

Example

13.41 An independent fostering agency is run according to certain Evangelical Christian principles. It has a policy requiring potential foster carers to be heterosexual. Under a contract with a local authority, the agency places children with foster carers and is paid following the placement. Because the agency is carrying out the functions of a local authority under a contract, it is prohibited from discriminating on the grounds of sexual orientation and its policy would be unlawful.

13.42 Sexual orientation discrimination also remains unlawful in relation to a religious or belief organisation that is only potentially within the scope of this exception because its purpose (as described in paragraph 13.31) is solely to foster or maintain good relations between persons of different religions or beliefs (schedule 23, paragraph 2(11)).

Training provided to non-residents

13.43 The Act contains an exception where a person employs or offers contract work to someone who is not ordinarily resident in Great Britain and the only or main purpose of that work is to provide training (schedule 23, paragraph 4(1)). The exception applies where the person who employs or offers contract work to an employee or contractor thinks that they do not intend to use skills they obtain as a result of their employment or contract work in Great Britain.

13.44 In these circumstances, it is not a breach of the Act for a person to provide an employee or contractor with access to facilities for education or training or ancillary benefits, whether in connection with employment, contract work or anything else (schedule 23, paragraph 4(3)). This exception only applies in relation to the individual's nationality.

Example

13.45 A publisher specialising in sustainable agricultural textbooks offers a discount to people who attend a training scheme in Great Britain and who then return to their home countries to put the skills learned into practice. It would not be unlawful race (nationality) discrimination if the company refused to offer the same discount to a farmer who lives in Scotland.

Charities

13.46 The Act (section 193, paragraphs 1 and 2 and section 194, paragraphs 1 and 4) does not prohibit a person from providing benefits only to people who share a protected characteristic if this is in accordance with a charitable instrument that establishes or governs a charity, and is either:

- a proportionate means of achieving a legitimate aim, or
- for the purpose of preventing, or compensating for, a disadvantage linked to that protected characteristic

13.47 A charity's 'charitable instrument' is its governing document or, in Scotland, its constitution or founding document. It sets out the charity's purposes, how its income can be spent and how the charity will operate. Depending on the legal structure of the charity, this may be in the form of a constitution or rules, a trust deed or a memorandum and articles of association. It could also be a charter, an Act of Parliament or other document, or a combination of two or more documents.

Example

13.48 A local charity that is established to provide support to at-risk groups of all ages in a particular area organises a twice-weekly lunch club for people over 65. The charity has evidence that older people in the area face problems arising from social isolation and poor diets, and it therefore provides a nourishing meal in a sociable setting to help them overcome these disadvantages. If a young person is refused entry to the lunch club this would not amount to unlawful age discrimination.

13.49 This exception does not permit a charity to limit a group of people who are to receive benefits by colour (section 194, paragraph 2 and section 193, paragraph 4). If the charitable instrument seeks to enable benefits to be provided to a group of persons defined by colour, then it will be treated as if that definition did not exist. In this situation:

- if the group of persons to receive benefits is defined only by colour, the charitable instrument will be applied as if it enabled benefits to be provided to all persons generally
- if the group of persons to receive benefits is defined partly by colour, the charitable instrument will be applied as if it enabled benefits to be provided to the group of persons without reference to colour

Example

13.50 A charity is formed in Manchester which seeks to improve access to mental health services for Black people. Its charitable instrument states that it will provide free counselling services to Black people living in the North West of England. Because the instrument seeks to limit the benefit to a group of people defined partly by colour, it will actually have effect as if it stated that the charity will provide free counselling services to people who live in the Northwest of England, without reference to colour.

Example

13.51 If in the previous example the charitable instrument states that the charity will provide free counselling services to Black people, the instrument would actually have effect as if it stated that the charity will provide free counselling services to all persons generally.

13.52 The charity and its trustees must initially consider whether restricting the benefits of a charity to people who share a protected characteristic meets either of the Act's two tests in paragraph 13.46. Where the charity is challenged, then this question would ultimately be decided by the courts.

13.53 The 'public benefit test' that all charities must satisfy to gain charitable status may assist, but it will not guarantee that any such restriction meets either of the tests specified in the Act. The Charity Commission for England and Wales and the Scottish Charity Regulator will consider the likely impact of any restriction regarding beneficiaries in the charitable instrument, and whether any such restriction can be justified, when assessing whether the aims of a charity meet the 'public benefit' test.

Meeting the test for restricting benefits

Proportionate means of achieving a legitimate aim

13.54 The requirements for showing that a restriction is a proportionate means of achieving a legitimate aim is discussed in general terms at paragraphs 5.52 to 5.57.

In the case of a body with charitable status, the restriction would need to promote, or in any event not inhibit, the fulfilment of one of its stated aims. A charity is permitted to apply a clearly defined rule to those who will and will not receive its benefits, and the reduced administrative cost associated with such a rule is relevant when considering the proportionality of the restriction[77].

13.55 To be proportionate, the impact of the restriction in furthering the aim in question should be balanced against its effect on those who are excluded from receiving benefits[78]. This should be assessed on a group basis rather than an individual basis, by comparing the advantages for groups covered by the restriction with the disadvantages for groups that fall outside i[79].

Preventing or compensating for disadvantage linked to the protected characteristic

13.56 To show that restricting its benefits to people who share a protected characteristic is for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic, the charity will need to demonstrate a reasonable connection between the past or current disadvantage experienced by this group and the benefits provided by the charity.

As discussed in paragraph 5.20, disadvantage can include:

- lack of opportunity
- lack of choice
- exclusion or rejection from, or barriers to, accessing services, education or employment

The disadvantage may be obvious and well-known or may be known to the charity through its funded research or evidence from other sources. The benefits the charity provides should be capable of making a difference in terms of overcoming the disadvantage linked to the protected characteristic.

Example

13.57 If the selected group (for example, Gypsies, Roma and Travellers) is disadvantaged in terms of educational achievement, then depending on the provisions of its charitable instrument, the charity should be able to provide benefits to Gypsies, Roma and Travellers to help them to overcome the disadvantage. These benefits might include:

- financial resources for educational projects
- supplementary educational facilities
- training for teaching staff on the learning needs of this group
- mentoring schemes
- extra learning experiences outside of school hours
- development work with parents and community leaders

13.58 There is no requirement that a charity must provide benefits to the most disadvantaged group or assess the relative disadvantage of different groups. The Act only requires that, if a charity provides benefits to a group of people who share a protected characteristic to the exclusion of others, it must be able to show that the purpose of restricting benefits in this way is to prevent or compensate for disadvantage experienced by members of that selected group or groups.

Example

13.59 A community café starts offering work experience to people with Down's Syndrome after learning about the low rates of paid employment among this group. The charity is not required to research whether other disabled people have higher levels of unemployment.

13.60 Charities whose aims include provision of benefits only to persons who share a protected characteristic should keep their aims under review to ensure that the restrictions remain lawful under the Act.

Example

13.61 If a charity had been established to provide benefits to the sons of retired Army officers, the trustees would need to consider whether this restriction would meet either of the two tests under the Act. If it does not, they may need to apply to the charity regulator to amend their aims, for example, to replace 'sons' with 'children'.

13.62 If a charity has, continuously from a date before 18 May 2005, required members or prospective members to make a statement that asserts or implies membership or acceptance of a religion or belief, the Act allows it to continue to do so (section 193, paragraph 5 and 6). If a charity restricts its members' access to a benefit, facility or service to those who make such a statement, this is treated as imposing such a requirement.

Activity to support a charity

13.63 It is not a breach of the Act, as it applies to services and public functions, to restrict participation in activities to only persons of one sex where those activities are carried out for the purpose of promoting or supporting a charity (section 193, paragraph 7). An example would be a women-only sponsored swim to raise money for a charity.

Competitive sport

13.64 The Act includes four types of exceptions that may apply in relation to the participation of a competitor in a sport, game or other activity of a competitive nature (section 195). These relate to sex, gender reassignment, nationality or birthplace, and age.

Competitive sport – sex

13.65 It is not a breach of the Act for a person to make different arrangements for the participation of male and female competitors in a sport, game or other activity of a competitive nature in specific circumstances (section 195, paragraph 1 and 3). These circumstances are set out in the Act (section 195, paragraph 3). They are where an average person of one sex would be at a disadvantage as a competitor against an average person of the other sex due to their physical strength, stamina or physique (in the Act, this is called a 'gender-affected activity').

13.66 In such circumstances, it will be lawful for a person to organise single-sex or separate-sex events. The law on the interpretation of this exception is not settled and there is uncertainty as to what other sex-based arrangements for participation in a gender-affected activity may be lawful. Organisers should therefore seek advice on any other arrangements. However, it is likely also to be lawful for a person to adopt other sex-based rules in relation to participation which enable men and women to compete fairly and safely, such as a rule specifying the numbers of men and women on a mixed-sex team to ensure fair and safe competition in a gender-affected team sport.

Example

13.67 The organisers of a 5-a-side football event decide that it is necessary to hold separate competitions for men and women. This is likely to be permitted under the Act. Physical strength, stamina and physique are all significant factors in a 5-a-side football match. An average man has an advantage compared to an average woman because, for example, men are on average taller and stronger and have more overall muscle mass than women.

Example

13.68 The organisers of a competitive tennis event decide that, in addition to separate competitions for men and women, they want to include a mixed doubles competition in which each pair must be made up of one man and one woman. Restricting teams in this way, and preventing, for example, two women from making up a team, is likely to be permitted under the Act. Physical strength, stamina and physique are all significant factors in tennis. An average man has an advantage compared to an average woman because men are on average taller, have greater reach, are stronger and have more overall muscle mass than women. Each of the types of competition in the event enables men and women to compete fairly and safely having regard to those average differences.

13.69 Arrangements relating to participation in a gender-affected activity which do not enable fair and safe competition between men and women may amount to unlawful sex discrimination against competitors of either sex, if they are placed at a disadvantage because of those arrangements.

13.70 Where there is no disadvantage due to differences in the average physical strength, stamina or physique of men and women, organising single-sex or separate-sex events may be unlawful sex discrimination.

13.71 This exception also applies to children's sport (section 195, paragraph 4). However, organisers must consider whether there are significant differences in physical strength, stamina or physique at the age and stage of development of the children competing in the activity.

Example

13.72 A primary school only has a boys' under-7 football team as there are not enough girls for a full team. A girl asks to join the team. It may be unlawful to decline this request unless the school can demonstrate that there are differences in physical strength, stamina or physique between boys and girls under 7 years old that would disadvantage girls taking part in football. Examples of disadvantage could be unfair competition or risks to health and safety.

Competitive sport – gender reassignment

13.73 Any sex-based rules or arrangements relating to participation in a gender-affected activity (read paragraph 13.65) should be applied on the basis of biological sex. Therefore, trans people should not be included in single-sex or separate-sex competitions for the sex with which they identify. They should also not be treated as that sex for the purposes of any other sex-based rules or arrangements that relate to participation. The law on the exception for sex discrimination in relation to gender-affected activities in section 195, paragraph 1 is not settled (read paragraph 13.66). However, it is unlikely to permit rules or arrangements that treat trans people as the sex with which they identify, and participants or prospective participants may bring claims of direct or indirect sex discrimination about such rules or arrangements.

Example

13.74 An athletics club chooses to organise a competitive running event that includes women and trans women. Running is a gender-affected activity. A woman who participates may be able to bring a claim for indirect sex discrimination due to the provider's decision to include trans women placing her at a particular disadvantage. Men who are excluded from the event may also be able to bring a claim for direct discrimination based on their exclusion. This is because the exception for sex discrimination in section 195, paragraph 1 may not apply if the club chooses to include trans women and exclude men.

13.75 In addition, it may be lawful to exclude some trans people or treat them differently from other members of their own sex in relation to participation in a gender-affected activity, when necessary for reasons of safety or fair competition. If it is not necessary for these reasons, it is likely to be unlawful to exclude trans people from participating in the same way as members of their own sex.

13.76 Consequently, if a person is organising single-sex or separate-sex events for men and women, or other events with sex-based rules in relation to participation, in a gender-affected activity, they should consider their approach to trans competitors' access to the service.

13.77 Direct gender reassignment discrimination can occur if a policy or decision to restrict participation of trans people is made on the grounds of gender reassignment. This would be the case, for example, if a trans man is excluded from a women's event because of the protected characteristic of gender reassignment. Read **Chapter 2** for more information on the meaning of gender reassignment.

13.78 Indirect gender reassignment discrimination can occur if a provision, criterion or practice puts trans people (including the individual trans person concerned) at a particular disadvantage compared to people who are not trans and it cannot be justified. This might be the case, for example, if a rule that excludes people who have received certain hormone treatment is more likely to result in the exclusion of trans people than others, unless that rule can be justified. If such a rule is necessary for reasons of safety or fair competition, it is likely to be justified.

13.79 In addition, in the context of a gender-affected activity, the Act provides an exception to a claim of gender reassignment discrimination if a person restricts participation of a trans person and can show it is necessary to do so for reasons of fair competition or the safety of competitors (section 195, paragraph 2).

13.80 This exception applies to service providers and public authorities, but not to associations covered by the Act who organise competitive sporting activities solely for members and their guests. However, associations may still adopt general rules which prevent people from participating in a sporting activity, for example because they have received certain hormone treatment or have hormone levels exceeding a set limit, if this is justified for reasons of safety or fair competition.

Example

13.81 A boxing gym runs a boxing competition for women. A trans man who has undergone treatment with testosterone wishes to compete. The gym declines his request because they are concerned that the treatment has had the effect of increasing his muscle mass and strength. This is likely to be lawful if the gym can demonstrate that there would be a genuine health and safety risk and / or impact on fair competition if the trans man were allowed to join the competition.

13.82 The combined effect of the exceptions relating to sex and gender reassignment under subsections 195, paragraphs 1 and 2 of the Act may impose significant limitations on the ability of some trans people to participate in some gender-affected activities. If the exceptions have been properly applied, this will not be unlawful under the Act. However, this result could constitute unlawful indirect gender reassignment discrimination unless the overall arrangements for participation are a proportionate means of achieving a legitimate aim. Organisers should therefore consider whether there are additional alternative arrangements that could be made to enable trans people to participate in the activity in question. This might include, for example, having mixed-sex categories in addition to separate-sex categories, or having a category in a gender-affected team activity with specified numbers of men and women on each team, which would enable trans people to participate as part of the specified number of members of their own sex (read paragraphs 13.66 and 13.73).

Competitive sport – policies on sex and gender reassignment

13.83 Given the physiological differences between men and women, and the potential impact of treatment that trans people may receive as part of the process of transition, it will often be necessary for organisations to develop general policies to guide and inform their decision making. Policies should be supported by clear reasoning and an evidence base. They will often wish to draw upon guidance from sporting authorities. Relevant factors may include:

- the extent to which there are competitive advantages arising from sex-based physiological factors, such as physical strength, stamina or physique
- whether such physiological factors give rise to safety risk factors, such as those arising from physical contact between men and women
- whether medical or other interventions that trans people may have received as part of their transition process, such as hormone treatment, may affect fairness and / or safety
- whether there are additional or alternative arrangements that could be made to enable trans people to participate
- whether an activity is primarily competitive, or competitive but with a significant social and recreational purpose and whether it is a mass participation event

Competitive sport – nationality, birthplace etc

13.84 The Act (section 195, paragraph 5 to 6) does not prohibit anything which is done because of a person's nationality or place of birth or how long that person has lived in a particular area or place, and which applies to:

- selecting one or more persons to represent a country, place or area or a related association in a sport, game or other competitive activity
- complying with eligibility rules for participation in that activity

Competitive sport – age

13.85 The Act does not prohibit age discrimination where a person does anything in relation to the participation of an individual as a competitor in competitive activities that are 'age banded' (section 195, paragraph 7).

13.86 This exception can be used by any individual or body involved in any aspect of the competitive activity, for example coaching, umpiring, refereeing, organising or training.

13.87 The action taken by the individual or body in relation to the participation of a competitor must be necessary to:

- secure a fair competition
- ensure the safety of competitors
- comply with the rules of a national, or international competition
- increase participation in that activity

Definition of an 'age banded activity'

13.88 An 'age banded activity' means a sport, game or other competitive activity where the physical or mental strength, agility, stamina, physique, mobility, maturity or manual dexterity of average persons of a particular age group would put them at a disadvantage compared to average persons of another age group when competing in events involving the activity (section 195, paragraph 8). This applies to physical activities such as athletics as well as primarily non-physical activities such as bridge or chess.

Example

13.89 A running club wishes to increase the participation in 10-kilometre events of men and women over 50. To achieve that aim, it organises age banded races as follows: under 18s, 19 to 49, 50 plus. The age banding of these races could fall within the exception and therefore be lawful.

Services for particular groups

Services for particular groups

13.90 The Act contains specific exceptions contains specific exceptions (discussed in this section) which allow service providers and, in certain cases, those exercising public functions (section 31, paragraph 3), to provide services:

- separately and / or differently for women and men
- exclusively for women
- exclusively for men
- to people of a particular age group (in certain circumstances)

13.91 If a service is generally provided only for persons who share a protected characteristic, a person who normally provides that service can (schedule 3, paragraph 30):

- insist on providing it in a way they normally provide it
- refuse to provide the service to people who do not share that protected characteristic, if they reasonably think it is impracticable to provide it

Separate services for women and men

13.92 The Act (schedule 3, paragraph 26(1)) does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions (section 31, paragraph 3)) offers separate services for men and women in specific circumstances. It is lawful to provide separate-sex services if:
1. a joint service for women and men would be less effective, and
2. providing the service separately to women and men is a proportionate means of achieving a legitimate aim

13.93 If these conditions do not apply, the provision of separate-sex services is likely to be unlawful sex discrimination.

13.94 The Act (schedule 3, paragraph 26(2)) also does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) provides separate services for each sex in a different way, if:

- a joint service for persons of both sexes would be less effective, or
- the extent to which the service is required by one sex makes it not reasonably practicable to provide the service other than separately and differently for each sex, and
- the limited provision of the service is a proportionate means of achieving a legitimate aim

Example

13.95 A domestic violence support unit is set up by a local authority for women and men separately as they are aware that service users feel safer and more comfortable attending a single-sex group. There is less demand for the men's group, which meets less frequently.

13.96 The Act (schedule 3, paragraph 26(3)) also does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) does anything in relation to the provision of separate services, or services provided differently for women and men, for the reasons set out in paragraph 13.94.

Example

13.97 A local authority allocates funding for an Integrated Care Board to contract with a voluntary sector organisation to provide counselling for women who have had a mastectomy.

13.98 Read paragraphs 13.113 to 13.133 for the considerations relevant to whether a separate-sex service, or anything done in relation to it, is a proportionate means of achieving a legitimate aim.

Single-sex services

13.99 The Act (schedule 3, paragraph 27) does not prohibit sex discrimination where a service provider (including a person providing a service in the exercise of public functions) provides a service exclusively to one sex, if doing so is a proportionate means of achieving a legitimate aim and at least one of the conditions in paragraphs 13.100 to 13.110 applies.

13.100 Condition 1: Only people of that sex need the service.

13.101 Condition 2: A service that is provided jointly for both sexes is not sufficiently effective without providing an additional service exclusively for one sex.

Example

13.102 A gym provides weightlifting classes to all its customers, but few women join the class, so it also provides an additional single-sex weightlifting class for women to encourage women to use the service.

13.103 Condition 3: A service provided for men and women jointly would not be as effective, and the demand for the services makes it not reasonably practicable to provide separate services for each sex.

Example

13.104 A support unit for women who have experienced domestic or sexual violence can be established, even if there is no men's unit established because there is insufficient demand to make it reasonably practical to provide a separate service for men.

13.105 Condition 4: The service is provided at a hospital or other place where users need special care, supervision or attention.

Example

13.106 A hospital chooses to provide a single-sex hospital ward for women patients to protect their safety, privacy and dignity. The hospital supports this decision by noting that the ward in question does not fit its criteria for the small number of circumstances where mixed-sex accommodation may be acceptable.

13.107 Condition 5: The service is for, or is likely to be used by, more than one person at the same time and a woman might reasonably object to the presence of a man, or vice versa.

It is likely to be reasonable for a woman to object to the presence of a man if she will be getting undressed or in a vulnerable situation when she is using the service.

Example

13.108 Women-only communal changing rooms in a sports facility.

13.109 Condition 6: The service is likely to involve physical contact between the service user and another person and that other person might reasonably object if the service user is of the opposite sex.

In this condition, limited and non-intimate physical contact is unlikely to justify single-sex provision. For instance, the fact that in first aid training there may be some physical contact between participants in the classes is unlikely to warrant the provision of single-sex sessions.

Example

13.110 A female carer only provides intimate personal care to female clients as she is uncomfortable providing this type of care to men in a domestic environment.

13.111 Where a service provider (including a person providing a service in the exercise of public functions) does anything in relation to the provision of single-sex services, this will be lawful provided that one of conditions 1 to 6 is met, and that providing the service on a single-sex basis is a proportionate means of achieving a legitimate aim.

13.112 Read paragraphs 13.113 to 13.133 for the considerations relevant to whether a single-sex service, or anything done in relation to it, is a proportionate means of achieving a legitimate aim.

Justification for separate and single-sex services

13.113 When providing a separate or single-sex service, a service provider (including a person providing a service in the exercise of public functions) must be able to demonstrate that doing so is a proportionate means of achieving a legitimate aim. Read paragraph 5.52 to 5.57 for further detail on proportionality.

13.114 An example of a legitimate aim, further to those referred to in paragraphs 13.92 to 13.112, for providing a separate or single-sex service could be ensuring the safety of women or the privacy and dignity of women and / or men. The service provider (including a person providing a service in the exercise of public functions) must show that providing the service only to one sex or separately to both sexes is a proportionate way to achieve the aim.

13.115 When considering whether providing a separate or single-sex service is proportionate, the service provider (including a person providing a service in the exercise of public functions) should consider all potential service users and whether there is a fair balance between:

1. the benefits of offering the service as a separate or single-sex service, and
2. the needs of those who are accessing it, and
3. the impact on those who are excluded from accessing it

13.116 When considering the benefits of offering a separate or single-sex service, the service provider (including a person providing a service in the exercise of public functions) should think about whether women's safety, privacy and / or dignity would be at risk in the service if it was shared with men.

Taking the example of offering a single-sex service for women, the service provider should consider factors such as:

- whether women are likely to be in a state of undress
- whether there will be limited ability for women to leave or to choose an alternative service
- whether the service is provided a result of, or connected with, male violence against women
- whether the physical differences between men and women are relevant to the experience of the service and put women at a particular disadvantage

Where factors like these are present, the benefits of offering a separate or single-sex service will be likely to outweigh other considerations in the balancing exercise.

13.117 The needs of potential service users include the specific needs of people with different protected characteristics, such as older people, disabled people and those who observe particular religious practices. For example, Muslim people may have a particular need for separate-sex services to observe the requirements of their faith.

Example

13.118 In accordance with its public sector equality duty, a local authority assesses demand for swimming classes at a pool provided by the authority for the local community. The assessment identifies an unmet demand for classes that meet the needs of Muslim people. In response to this, the swimming class provider operates a mix of services with some separate-sex classes, which are used predominantly by Muslim women and men, as well as mixed-sex classes which are open to everybody. The swimming class provider has considered the impact of the mix of its services across different protected characteristics and determined that its balanced mix of services is proportionate. The provision made is therefore likely to be lawful.

13.119 The impact on those who will be excluded from the service includes both the impact on people of the opposite sex generally and the particular impact on trans people of the opposite sex. In separate or single-sex services, a trans man will be excluded from the men-only service because his sex is female, and a trans woman will be excluded from the women-only service because her sex is male. Trans people are likely to be disadvantaged by this, by comparison to people who are not trans.

13.120 The service provider (or person providing a service in the exercise of public functions) should consider whether the disadvantage to trans people, and any other people who may be disadvantaged, outweighs the benefits of achieving the legitimate aim. They should also consider whether there is a less intrusive option than excluding trans people which would be proportionate (read paragraphs 13.137 to 13.141).

13.121 Having carried out this balancing exercise, the service provider (including a person providing a service in the exercise of public functions) may conclude that arrangements or adaptions can be made to meet the needs of all service users, or that it remains proportionate to maintain only a separate or single-sex service.

13.122 In many cases, it will be proportionate to take a holistic approach to service provision by providing a mix of services which may include both separate or single-sex services and mixed-sex services. The mix of services in terms of the size of the separate or single-sex services and of the mixed-sex services should reflect the needs and relative numbers of service users with different needs.

Example

13.123 A service provider operates a shopping centre and decides to renovate the centre. It initially intends to only provide separate-sex toilets to improve the safety and comfort of users. This disadvantages trans people because it means that a trans person cannot access a toilet catered towards their acquired gender. They also note that this option may cause safety risks and distress for trans users if required to use the toilets designated for those of the same biological sex. The service provider therefore decides to also provide toilets in individual lockable rooms with hand basins, which can be used by people of either sex.

Example

13.124 A community group is opening a small advice centre. It decides to provide separate-sex toilets for women and men, and it extends the use of the accessible toilet with baby changing facility so it can also be used as a mixed-sex toilet for anybody who does not wish to use the toilet for their sex. This is likely to be proportionate given the size and resources of the centre and takes into account the needs of all the potential service users. The community group should, on an ongoing basis, monitor whether there is any negative impact on both trans and disabled people and take appropriate action. If the community group is exercising public functions, this will also be relevant as part of their duties under the Public Sector Equality Duty.

Example

13.125 A local gym organises weightlifting induction classes designed to teach users of the gym proper techniques and safety measures. The classes are in high demand and are well attended. A small number of women request women-only classes, as they feel uncomfortable in the mixed-sex service. The gym amends its schedule to offer one class a fortnight to cater to this request, which it considers to be proportionate to the needs of service users and the relative demand. This is likely to be lawful because it has balanced the needs of different service users and provided a proportionate mix of services.

13.126 However, it may be that offering alternative arrangements is not reasonably possible for the service provider (including a person providing a service in the exercise of public functions) or that doing so would undermine the service that is being provided. This may be because of the type of service being provided, the needs of the service users, the physical constraints of any building, or because of the disproportionate financial costs associated with making those arrangements.

Example

13.127 In the example in paragraph 13.125, the women who have requested women-only classes also ask for single-sex changing rooms. The gym is in a small, shared studio space which provides mixed changing facilities with private cubicles for changing. The cubicles have floor to ceiling lockable doors and there have been no complaints about inappropriate conduct in the changing rooms. The service provider determines that providing single-sex changing rooms is impractical because of space constraints and the disproportionate cost. Since the existing changing rooms enable users to change in privacy, the current arrangement is likely to be proportionate and lawful.

Example

13.128 A women's centre provides a gym predominantly used by Jewish women who have religious objections to sharing a gym with men. The gym considers whether to open the gym to men on certain days, or to open the gym on a mixed-sex basis on certain days.

However, the centre decides to offer the gym only to women because the overwhelming demand for the service is from Jewish women and there are numerous other gyms in the area that cater to men and trans women. This service would exclude men and trans women, but this is likely to be proportionate and lawful.

The gym should also consider whether a service user may have a reasonable objection to a trans man accessing the gym and, if so, whether it is necessary to exclude them. This will be a question of proportionality and will depend on all of the circumstances, including the extent to which the trans person presents as the opposite sex. For this reason, they should only consider doing this on a case-by-case basis.

Read paragraphs 13.145 to 13.147 for further detail.

13.129 It is good practice to record the reasons why a decision has been taken to provide or not to provide a separate or single-sex service, along with any supporting evidence.

13.130 If a service provider (or a person providing a service in the exercise of public functions) admits trans people to a service intended for the opposite sex, then it can no longer rely on the exceptions set out at paragraphs 13.99 to 13.111. This means that if a service is provided only to women and trans women or only to men and trans men, it is not a separate-sex or single-sex service under the Equality Act 2010.

13.131 A service like this is very likely to amount to unlawful sex discrimination against the people of the opposite sex who are not allowed to use it. A service which is provided to women and trans women could also be unlawful sex discrimination or lead to unlawful harassment against women who use the service. Similar considerations would apply to a service provided for men and trans men. It is possible to offer a mixed-sex service alongside a single-sex service. A mixed-sex service must be open to all service users.

Example

13.132 A gym makes it clear in its policies that service users must use changing rooms designated as 'male' or 'female' in accordance with their sex. The gym also provides mixed-sex facilities which can be used by any service users. The gym suggests service users contact them privately if they need advice on which facilities to use.

A person who identifies as non-binary asks the gym which facilities they should use. The gym explains their policy on changing rooms and advises the user that they can use the changing room corresponding to their biological sex or the mixed-sex facility. The user decides that they would be more comfortable using the mixed-sex facility as they have had previous concerns around harassment due to their presentation.

This example would also apply to a person who idenitifies as gender-fluid.

13.133 If a service provider (including a person providing a service in the exercise of public functions) decides only to provide a service on a mixed-sex basis, without any separate or single-sex option, this could be direct or indirect sex discrimination against women who use the service or lead to unlawful harassment against them. This is most likely in contexts like those referred to in paragraph 13.116.

Policies and exceptions for separate and single-sex services

13.134 It will usually be helpful and often necessary for service providers (including a person providing a service in the exercise of public functions) to have a policy setting out whether, and if so how, separate or single-sex services will be provided. When developing a policy, the service provider should consider how the policy should apply in different circumstances to ensure appropriate consideration of all affected interests and provide transparency for service users.

13.135 However, individual circumstances may, exceptionally, require a different approach to that set out in a policy. The law in this area is complex, and it is not certain that it is permissible to make exceptions to allow people of the opposite sex to use a separate or single-sex service. It is likely, however, that this will be permissible if doing so adds a necessary flexibility without undermining the aim of the service and / or contributes towards achieving the aim[80].

Example

13.136 A council swimming pool has separate men's and women's changing rooms. One of the aims of having separate-sex changing rooms is to safeguard women's ability to access the facilities and use them safely. A woman is allowed to take her male child under the age of ten into the women's changing room. This does not undermine the aim, because it is unlikely that young boys pose a threat to women's safety. It also contributes towards achieving the aim, because fewer women would be able to use the swimming pool if they could not bring their children with them[81].

13.137 In most situations, when a potential service user wishes to access a single-sex service for the opposite sex, the service provider (including a person providing a service in the exercise of public functions) should consider whether it can accommodate the needs of the service user in a way which achieves a fair balance without compromising the single-sex nature of the service.

13.138 The service provider (including a person providing a service in the exercise of public functions) should consider whether it can offer a separate service to that individual and others in similar circumstances. If it is possible to do so, the service will remain a single or separate-sex service, with an additional separate service for those that share that individual's circumstances.

13.139 For example, if a leisure centre offers women-only water aerobics sessions, and it is approached by a man who would like to access the service, the leisure centre should consider whether it could offer a water aerobics session that is also open to men at a different time or on a different day. If it is possible to do so, the service would remain a separate or single-sex service, but with an additional separate service that is also open to men.

13.140 Another example of a less intrusive measure would be adapting a service to enable the service to be used by people of both sexes. For example, it may be possible to offer toilets in individual lockable rooms to be used by both sexes.

13.141 It may be that offering alternative arrangements is not reasonably possible for the service provider (or person providing a service in the exercise of public functions) or that doing so would undermine the service that is being provided. This may be because of the type of service being provided, the needs of the service users, the physical constraints of any building, or because of the disproportionate financial costs associated with making those arrangements. The service provider may take account of the fact that if it admits the individual, it may cease to be a separate or single-sex service (read paragraph 13.130).

Separate or single-sex services – gender reassignment

13.142 If a service provider (including a person providing a service in the exercise of public functions) is considering providing a separate or single-sex service, they should consider their approach to trans people's use of the service.

13.143 The impact of separate or single-sex services on trans people should be considered when the service provider is deciding whether it is justified to have a separate or single-sex service. Read paragraphs 13.120 to 13.133 for further information on this.

13.144 If a service provider (including a person providing a service in the exercise of public functions) decides to have a separate or single-sex service and allows trans people to use the service intended for the opposite sex, the service will no longer be a separate or single-sex service under the Equality Act 2010 (the Act). It is also very likely to amount to unlawful discrimination against others (read paragraph 13.131). It is possible to offer a mixed-sex service alongside a single-sex service. A mixed-sex service must be open to all service users.

13.145 If it is justified to provide a separate or single-sex service, then it will not be unlawful discrimination because of gender reassignment to prevent, limit or modify trans people's access to the service for their own sex, as long as doing so is a proportionate means of achieving a legitimate aim (schedule 3, paragraph 28).

13.146 For example, a trans man might be excluded from the women-only service if the service provider decides that, because he presents as a man, other service users could reasonably object to his presence, and excluding him is a proportionate means of achieving a legitimate aim.

13.147 A legitimate aim for excluding a trans person from a separate or single-sex service for their own sex might be to prevent discomfort or distress for other service users. Service providers should consider whether other service users could reasonably object because they are worried about sharing a single or separate-sex service with someone who appears to be of the opposite sex. That will depend on all the circumstances, including the nature of the service in question and the extent to which the trans person presents as the opposite sex. For this reason, a service provider (including a person providing a service in the exercise of public functions) should only consider doing this on a case-by-case basis.

13.148 The service provider should consider whether there is a suitable alternative service for the trans person to use. In the case of services which are necessary for everybody, such as toilets, it is very unlikely to be proportionate to put a trans person in a position where there is no service that they are allowed to use.

13.149 If the service provider does not act proportionately, this is very likely to amount to direct or indirect discrimination because of gender reassignment (section 13 and section 19).

Example

13.150 Group counselling sessions are provided for female survivors of domestic violence. The service provider excludes a trans man from the sessions because they consider he is likely to be perceived as a man and the service provider is concerned that women service users could reasonably be worried or distressed by the presence of someone they perceive to be a man using the service.

The service provider's decision to exclude the trans man from the service could amount to direct gender reassignment discrimination because he has been treated less favourably than a woman without the protected characteristic of gender reassignment. However, in this situation the service provider is likely to be able to rely on the exception from liability explained in paragraph 13.145, because the decision to exclude the trans man was proportionate.

Example

13.151 A trans man attends a gym frequently and uses the women's changing room, consistent with his sex. If the gym owner decides that he can no longer use the women's changing room and there is no other changing room he can use, this may be a disproportionate decision. If it is disproportionate, the gym owner will not be able to rely on the exception for gender reassignment discrimination (schedule 3, paragraph 28). The trans man will be able to bring a complaint of direct gender reassignment discrimination, because he has been treated less favourably than a woman who does not have the protected characteristic of gender reassignment.

13.152 If the nature of a service means that it is only, or generally, used by women or by men, this does not mean that it is necessarily a separate or single-sex service under the Act. A service like this does not need to operate according to the rules and principles described in paragraphs 13.99 to 13.151. However, the Act (schedule 3, paragraph 30) contains a different exception which means that, in services of this sort, it will not be unlawful discrimination if the service provider refuses to serve a person of the opposite sex, if it would be impracticable to provide the service to that person. The service provider can also refuse to adjust the way in which the service is provided to meet the needs of a person of the opposite sex. This exception applies to all protected characteristics in the Act, not just sex.

Example

13.153 A hospital provides an Obstetrics and Gynaecology (OBGYN) outpatient service. Only women and trans men need to use the service. The hospital provides the service to women and trans men in a way which preserves all users' privacy and dignity. Where that is the case, it is unlikely to be proportionate to exclude a trans man because of objections from female service users.

The outpatient service does not offer any treatment which is suitable for a man or a trans woman and therefore can refuse to treat them. The hospital can also refuse to adjust the way in which it provides the service.

Communal accommodation

13.154 The Act does not prohibit sex discrimination or gender reassignment discrimination where a person does anything in relation to admitting persons to communal accommodation, or providing any benefit, facility or service linked to the accommodation (schedule 23, paragraph 3(1)). This exception applies if the criteria set out in paragraphs 13.157 to 13.159 are satisfied.

13.155 'Communal accommodation' is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex (schedule 23, paragraph 3(5) to (6)). It can also include:

- shared sleeping accommodation for men and for women
- ordinary sleeping accommodation
- residential accommodation, all or part of which should only be used by persons of the same sex because of the nature of the sanitary facilities serving the accommodation

13.156 A benefit, facility or service is linked to communal accommodation if it cannot be properly and effectively provided except to those using the accommodation. It can only be refused to a person if they can lawfully be refused use of the accommodation (schedule 23, paragraph 3(7)).

13.157 This exception only applies if the communal accommodation is managed in a way that is as fair as possible to both women and men (schedule 23, paragraph 3(2)).

13.158 When excluding a person from use of communal accommodation because of sex or gender reassignment, the service provider, person exercising public functions or association must consider:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
- the relative frequency of demand or need for the accommodation by persons of each sex (schedule 23, paragraph 3(3))

13.159 Excluding a person from use of communal accommodation provided for their own sex because of gender reassignment will only be lawful if it is a proportionate means of achieving a legitimate aim (schedule 23, paragraph 3(4)). The matters which a service provider, person exercising public functions or association should consider are similar to those set out in paragraphs 13.113 to 13.152.

Asking about protected characteristics

13.160 There are limited circumstances under the Act where asking an individual about their protected characteristic in the provision of services may be warranted, for example, to make reasonable adjustments. In practice, questions may be asked on an anonymised basis to monitor diversity for operational and delivery purposes where service providers are, for example, assessing any under representation, disadvantage encountered or additional needs of service users. However, there are a number of factors that service providers should consider in relation to the provision of single-sex services.

Asking about sex

13.161 Personal data includes information about a person's sex which may also be protected under Article 8 of the European Convention on Human Rights (ECHR). In particular, it is important to be aware that some people, including some trans or gender non-conforming people, may wish to keep such information private as far as possible and may find it distressing to be asked about their sex.

13.162 To comply with Article 8 of the ECHR, a service provider must be able to objectively justify asking an individual about their sex. A request for information about sex should only be made where it is a proportionate means of achieving a legitimate aim. Furthermore, a request for information about sex which is not a proportionate means of achieving a legitimate aim could also amount to unlawful indirect gender reassignment discrimination.

13.163 Examples of legitimate aims include:

- for the purposes of diversity monitoring
- because the information is needed for operational reasons relating to the services or functions in question
- in relation to lawful single or separate-sex provision under the Equality Act 2010

For a more detailed explanation of legitimate aim and proportionality, read paragraphs 5.49 to 5.57.

13.164 There may be other reasons why it is legitimate to ask about sex which do not fall into those categories. If a service provider, a person exercising public functions or an association wishes to ask about sex for a different reason, that should be done in accordance with the general guidance set out in paragraphs 13.161 to 13.182 It may be helpful to seek specific legal advice in relation to making any such request.

13.165 Discrimination or harassment could occur if, for example, individuals are asked about their sex in a way that requires them to disclose this information in public, or if the language or manner of a request is rude, combative or offensive. Any request that is necessary should take this into account and be made sensitively and discreetly.

Information for the purposes of lawful single or separate-sex provision

13.166 It is likely to be a legitimate aim for a service provider, a person exercising public functions or an association to seek to ensure that service users understand that the service or the association is a single or separate-sex service or association, under the Act. Read paragraphs 13.92 to 13.152 for further detail on single-sex services.

13.167 In many cases, the primary means of ensuring that lawful provision is to clearly communicate to potential service users or members that those services are available to those of the same sex only. This should be done by using proportionate means which are likely to be effective. These may include signage, promotional materials including online and hard copies and verbal information provided as part of any enrolment, admission or induction process.

13.168 Where, regardless of such communications, there is clear evidence of an issue with members of the opposite sex accessing or seeking to access the single or separate-sex service or association in question, it may be legitimate to ask individuals to provide confirmation that they are of the eligible sex by proportionate means. Evidence of such concern might include the individual's physique or physical appearance, behaviour or concerns raised by other service users. However, service providers, those performing public functions and associations must keep in mind that it is not always possible to be sure of a person's sex from their appearance. Whether it is legitimate to approach any particular individual to make enquiries about their sex will be a sensitive question that will depend on all the circumstances.

13.169 Factors that may be relevant include:

- the strength of the grounds for concern
- whether concerns have been raised by other service users
- the nature of the service or facility in question
- whether there is any particular history or other evidence of improper access being a problem

13.170 It is unlikely to be either practical or appropriate to approach any particular individual to make enquiries about their sex in relation to facilities, such as toilets, which are incidental to the primary service.

13.171 Where it is necessary to ask about a service user's sex, the measures involved in doing so must be no more than necessary to accomplish the aim of establishing eligibility.

13.172 Such measures may be proportionate if implemented in response to clear evidence of the opposite sex accessing the single or separate-sex service or association membership. Where an individual is asked to confirm their sex, this should be done as sensitively as possible, and must respect their privacy.

13.173 The procedures associated with any such request for confirmation of sex as part of an enrolment or admission process should be designed to avoid the information being given in the presence of other service users or staff, and to avoid potential distress to the service user as far as possible.

13.174 Service providers, those performing public functions and associations should consider what protocols or procedures are appropriate for their particular circumstances. These should take account of the sensitive nature of the issues and any potential risks to staff or others. All relevant staff should be made aware of these procedures and trained in fulfilling their responsibilities under them.

13.175 Information about sex is sensitive and should be treated as special category personal data. Such information should be held securely and not be retained longer than is reasonably necessary for achieving a legitimate purpose. Access to such information should be restricted to only people who need access to it for that, or for ongoing legitimate purposes.

13.176 If, in all the circumstances, it is legitimate to ask an individual to confirm their sex, and that is done in a manner which is proportionate, it is unlikely to involve unlawful discrimination and harassment. If the provision of the service meets the criteria set out in the Act for the provision of single or separate-sex services, it is unlikely to amount to direct sex discrimination. Read paragraphs 13.92 to 13.153 for further detail on single-sex services.

13.177 Requesting confirmation of sex in such circumstances may not have a harassing effect and, even though the approach may place trans people at a particular disadvantage, it is likely to be justified. Read Chapter 8 for more detail on harassment.

13.178 Where an individual confirms, in response to such a request, that they are not of the sex for which the single or separate-sex service or association in question is intended, they may be required to leave and thereafter be excluded from the service. This should again be handled as sensitively as possible in the circumstances.

13.179 Where there remains a genuine concern about the accuracy of the response to a request for an individual to confirm their sex, then the service provider, person performing public functions or association should consider what action is proportionate in the circumstances. There is no type of official record or document in the UK which provides reliable evidence of sex. For example, sex on passports and driving licences may be changed with or without a Gender Recognition Certificate (GRC), and birth certificates may reflect the acquired gender of someone who has a GRC. Therefore, it is unlikely to be proportionate or practical to ask for further evidence of a person's sex. In such circumstances, it is likely to be necessary to weigh up the relevant factors to decide whether to exclude the individual from the service or association or to permit them to continue to access it.

13.180 Factors that may be relevant to this decision include:

- the strength of the continuing grounds for concern
- the nature of the service
- the nature and potential severity of the risks and potential harms to, respectively, the individual in question and other service users

Other relevant legal considerations

13.181 It is important to be aware of legal provisions protecting privacy in the context of making such enquiries. Unless it is relevant for operational reasons, whether or not someone has a GRC is unlikely to be relevant information for the purposes of asking about either the protected characteristic of sex or the protected characteristic of gender reassignment. However, if, in the course of asking for such information or otherwise, a service provider, those exercising public functions or an association acquires information that someone has a GRC or has applied for a GRC, onward disclosure of either that information or their sex without consent may be a criminal offence in some circumstances (read section 22 of the Gender Recognition Act 2004).

13.182 Information about sex is likely to constitute special category data for the purposes of the Data Protection Act 2018 (DPA) and UK General Data Protection Regulations (GDPR). Processing personal data should be done with regard to that legislation and the constraints of the relevant systems and resources. Any information about the sex of individuals which is obtained and held by a service provider should be held securely and not be retained longer than reasonably necessary for the purpose of dealing with admission of each individual or for ongoing legitimate purposes. Legitimate purposes may include, for example, equality monitoring or service planning reasons, in which case thought should be given to anonymising data, where possible. Access to any personal information should be restricted to people who legitimately need access to it for those purposes. This should be done with regard to the constraints of the relevant systems and resources.

Separate or single-sex services relating to religion

13.183 The Act does not prohibit sex discrimination in the provision of services or the exercise of public functions where a minister of religion provides separate or single-sex services (schedule 3, paragraph 29(1)). This exception applies if:

- the service is provided for the purposes of an organised religion
- it is provided at a place which is (permanently or temporarily) used for those purposes, and
- the limited provision of the service is necessary to comply with the doctrines of the religion, or
- the limited provision of the service is for the purpose of avoiding conflict with the strongly held religious views of a significant number of the religion's followers

13.184 In this context, a minister is a minister of religion or other person who:

- performs functions in connection with the religion, and
- holds an office or appointment in a relevant organisation in relation to a religion, or is accredited, approved or recognised for the purposes of one (schedule 3, paragraph 29(2))

13.185 A relevant organisation is one whose only or main purpose is not commercial, and which is one of the following (schedule 3, paragraph 29(3) to (4)):

- to practise or advance the religion
- to teach the practice or principles of the religion
- to enable persons of the religion to receive benefits, or to engage in activities, within the religion's framework
- to foster or maintain good relations between persons of different religions

Example

13.186 If the criteria in paragraph 13.185 are met, a synagogue can have separate seating for men and women at a reception following a religious service.

13.187 This exception does not apply to acts of worship, which are not 'services' within the meaning of the Act, so no exception is required.

13.188 This exception does not permit harassment or victimisation, which are still prohibited under the Act.

Services generally provided to persons who share a protected characteristic

13.189 The Act does not prohibit discrimination in certain cases where a service is generally provided only for people who share a protected characteristic (such as gay people or people of a particular ethnic origin) (schedule 3, paragraph 30).

This exception permits a service provider (including a person providing a service in the exercise of public functions) who normally provides the service for members of that group to:

- continue to provide the service in this way
- refuse to provide the service to people who are not members of that group, if the service provider reasonably thinks that it is impracticable to do so

13.190 This provision does not mean that, if a service is generally provided for persons who share a protected characteristic, all service providers must provide the service in this limited way. It simply means a service provider who normally provides a service in that way is permitted to continue to do so.

Example

13.191 A butcher who sells halal meat does not have to also sell non-halal meat or kosher meat. However, if a non-Muslim customer wanted to purchase the meat on offer, he could not refuse to sell it to them.

13.192 The provision does not apply to those exercising a public function that is not the provision of a service, or to associations. It does not permit harassment or victimisation, which are still prohibited under the Act.

Pregnancy – health and safety

13.193 The Act does not prohibit discrimination by service providers, those exercising public functions and associations in certain cases on the grounds of pregnancy-related health and safety concerns. These exceptions are explained in more detail in this section.

The exceptions apply where the service provider, person exercising public functions or association believes that there is an actual or potential health or safety risk to the pregnant woman. They do not apply to any such risks to an unborn foetus. In addition, the exceptions do not permit harassment or victimisation, which are still prohibited under the Act.

13.194 When explaining these exceptions, we use the same language as the Act, which refers to discrimination against women on the grounds of pregnancy and maternity. As explained in paragraph 4.55, a trans man who becomes pregnant is likely to be protected under the protected characteristic of pregnancy and maternity[82].

13.195 The Act does not prohibit discrimination by a service provider or person exercising public functions when refusing a service to a pregnant woman on the grounds of her pregnancy if they:

- reasonably believe that providing the service would create a risk to the health or safety of the woman because of her pregnancy, and
- refuse to provide the service to people with other physical conditions because of a reasonable belief that providing the service would create a risk to their health or safety (schedule 3, paragraph 14(1))

Example

13.196 The owner of a fairground ride displays a notice which states that the ride is unsuitable for people with back injuries. If the owner refused to allow a pregnant woman to go on the ride because of a reasonable belief that the ride is also unsuitable for those who are pregnant, this is likely to be permitted by this exception.

13.197 Similarly, the Act does not prohibit discrimination by a service provider or person exercising public functions where they provide, or offer to provide, a conditional service to a pregnant woman on the grounds of her pregnancy if:

- the conditions are intended to remove or reduce a risk to their health or safety
- the service provider or person exercising public functions reasonably believes that providing the service without the conditions would create such a risk to their health or safety, and
- the service provider or person exercising public functions imposes conditions on providing the service to people with other physical conditions because of a reasonable belief that providing the service without such conditions would create a risk to their health or safety (schedule 3, paragraph 14(2))

13.198 The Act does not prohibit discrimination by an association where it applies different terms for admitting a pregnant woman as a member or associate, or inviting them as a guest (or permitting them to be invited as such) if:

- the terms include a term intended to remove or reduce a risk to the individual's health or safety
- the association reasonably believes that without that term, admitting the person would create such a risk, and
- the association sets terms of admission for people with other physical conditions that include a term intended to remove or reduce a risk to their health or safety, because of a reasonable belief that admitting them without such a term would create a risk to their health or safety (schedule 16, paragraph 2(1) and (2))

13.199 Similarly, the Act does not prohibit discrimination by an association where it varies the terms of membership of a pregnant member or varies the rights of a pregnant associate, if:

- the variation to the terms or rights is intended to remove or reduce a risk to the individual's health or safety
- the association reasonably believes that not varying the terms or rights would create such a risk, and
- the association varies the terms or rights of people with other physical conditions with the intention of removing or reducing a risk to their health or safety, because of a reasonable belief that not doing so would create such a risk (schedule 16, paragraph 2(5))

13.200 The Act does not prohibit discrimination by an association where it provides a pregnant member, associate or guest access to a benefit, facility or service in a different way (schedule 16, paragraph 2(3)), if:

- the way used by the association is intended to remove or reduce a risk to the individual's health or safety
- the association reasonably believes that providing access in any other way would create such a risk, and
- the association provides people with other physical conditions access to a benefit, facility or service in a way that is intended to remove or reduce a risk to their health or safety, because of a reasonable belief that providing access in any other way would create such a risk

13.201 The Act does not prohibit discrimination by an association when it refuses to provide a pregnant woman access to a benefit, facility or service (schedule 16, paragraph 2(4)), if:

- the association reasonably believes that, because the individual is pregnant, allowing access would create a risk to their health or safety, and
- the association refuses access to the benefit, facility or service to people with other physical conditions because of a reasonable belief that allowing them access would create a risk to their health or safety

Example

13.202 A private sports club carries out fitness tests for the different equipment in their gym. They advise all members that if they have specified health conditions, they will not be able to use certain equipment or to use equipment to certain levels of intensity. The club also restricts use of some equipment by any member, associate or guest who is over six months pregnant.

If the club reasonably believes the restrictions are necessary to ensure the health or safety of members who are over six months pregnant or have specified health conditions, the club's treatment of pregnant members, associates and guests is likely to come within this exception.

Insurance and other financial services

13.203 In some circumstances, the Act does not prohibit discrimination in the provision of services and the exercise of public functions where the fact that a person is disabled is used as a factor in deciding whether to provide insurance services to that person and, if so, on what terms (schedule 3, paragraph 20A and 21).

13.204 The Act also does not prohibit discrimination in some circumstances where a person's age is used as a factor in the provision of insurance and other financial services (Reg. 3 Equality Act 2010 (Amendment) Regulations 2012/2992). These exceptions are explained in more detail in this section.

13.205 For contracts entered into before 21 December 2012, the Act does not prohibit sex, gender reassignment and pregnancy and maternity discrimination.

Disability

13.206 The Act does not prohibit disability discrimination in relation to anything in connection with insurance business (schedule 3, paragraph 21) if:

- it is done based on information which is relevant to the assessment of the risk to be insured
- the information is from a reliable source, and
- it is reasonable to do so

This exception does not, however, permit harassment or victimisation, which are still prohibited under the Act.

13.207 'Insurance business' means business consisting of effecting or carrying out contracts of insurance. This includes buying, selling, subscribing for or underwriting a contract of insurance, or offering or agreeing to do so, and carrying out a contract of insurance, as a principal or as an agent (read section 22 and schedule 2 of the Financial Services and Markets Act 2000).

This exception applies to anyone involved in 'insurance business' in any aspect of selling insurance or writing the terms on which a disabled person can be insured against certain risks.

13.208 Information which might be relevant to the assessment of the risk to be insured includes actuarial or statistical data or a medical report.

The exception would not permit an insurer to rely on untested assumptions, stereotypes or generalisations in respect of a disabled person.

13.209 Additional factors that may be relevant when determining whether the information comes from a source on which it is reasonable to rely include:

- whether the information is up to date
- the suitability of the method of data collection, where data is involved
- whether the information is representative
- whether the information is credible (for example, it is generally accepted by the scientific or actuarial community)

Example

13.210 A disabled man living with HIV applies to a motor insurer for comprehensive insurance on his motor car. When completing the application form, he states that he has HIV. The insurer is willing to provide him with insurance cover but only at a higher premium than would be charged to other motorists. The decision to charge a higher premium is not based on any sound data about HIV or on the man's actual medical condition. It is likely to be unlawful.

Life and income protection insurance

13.211 The UK government, the Association of British Insurers (ABI) and the British Insurance Brokers' Association (BIBA) have a voluntary agreement in place that applies when service providers refuse critical illness insurance, income protection or life insurance to an individual because they have a pre-existing medical condition or disability. The agreement obliges service providers to:

- refer the individual to another company that can help, or
- direct the individual to a signposting system, which should be able to identify more suitable service providers

13.212 Here is the **BIBA signposting service**.

13.213 Signposting an individual does not mean that an insurer will have complied with their obligations under the Act, that they will have been justified in refusing to provide a service, or that they may not be found liable for breaches of the Act.

Age

13.214 The Act does not prohibit age discrimination in relation to anything in connection with providing a financial service (schedule 3, paragraph 20A).

This would include services of a banking, credit, insurance, personal pension, investment or payment nature. Some examples are:

- mortgages
- annuities
- current accounts and savings accounts
- cheque cashing services
- loans
- bank overdrafts
- credit cards and charge cards
- debt advice and debt management services
- e-money services
- equity release
- fraud and credit scoring used by financial services companies
- spread betting services
- investment advice

This is not an exhaustive list.

13.215 However, where a financial services provider carries out a risk assessment which considers the age of the service user, it will only be able to rely on this exception (schedule 3, paragraph 20A (2)) if:

- the information used for the risk assessment is relevant, and
- the information comes from a source on which it is reasonable to rely

13.216 This might apply, for example, in deciding what premium to charge a customer for motor or travel insurance.

Information which might be relevant to the risk assessment includes actuarial or statistical data, future projections or a medical report. It cannot include untested assumptions, stereotypes or generalisations in respect of age.

13.217 Additional factors that may be relevant are set out in paragraph 13.209.

Example

13.218 A couple, both aged 60, apply for a 15-year mortgage to buy a new home. The mortgage lender wants to assess the risk that they will be unable to afford the mortgage repayments in future, and so asks them about their retirement plans and post-retirement income. This information is relevant to the assessment of risk relating to age and comes from a source on which it is reasonable to rely – the couple themselves. The lender can therefore rely on the financial services exception.

13.219 This exception applies to service providers and those exercising public functions. It does not permit harassment or victimisation, which are always unlawful.

Example

13.220 A woman in her 70s believes that there are unauthorised purchases on her credit card statement. She tells her credit card provider that she suspects her card has been cloned. The provider tells her she is probably just being 'forgetful' and that she should contact them via a younger relative. The woman feels humiliated by her treatment. This is likely to amount to harassment related to age and would not be covered by the financial services exception.

Travel and motor insurance

13.221 The UK government, the Association of British Insurers (ABI) and the British Insurance Brokers' Association (BIBA) have a voluntary agreement in place that applies when service providers refuse travel and motor insurance to an individual because their age falls above the upper age limit for the product. The agreement obliges service providers to:

- refer the individual to another company that can help, or
- direct the individual to a signposting system, which should be able to identify more suitable service providers

13.222 Here is the **BIBA signposting service**.

13.223 Signposting an individual does not mean that an insurer will have complied with their obligations under the Act. Nor does it mean that they will have been justified in refusing to provide a service or that they may not be found liable for breaches of the Act.

Existing insurance policies

13.224 The Act also contains an exception for insurance policies which came into existence before schedule 3 paragraph 23 came into force (referred to as an 'existing insurance policy') (schedule 3, paragraph 23).

13.225 The Act does not prohibit discrimination in relation to anything in connection with insurance business relating to an existing insurance policy. 'Insurance business' has the same meaning as explained in paragraph 13.207.

13.226 This exception does not, however, permit harassment or victimisation, which are still prohibited under the Act.

13.227 Existing insurance policies may continue without need for change until they are renewed through a new contract or have their terms reviewed so as to amend an existing contract[83], on or after 1 October 2010. This exception would then no longer apply and any discrimination would only be lawful if the relevant conditions set out in paragraphs 13.203 to 13.220 are met.

Financial services arranged by an employer

13.228 It is not a breach of the Act, as it applies to services and public functions, to provide certain financial services arranged by an employer (schedule 3, paragraph 20).

13.229 This exception applies if the financial services are provided pursuant to an arrangement between an employer and a service provider to provide the service to the employer's employees as a consequence of their employment.

13.230 The financial services are:

- insurance or a related financial service
- a service relating to membership of or benefits under a personal pension scheme

13.231 An employer could still be liable for breaching the Act in the provision of such financial services under Part 5 where applicable. This is outside the scope of this Code.

Immigration

13.232 Where certain immigration decisions are made and certain potentially discriminatory immigration functions are carried out, the Act does not prohibit (schedule 3, Part 4):

- age discrimination
- disability discrimination
- race discrimination (relating to nationality and ethnic or national origins only)
- religion or belief discrimination

Different conditions apply for each type of discrimination and these are explained in more detail in this section. The exceptions do not permit harassment or victimisation, which are still prohibited under the Act.

13.233 The exception relating to nationality discrimination authorised by statute or the executive may also be relevant in relation to immigration functions. This is explained in paragraphs 13.17 to 13.20.

Age

13.234 The Act does not prohibit age discrimination where service providers and persons exercising public functions perform certain immigration functions (schedule 3, paragraph 15A).

13.235 This exception applies to anything done in the exercise of relevant functions by:

- a Minister of the Crown acting personally
- a person acting in accordance with a relevant authorisation

In this context, a Minister of the Crown 'acting personally' will usually include acting through their officials[84].

'Relevant functions' are functions exercisable by virtue of certain provisions which are set out in the Act (schedule 3, paragraphs 15A(5) to (6)).

13.236 A 'relevant authorisation' (schedule 3, paragraph 15A(4)) is a requirement imposed or an express authorisation given:

- in relation to a particular case or class of case, by a Minister of the Crown acting personally
- in relation to a particular class of case, by or under any relevant function

Example

13.237 A 36-year-old woman from South Korea travels to the UK under a Standard Visitor visa. This permits her to visit the UK but not to do any paid work. While in the UK, she decides to apply for a visa under the Youth Mobility Scheme to enable her to work. Applicants can only qualify for the scheme if they are aged between 18 and 35.

The application is considered by an immigration official, who applies the Immigration Rules and rejects the application on the grounds of the woman's age. This is a relevant function exercisable under the Immigration Acts. The decision to reject the application will not be age discrimination because the requirements for the scheme set out in the Immigration Rules are covered by this exception.

Disability

13.238 The Act does not prohibit disability discrimination where service providers and persons exercising public functions perform certain immigration functions (schedule 3, paragraph 16).

13.239 This exception applies to any of the following decisions or anything done for the purpose of, or in pursuance of, any such decision, whether or not the decisions are taken in accordance with immigration rules, provided such decision is taken because it is necessary for the public good to:

- refuse entry clearance
- refuse leave to enter or remain in the UK
- cancel leave to enter or remain in the UK
- vary leave to enter or remain in the UK
- refuse an application to vary leave to enter or remain in the UK

13.240 The Act also does not prohibit disability discrimination in relation to a decision or guidance by the Secretary of State, or a decision taken in accordance with guidance by the Secretary of State, if the decision or guidance is in connection with any of the decisions set out at paragraph 13.239.

Example

13.241 A person who entered the UK as a student from Australia has severe paranoid schizophrenia. After they violently assault several people involved in their care, the Secretary of State decided to cancel their leave to enter or remain on the ground that this is necessary for the public good.

Nationality and ethnic or national origins

13.242 The Act does not prohibit race discrimination, as it relates to nationality or ethnic or national origins, where service providers and persons exercising public functions perform certain immigration functions (schedule 3, paragraph 17).

This exception matches the equivalent relating to age discussed in paragraphs 13.234 to 13.237. It does not apply to discrimination because of colour.

13.243 The exception applies to anything done in the exercise of relevant functions by:

- a Minister of the Crown acting personally
- a person acting in accordance with a relevant authorisation

In this context, a Minister of the Crown 'acting personally' will usually include acting through their officials[85].

'Relevant functions' are functions exercisable by virtue of certain provisions which are set out in the Act (schedule 3, paragraphs 15A(5) to (6)).

13.244 A 'relevant authorisation' (schedule 3, paragraph 15A(4)) is a requirement imposed or an express authorisation given:

- in relation to a particular case or class of case, by a Minister of the Crown acting personally
- in relation to a particular class of case, by or under any relevant function

Example

13.245 Immigration officers screening passengers entering the UK would be acting lawfully under the Act if they apply a more rigorous screening process to people of a particular nationality, having been authorised by a Minister to do so. A person who was singled out for such examination because of their nationality would not be able to bring a successful claim for race discrimination under the Act. However, if an immigration officer subjected all Black people to more rigorous examination, the exception would not apply and this could be unlawful race (colour) discrimination.

Religion or belief

13.246 The Act does not prohibit religion or belief discrimination where service providers and persons exercising public functions perform certain immigration functions (schedule 3, paragraph 18).

13.247 This exception applies to a decision taken in accordance with immigration rules, or anything done for the purpose of or in pursuance of a decision (schedule 3, paragraph 18(3)):

- to refuse entry clearance or leave to enter or to cancel leave to enter or remain in the UK on grounds that exclusion of the person is conducive to the public good
- to vary leave to enter or remain or to refuse to do so on grounds that it is undesirable for the person to remain in the UK

13.248 This exception also applies to a decision, or anything done for the purposes of or in pursuance of a decision, in connection with an application for entry clearance or leave to enter or remain in the UK, whether or not the decision is taken in accordance with immigration rules, provided the decision is taken because (schedule 3, paragraph 18(5) and (6)):

- the person holds an office or post or provides a service in connection with a religion or belief
- one religion or belief is to be treated differently from others
- the exclusion of a person who holds an office or post or provides a service in connection with religion or belief is conducive to the public good

13.249 This exception also applies to a decision taken, or guidance given, or a decision taken in accordance with guidance given, by the Secretary of State in connection with either of the decisions in paragraphs 13.247 and 13.248 (schedule 3, paragraph 18(7)).

Example

13.250 A preacher applies for leave to enter the UK. He is known for extreme religious views and using his role to incite violence. The Home Secretary refuses the application on the grounds that his presence in the UK would not be conducive to the public good.

Care within the family

13.251 The Act's services and public functions provisions do not apply where a person takes into their home, and treats as a member of their family, someone who requires particular care and attention (schedule 3, paragraph 15).

13.252 This is the case whether or not the person who takes the other person into their own home is paid to do so, for example in order to provide foster care.

Example

13.253 A Muslim family could choose to foster only a Muslim child. This would not constitute discrimination against a non-Muslim child.

Blood services

13.254 It is not a breach of the Act, as it applies to services and public functions, for someone operating a medical service for the collection and distribution of human blood or blood components to refuse to accept a person's donation of blood (schedule 3, paragraph 13). This exception applies if:

- the refusal is because of an assessment of the risk to the public or to the person based on clinical, epidemiological or other data from a reliable source and
- the refusal is reasonable

Exceptions for certain transport services in relation to disability discrimination

13.255 The Act does not prohibit disability discrimination by service providers and persons exercising public functions in relation to certain transport services involving transport by air or transport by land (schedule 3, Part 9). As explained at paragraph 3.31, this Code does not cover these provisions.

Exception for television, radio and online broadcasting and distribution

13.256 The Act contains an exception designed to protect the editorial independence of broadcasters when broadcasting or distributing content, whether on television, radio or online (schedule 3, paragraph 31(1)).

13.257 It is not a breach of the Act for a service provider or person exercising public functions to do anything in relation to the provision of a content service (as defined in section 32, paragraph 7 of the Communications Act 2003). This covers the broadcasting, distributing and scheduling of programmes and content either on television, radio or online. It includes editorial decisions about the content as well as which programmes to commission, scheduling of programmes, or who should take part in a particular programme.

13.258 This exception does not apply to the provision of an electronic communications network, electronic communications service or associated facility as defined in section 32 of the Communications Act 2003 (schedule 3, paragraph 31(2)). This means that discrimination, harassment or victimisation in the activity of sending signals is not permitted under the Act, because the exception only applies to the content of what is broadcast.

Example

13.259 If an internet service provider refused to send a signal to a person's home and the person considered that this refusal amounted to an act of discrimination or harassment because of or related to a protected characteristic, they could bring a claim against the internet service provider. They could not, however, bring a claim of discrimination or harassment against a production company because of a decision regarding who should appear in a particular podcast or on which day new episodes should be released.

Exceptions for services provided by Information Society Service Providers

13.260 An Information Society Services Provider (ISSP) is a provider which supplies services remotely, that have been requested by a user, through electronic means, which are normally provided for remuneration (read paragraph 11.77) (schedule 25, paragraph 7).

There are special rules about the territorial extent of the Act when a remote service is an ISSP (read paragraphs 11.79 to 11.82).

13.261 If a remote service is an ISSP and it is subject to the Act, there are exceptions that might still apply.

13.262 The three exceptions are where the ISSP:

- acts as a mere conduit
- caches information
- is a host that stores information

These exceptions are explained in more detail in paragraphs 13.263 to 13.268.

13.263 The Act does not apply where the ISSP acts as a mere conduit (schedule 25, paragraph 3). A mere conduit means that the ISSP does not:

- initiate the transmission
- select the recipient or
- select or modify the information in the transmission

Acting as a mere conduit includes the automatic, intermediate, and transient storage of the information transmitted, so long as it is only stored in order to carry out the transmission and not for longer than is reasonably necessary.

Example

13.264 An ISSP delivers email traffic via its network. The email is from a health club to potential customers offering a discount for a spa weekend for mixed-sex couples only. The ISSP has not initiated the transmission, selected the recipient or chosen or modified the information in the email. Therefore, the ISSP is only a mere conduit for this discriminatory content and is not liable under the Act.

13.265 The Act does not apply where the ISSP is caching only (schedule 25, paragraph 4). Caching refers to the strategy of an ISSP in which the ISSP keeps a copy of a page or image that an internet user has already accessed and seen. The copy is then displayed for the user each time the user subsequently refers to the same page or image rather than downloading the entire file again. Caching speeds up the user's next visit to the webpage. An ISSP can rely on the caching exemption to the Act when it:

- provides automatic, intermediate and temporary storage of information for the purpose of enabling future requests for that information to be served faster
- stores the information solely for the purpose of making more efficient the onward transmission of the information to recipients of the service at their request
- does not modify that information, and
- complies with any conditions of access to the information

This exception only applies if the ISSP also expeditiously removes or disables access to the information as soon as the ISSP is aware that:

- the information at the initial source of the transmission has been removed from the network
- access to it has been disabled, or
- a court or administrative authority has required the information to be removed from the network or for access to it to be disabled

Example

13.266 A restaurant advertises services online for potential customers, and an ISSP caches files from the restaurant's website for internet users. The web page makes clear the restaurant will not take bookings from groups consisting of all males. If all the conditions in paragraph 13.265 are met, then the ISSP can rely on the caching exception and the Act will not apply.

13.267 The Act does not apply where the ISSP is hosting only (schedule 25, paragraph 5). Hosting is a service provided by an ISSP to a user which offers a physical location for the storage of web pages and files which can be viewed on the internet. The Act does not apply where the ISSP hosts information provided by a service user, if:

- the ISSP had no actual knowledge when the information was provided that its provision was unlawful under the Act, or
- when the ISSP actually knew the provision of the information was unlawful, it expeditiously removed the information or disabled access to it

If the service user is acting under the control of the ISSP then this exception does not apply.

Example

13.268 An ISSP offers subscribers free space for a small website that is hosted by one of its computers. The website advertises a hotel which offers accommodation services to potential customers. The hotel's webpage states it will not take bookings from physically disabled people. The ISSP had no actual knowledge when the information was provided that it was unlawful under the Act and so the ISSP was acting as host only and will not be liable under the Act.

Later, a person brought the discriminatory advertisement to the ISSP's attention. Upon gaining knowledge that the provision of the information was unlawful, the ISSP quickly removed the information or disabled access to it. This action means that the ISSP can continue to rely on the exception for hosting.

Exceptions relating to the solemnising of marriage and registering of civil partnerships

13.269 Since the Marriage (Same Sex Couples) Act 2013 in England and Wales and the Marriage and the Civil Partnership (Scotland) Act 2014 in Scotland were passed, some religious denominations allow their representatives to marry same-sex couples according to their rites. Certain religious organisations also allow their representatives to conduct blessings or other rites following civil partnership ceremonies and, in Scotland, to register civil partnerships for same-sex and opposite-sex couples.

13.270 The Act permits religious representatives of these denominations and organisations to refuse to solemnise or otherwise take part in same-sex and opposite-sex marriages in certain cases. These exceptions apply where the refusal is on certain grounds, which are explained in more detail in paragraphs 13.276 to 13.291.

13.271 The Act also permits religious representatives in certain cases to refuse to take part in events celebrating the formation of a civil partnership, in Scotland to register civil partnerships, and to refuse access to their premises for such purposes.

13.272 Religious representatives can also refuse, in certain cases, to solemnise marriages where they reasonably believe at least one of the people marrying has acquired their gender under the Gender Recognition Act 2004, without breaching the Act's prohibition on discrimination.

13.273 These exceptions apply where the refusal is on certain grounds, which are explained in more detail in paragraphs 13.292 to 13.296.

13.274 As explained in paragraph 13.5, harassment related to the protected characteristics of religion and belief and sexual orientation are not prohibited under the Act in the areas covered by this Code.

13.275 In addition, harassment related to the protected characteristics listed in paragraph 13.5 is not prohibited under the Act in the circumstances set out in paragraphs 13.276 to 13.296. The term 'harassment' is used to refer to harassment related to those protected characteristics.

Same-sex marriage

England and Wales

13.276 It is not a breach of the Act, as it applies to services and public functions, for any person or religious organisation to refuse to conduct, facilitate, attend or take part in a religious marriage ceremony of a same-sex couple, or consent to it being conducted (schedule 3, paragraph 25A).

This exception applies where the person's or organisation's refusal is for the reason that it is a same-sex marriage.

Scotland

13.277 It is not a breach of the Act, as it applies to services and public functions, for:

- an approved celebrant to refuse to solemnise a Scottish religious or belief marriage (schedule 3, paragraph 25B(1))
- any person to refuse to take part in a religious or belief ceremony forming part of, or connected with, the solemnising of a Scottish marriage (schedule 3, paragraph 25B(3))

These exceptions apply where the refusal is for the reason that it is a same-sex marriage.

13.278 An 'approved celebrant' is a person authorised to solemnise a Scottish marriage (section 8, paragraph 2(a) Marriage (Scotland) Act 1977).

13.279 In relation to religious or belief organisations, it is not a breach of the Act:

- in the provision of services and exercise of public functions, for an organisation to allow one of its celebrants to refuse to solemnise a marriage in this way (schedule 23, paragraph 2(9C))
- in the provision of services, exercise of public functions and activities of associations, for an organisation (or person or group on its behalf) to refuse to allow premises that it owns or controls to be used to solemnise a marriage for the reason that it is a same-sex marriage (schedule 23, paragraph 2(9A)(a) and schedule 23, paragraph 2(9B)(a))

Civil partnerships

England and Wales

13.280 It is not a breach of the Act, as it applies to services and public functions, for a religious organisation or certain individuals in England and Wales to refuse to provide, arrange, facilitate, participate or be present at a ceremony or event to mark the formation of a civil partnership (schedule 3, paragraph 25AA(1)(b)(ii)).

13.281 These exceptions apply where the refusal is for the reason that the person or organisation does not wish to be involved in such acts, either in relation to civil partnerships in general, or those that involve a same-sex couple or an opposite-sex couple.

13.282 These exceptions apply to:

- religious organisations
- a constituent body or part of a religious organisation
- a person acting on behalf or under the auspices of such an organisation, body or part thereof

They do not apply to a civil partnership registrar (schedule 3, paragraph 25AA(3)).

Scotland

13.283 The Act contains exceptions specific to Scotland, reflecting that Scots law allows the religious or belief registration of civil partnership.

13.284 It is not a breach of the Act, as it applies to services and public functions, for:

- an approved celebrant to refuse to register a Scottish civil partnership (schedule 3, paragraph 25B(2))
- any person to refuse to take part in a religious or belief ceremony forming part of, or connected with, the registration of a Scottish civil partnership (schedule 3, paragraph 25B(4))

13.285 An 'approved celebrant' is a person authorised to register civil partnerships (section 94A(4)(a) Civil Partnership Act 2004).

13.286 These exceptions apply where the refusal is for the reason that the approved celebrant (or person) does not wish to register civil partnerships (or take part in such civil partnership ceremonies) in general, or those that involve a same-sex couple or an opposite-sex couple.

13.287 In relation to religious or belief organisations, it is not a breach of the Act:

- in the provision of services and exercise of public functions, for an organisation to allow one of its celebrants to refuse to register the civil partnership in this way (schedule 23, paragraph 2(9C))
- in the provision of services, exercise of public functions and the activities of associations, for an organisation (or person or group on its behalf) to refuse to allow premises that it owns or controls to be used to register a civil partnership for the reason that it is between two people of the same sex or between two people of the opposite sex (schedule 23, paragraph 2(9A)(b) and schedule 23, paragraph 2(9B)(b))

Opposite-sex marriage and existing civil partnerships

Scotland

13.288 The Act contains further exceptions specific to Scotland relating to opposite-sex marriages where the couple are in an existing civil partnership with each other.

13.289 It is not a breach of the Act, as it applies to services and public functions, for:

- an approved celebrant to refuse to solemnise a Scottish marriage (schedule 3, paragraph 25B(1A))
- any person to refuse to take part in a religious or belief ceremony forming part of, or connected with, the solemnising of a Scottish marriage by an approved celebrant (schedule 3, paragraph 25B(3A))

13.290 These exceptions apply where it is a marriage of two people of the opposite sex who are in a civil partnership with each other.

13.291 In relation to religious or belief organisations, it is not a breach of the Act:

- in the provision of services and the exercise of public functions, for an organisation to allow one of its celebrants to refuse to solemnise a Scottish marriage in this way (schedule 23, paragraph 2(9C))
- in the provision of services, exercise of public functions and activities of associations, for an organisation (or person or group on its behalf) to refuse to allow premises that it owns or controls to be used to solemnise a Scottish marriage (schedule 23, paragraph 2(9A)(aa)) for the reason that it is a marriage of two people of the opposite sex who are in a civil partnership with each other (schedule 23, paragraph 2(9B)(aa))

Exceptions relating to gender reassignment

England, Wales and Scotland

13.292 Where a person reasonably believes that one of a couple marrying has acquired his or her gender under the Gender Recognition Act 2004, the Act does not prohibit gender reassignment discrimination in the provision of services and exercise of public functions where that person refuses to:

- solemnise such a marriage in a registered building under section 44(1) of the Marriage Act 1949 (schedule 3, paragraph 24)
- solemnise such a marriage according to a form, rite or ceremony of a body of persons who meet for religious worship (schedule 3, paragraph 24(3) and (4))
- permit such a marriage to be solemnised in a church or chapel, where that person is a clerk in Holy Orders of the Church in Wales and is the minister of the church or chapel (schedule 3, paragraph 24(1))

This exception does not permit harassment or victimisation, which are still prohibited under the Act.

13.293 In England and Wales, this exception applies to those authorised by the Marriage Act 1949 to solemnise religious marriages (schedule 3, paragraph 24).

13.294 In Scotland, an approved celebrant does not contravene section 29 of the Equality Act 2010, where it relates to gender reassignment discrimination, by refusing to solemnise the marriage of a person if they reasonably believe that his or her gender has been acquired under the Gender Recognition Act 2004 (schedule 3, paragraph 25(1)).

This exception applies to an approved celebrant authorised by the Marriage (Scotland) Act 1977 to solemnise a Scottish marriage (schedule 3, paragraph 25(2)).

Scotland

13.295 The Act does not prohibit gender reassignment discrimination where an approved celebrant refuses to register a Scottish civil partnership if they reasonably believe that one of a couple marrying has acquired his or her gender under the Gender Recognition Act 2004 (schedule 3, paragraph 25(3)).

13.296 An 'approved celebrant' is a person authorised to register civil partnerships (section 94A(4)(a) Civil Partnership Act 2004).

Age-specific exceptions

13.297 Four age-specific exceptions are discussed in paragraphs 13.294 to 13.348. For the purposes of all the exceptions, the term 'age discrimination' means direct age discrimination and indirect age discrimination only. These exceptions do not apply to harassment or victimisation, which are still prohibited under the Act.

Concessionary services

13.298 The Act does not prohibit age discrimination where a service provider or person exercising public functions gives a concession to people of a particular age (schedule 3, paragraph 30A).

What a concession is

13.299 A concession is:

- a benefit, right or privilege making the manner in which the service is provided more favourable than the way it is usually provided to the public or a section of the public, or
- a benefit, right or privilege making the terms on which a service is provided more favourable than the terms on which it is usually provided to the public or section of the public (schedule 3 paragraph 30A(2))

13.300 'Benefit' might include reduced costs. 'Rights and privileges' cover entitlements as well as preferential treatment afforded to individuals.

13.301 'Manner' is the way in which the service is provided. An example of such a concession might be 'out of hours' provision for certain age groups, such as later than usual in the evening, or earlier in the morning.

13.302 The 'terms' on which a service is provided refer to what is agreed about the provision of the service between the service provider or person exercising public functions and the individual using the service. The terms will include the conditions of the service and the charge to the individual.

13.303 This means that a service provider or person exercising public functions can offer more favourable treatment to people of particular age groups. There is no need to show that a concession is a proportionate means of achieving a legitimate aim, so long as it meets one of the criteria set out in paragraphs 13.298 and 13.299.

Example

13.304 A health spa offers students two hours of massage therapy for the price of a one-hour treatment. This is preferential treatment that is lawful because of the exception for concessionary services. Because students are more likely to be in younger age groups, this might otherwise amount to indirect age discrimination.

Example

13.305 A hairdresser offers reduced rates for pensioners on Tuesdays. This falls within the exception for concessionary services, so a younger customer who is not offered a reduced rate for their haircut cannot complain that this amounts to age discrimination in the terms of service.

13.306 A service provider or person exercising public functions may give such favourable treatment to one age group that a different age group is effectively excluded from receiving this service. In this situation, the exception will only apply where the concession is the reason for the treatment.

Example

13.307 In the hairdresser example in paragraph 13.305, a woman aged 40 asks for an appointment on a particular Tuesday when appointments are still available. As she is not a pensioner, she is refused. Because the concession is not the reason for the refusal, this treatment will amount to direct age discrimination unless the treatment can be justified.

13.308 If the treatment amounts to harassment or victimisation it would also not be permitted by the exception for concessions.

Example

13.309 A bar wishing to attract young customers offers under 25s their first drink free of charge and at-table service. These are lawful concessions. However, when an older couple ask for at-table service, the security staff ask them to leave in an aggressive and abusive manner, emphasising that their custom is not wanted by the bar. This creates a hostile and degrading environment for the couple. The treatment is likely to amount to harassment related to age and would be unlawful.

13.310 Service providers and those exercising public functions should be aware that a concession may indirectly discriminate against people who share a protected characteristic other than age. In such a case, unless the treatment can be objectively justified then it would be unlawful.

Example

13.311 In the example in paragraph 13.309, if only alcoholic drinks were offered by the bar then the concession may be indirectly discriminatory against Sikh or Muslim students who do not consume alcohol on religious grounds.

Package holidays

13.312 The Act does not prohibit age discrimination where a service provider or person exercising public functions provides a 'relevant holiday service' to people of a particular age group (schedule 3 paragraph 30(B)).

13.313 Holiday companies, hotels, and owners or letting agents of holiday cottages or chalets may be covered by this exception if they provide 'relevant holiday services'.

13.314 A local authority providing holidays for particular age groups might also fall within this exception.

13.315 If a holiday falls outside this exception, the provider may still be able to objectively justify any age discrimination.

13.316 Because the ban on age discrimination in the provision of services does not extend to under 18s, excluding children from holiday services will not amount to age discrimination of the children.

When the exception applies

13.317 This exception only allows discrimination in relation to a decision about whether or not to provide a person with a 'relevant holiday service'. It does not extend to other related matters such as the terms on which the service is provided or a decision to terminate it.

Example

13.318 A holiday company providing accommodation and travel requires people aged between 18 and 25 years old to pay a higher damage deposit for self-catering rentals, believing this age group to be less responsible. This practice would fall outside the exception for package holidays because it relates only to the terms on which the accommodation is provided. As it involves less favourable treatment of a particular age group, it would only be lawful if it can be objectively justified.

13.319 A 'relevant holiday service' means a service where:

- a person pays a single price for at least two of the following: travel, accommodation, access to activities or services forming a significant part of the service or its cost
- the holiday is for more than 24 hours or includes overnight accommodation
- the holiday is provided only to people in a certain age group, and
- an essential feature of the holiday is bringing together people in that age group with a view to facilitating their enjoyment of facilities or services designed with particular regard to people of that age group

The different elements of this definition are explained in more detail in paragraphs 13.323 to 13.328.

13.320 The exception will only apply if the service provider or person exercising public functions provides the individual with a written statement before the start of the holiday to explain that the holiday service is only available to people of a particular age group.

13.321 The service provider or person exercising public functions must provide the holiday only to individuals of a particular age group.

Example

13.322 A tour operator has promoted a weekend of guided country walks exclusively for people over 55. The operator extends the holiday to the 21-year-old daughter of one of the travellers in the tour group. Two weeks later, another tour member asks if his 30-year-old son can join the trip but the operator refuses. If the man and his son complain, the tour operator would not be able to rely on the exception for holiday services because it has not provided the holiday exclusively for one age group.

13.323 An essential element of the holiday must be that people in the same age group are brought together:

- with the intention of helping them to enjoy facilities or services, and
- in circumstances where those facilities or services have been designed with that age group particularly in mind

Example

13.324 An operator opens a package holiday resort exclusively for people over 60. However, the services and facilities on offer within the resort have not been tailored to this age group. In fact, they are identical to services and facilities in the company's other resorts, which were designed for younger adults and their children. The operator cannot show that the facilities and services on offer have been designed with the target age group particularly in mind and so could not rely on the exception for holiday services.

13.325 The price of the holiday must include at least two of the following:

- travel (even if there is an option for the service user to make alternative travel arrangements)
- accommodation
- access to activities or services not ancillary to travel or accommodation, which form a significant part of the service or its cost

Example

13.326 A hotel provides accommodation restricted to people under 35 along with optional horse-riding lessons. No other services or facilities are provided. The lessons are not ancillary to the travel or accommodation and do not form a significant part of the service or the overall cost. The hotel could not rely on the exception for holiday services because the lessons are not a significant part of the service or its cost.

13.327 To fall within the exception, the individual must pay a single price for the holiday as a package.

Example

13.328 A holiday company only provides cheap hotel accommodation and does not provide any other services, and so none of its holidays fall within the exception for holiday services. Once at the hotel, a customer can choose to pay extra for tours of local villages and transfers back to the airport. The exception still does not apply because at the time of booking, the customer only paid for accommodation.

Age-restricted services

13.329 The Act does not prohibit age discrimination where a service provider or person exercising public functions refuses to provide certain services which are age-restricted by legislation where certain conditions are met (schedule 3, paragraph 30C). This would include selling alcohol, cigarettes or fireworks.

13.330 It can be difficult to accurately assess the age of customers. For this reason, all providers of age-restricted services should ensure that they adhere to the Act when asking for age verification where it appears to them that a customer may be under the legal age limit.

13.331 Because the ban on age discrimination in the provision of services does not extend to under 18s, it will not be unlawful to deny an age-restricted service to a child. However, where a customer is 18 or over but is refused such a service because they appear to the service provider or person exercising public functions to be under 18, the age discrimination provisions would apply and the refusal could be unlawful unless the exception applies.

When the exception applies

13.332 It will not be age discrimination where an individual is denied an age-restricted service in the following circumstances:

- there has been an age warning
- it appears to the service provider (or person exercising public functions), its employees or agents that the individual is under the age specified in the age warning, and
- the individual is not able to provide satisfactory identification proving otherwise (schedule 3, paragraph 30C(2))

13.333 An ‘age warning’ means that the service provider or person exercising public functions has displayed a statement at the premises where the age-restricted service is provided. The statement must explain that, in the absence of satisfactory identification, the age-restricted service will not be provided to individuals who appear to the service provider, its employees or agents to be under the age specified in the statement (schedule 3, paragraph 30C(1)(b)).

Example

13.334 An off-licence adopts an age verification policy that requires individuals who appear to be under 25 to produce satisfactory identification before selling them alcohol. It displays a sign warning that customers who appear to be under 25 will be asked to show appropriate identification proving that they are old enough to buy alcohol. This would qualify as an 'age warning' under the exception for age restricted services.

13.335 It is good practice for a service provider or person exercising public functions to ensure that the display is readily and easily visible to individuals in a public area.

13.336 If the age-restricted service relates to licensed premises within the meaning of section 19A of the Licensing Act 2003, then satisfactory identification means a valid document which includes the person's:

- photograph
- date of birth, and
- a holographic mark

A passport or driving licence would fall into this category (section 19A Licensing Act 2003 The Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010 Schedule, paragraph 3(3)).

13.337 In all other cases, satisfactory identification means a valid document that includes a photograph of the person and proves that they are not under-age. A Citizen Card would fall into this category (schedule 3, paragraph 30C(4)(b)(ii)).

13.338 The exception applies to the actual provision or refusal of a service or provision of access to a service. It does not extend to other related matters such as the manner in which the service is provided (schedule 3, paragraph 30C(4)(a)).

Example

13.339 The owner of a convenience store makes aggressive demands for age verification to all customers who appear to be under the age of 18 when they try to buy alcohol. This relates to the manner of providing the service and so goes beyond what is permitted by this exception. If this conduct violates the dignity of a customer who is 18 or over, or creates an intimidating, hostile, degrading, humiliating or offensive environment for them, it could also amount to harassment.

13.340 Where a service provider or person exercising public functions asks for age verification in circumstances outside this exception, it may still be possible for them to objectively justify any age discrimination.

Residential mobile homes

13.341 The Act does not prohibit age discrimination by a service provider or person exercising public functions in certain circumstances relating to residential mobile homes (schedule 3, paragraph 30D).

When does the exception apply?

13.342 The exception applies in relation to the owners of 'protected sites' within the meaning of the Mobile Homes Act 1983, where the rules for the site specify an age restriction. It covers situations where mobile homes are brought onto, or bought on, a protected site or are rented out by the owner of the protected site.

13.343 A 'protected site' is any site requiring a site licence, except where the licence (or planning consent):

- permits holiday use alone, or
- prohibits the stationing of mobile homes for residential use for certain times of the year

In addition, local authority sites and certain sites for Gypsies, Roma and Travellers that are for residential use all year meet the definition of 'protected site' (although such sites do not require a licence).

13.344 The Act does not prohibit age discrimination where the owner of a protected site:

- enters into a mobile home agreement with someone, where a park rule that is a term of that agreement entitles only people who have reached a particular age to station and occupy a mobile home on the site
- refuses to permit a person to assign a mobile home agreement to anyone who has not reached a particular age (schedule 3, paragraph 30D(1))

13.345 A 'mobile home agreement' means an agreement to which the Mobile Homes Act 1983 or Part 4 of the Mobile Homes (Wales) Act 2013 applies. This includes any agreement permitting a person to station a mobile home on a 'protected site' and to occupy the mobile home as their only or main residence (schedule 3, paragraph 30D(5)).

13.346 The Act also does not prohibit age discrimination where the owner:

- enters into a mobile home rental agreement with a person which imposes a requirement that the mobile home in question may be occupied only by people who have attained a particular age, or
- refuses to permit a person to assign a mobile home rental agreement to anyone who has not reached a particular age (schedule 3, paragraph 30D(3))

13.347 A 'mobile home rental agreement' means an agreement that entitles a person to occupy a mobile home on the 'protected site' as their residence in exchange for the payment of money and the performance of other obligations. The agreement may be for a specified period or for successive periods of a specified duration. An arrangement to occupy a mobile home for a holiday does not qualify as a mobile home rental agreement (schedule 3, paragraph 30D(5)).

13.348 If the owner wishes to rely on either of these two provisions, they must first provide the person concerned with a written statement that specifies that the mobile home may be occupied only by people who have reached the relevant age (schedule 3, paragraph 30D(4)).

13.349 The Act also does not prohibit age discrimination where the owner imposes a requirement in park rules that mobile homes stationed on the site and occupied under mobile home agreements may be occupied only by people who have reached a particular age (schedule 3, paragraph 30D(2)).

13.350 'Park rules' refer to rules (made in compliance with relevant legislation) which apply to residents of mobile homes on the protected site, and which, under the mobile home agreement or the mobile home rental agreement, must be observed (schedule 3, paragraph 30D(5)).

Example

13.351 A couple in their 60s put their mobile home up for sale. Another couple in their 30s want to purchase it. The home is on a mobile home park where the park rules forbid occupiers under 60. This restriction would be lawful and could be included as an express term of the mobile home agreement. If the younger couple occupied the mobile home on that site, that would be in breach of the age-restriction in the park rules and mobile home agreement and the site owner would be entitled to terminate the agreement.

Example

13.352 A couple in their 70s want to place their mobile home on a site and occupy it as their only or main residence. The owner enters into an agreement with the couple, which states that they can place their mobile home upon his site on condition that they and any future occupants of the mobile home are over 65. He gives them a written statement to this effect in advance. This would be lawful as it falls within the residential mobile homes exception.

Chapter 14

Enforcement

Introduction

14.1 This chapter of the code of practice (the Code) gives an overview of enforcement by the civil courts in England, Wales and Scotland of Part 3 of the Equality Act 2010 (the Act), which applies to services and public functions, and Part 7, which applies to associations (sections 113 to 119 and sections 136 to 144).

14.2 In this chapter, 'civil courts' means the County Courts of England and Wales and the sheriff court in Scotland unless the contrary is indicated.

Claims for judicial review are dealt with as a separate topic in this section.

14.3 This chapter is not intended to be a procedural guide to presenting a claim to the civil courts. The civil courts procedure is contained in the Civil Procedure Rules 1998 in England and Wales and in the Sheriff Court Civil Procedure Rules, which include the Ordinary Cause and Simple Procedure Rules, in Scotland.

14.4 A person who brings proceedings in England and Wales is known as the claimant and a person against whom proceedings are brought is known as the defendant.

14.5 A person who brings proceedings in Scotland is known as the pursuer in Ordinary Cause claims, and the claimant in Simple Procedure claims. The person against whom proceedings are brought in Scotland is known as the defender in Ordinary Cause claims and the respondent in Simple Procedure claims. In this chapter we use the terms pursuer and defender for proceedings in both Ordinary Cause and in Simple Procedure.

Unlawful acts that can be remedied by the civil courts under the Act

14.6 A person who believes they have suffered unlawful discrimination, harassment, or victimisation in the provision of services, the exercise of public functions or the activities of associations may bring civil proceedings.

14.7 Those proceedings normally take place in the County Court in England and Wales and the sheriff court (in Scotland). There are exceptions to this which are explained in this chapter.

14.8 The unlawful acts that the civil courts can remedy include:

- direct discrimination
- indirect discrimination
- pregnancy and maternity discrimination
- discrimination arising from disability
- failure to make reasonable adjustments for disabled persons
- harassment
- victimisation

14.9 These forms of unlawful conduct are explained in:

- **Chapter 4** - Direct discrimination
- **Chapter 5** - Indirect discrimination
- **Chapter 6** - Discrimination arising from disability
- **Chapter 7** - Disabled people: reasonable adjustments
- **Chapter 8** - Harassment
- **Chapter 9** - Victimisation and other unlawful acts

These are all referred to as 'unlawful acts' in this chapter.

14.10 Before starting proceedings, a person should ensure that the relevant provisions of the civil courts' rules are observed. In England and Wales, this includes consideration of the Civil Procedure Rules Practice Direction on pre-action conduct and protocols, which sets out requirements for the content of pre-action correspondence.

Assessors in cases under the Act

14.11 In cases about unlawful acts, a judge or sheriff (in Scotland) will usually have to appoint an 'assessor' to assist them. These are persons of skill and experience in discrimination issues who help to evaluate the evidence. The Act says that unless the judge or sheriff is satisfied that there are good reasons for not doing so, they must appoint an assessor (section 114, paragraph 7 and 8, section 63, paragraph 1 of the County Courts Act 1984, rule 44.3 of schedule 1 to the Sheriff Court (Scotland) Act 1907).

14.12 A party to proceedings can object in writing to the court about the appointment of an assessor.

Time limits

14.13 Court action must be started within six months minus one day of the alleged unlawful act (section 118). The court can extend this time limit provided it is 'just and equitable' to do so (section 140AA). This is explained further in paragraphs 14.24 and 14.25.

14.14 The six-month time limit may also be extended in certain contractual disputes where a non-binding alternative dispute resolution (ADR) procedure has started, with an approved alternative dispute resolution provider. This extension applies when the ADR procedure has commenced within the six-month time frame or within an extended time frame if it has been extended by the courts. If a claimant or pursuer (in Scotland) meets these conditions, they will have up to eight weeks from the date the dispute resolution ends to start their claim in court.

When the period for bringing the claim starts

14.15 The Act says that the period for bringing a claim starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred. For example, the date when a person was refused entry to a shop on an unlawful basis would be the start of the period for bringing a claim about that refusal.

14.16 Sometimes, however, the unlawful act is a service provider's failure to do something. The Act says that a failure to do a thing occurs when the person decided not to do it (section 118, paragraph 6(b)). In the absence of evidence to the contrary, a person is treated as deciding not to do a thing:
1. when they do an act inconsistent with doing the thing, or
2. on the expiry of the period in which they might reasonably have been expected to do the thing (section 118, paragraph 7)

14.17 The question of when a defendant or defender (in Scotland) might reasonably have been expected to have acted is to be considered from the claimant's or pursuer's perspective, having regard to the facts known or which ought reasonably to have been known by the claimant or pursuer at the relevant time[86].

14.18 The Act provides that where conduct extends over a period, it should be treated as being done at the end of that period for the purposes of calculating when the unlawful act occurred (section 118, paragraph 6(a)).

14.19 If a service provider has a policy, rule, or practice (whether formal or informal) in accordance with which decisions are taken from time to time, this might constitute 'conduct extending over a period'.

14.20 If a person is discriminated against on many occasions, then the period for bringing a claim starts when the last act of discrimination occurred.

14.21 If an unlawful policy results in a person being discriminated against on a continuing basis, then the period starts when the policy is no longer applied.

14.22 A continuing state of affairs made up of a series of acts that are linked to one another may also constitute conduct extending over a period, even if the linked acts are not the result of any 'policy' or 'rule', and even if the individual acts are done by different persons and at different places. However, where a single or one-off unlawful act has continuing consequences, the time limit to bring a claim will start from the date of that unlawful act, and not from the date of its consequences.

Example

14.23 Security staff at a club repeatedly turn away a gay man using a variety of reasons, none of which seem plausible to him. However, after the fifth occasion the door staff tell him plainly, he is being turned away because he is gay, under instructions from the owner. Although this has been going on for over a year, the court may treat all these instances as part of a continuing state of affairs in which the gay man has been treated less favourably than others. If so, he can bring a claim in respect of all the instances. It would not matter if a variety of door staff were involved or whether he was turned away from each of a chain of clubs in the same ownership. He would also have grounds to argue that it would be just and equitable to extend time limits if he had been unable to identify that the earlier reasons for turning him away were discriminatory.

What happens if the claim is presented outside the correct time limit

14.24 Where a claim is brought outside the time limits referred to in this section, the courts have discretion to hear the case if satisfied that it is just and equitable to do so (section 118, paragraph 1(b)).

14.25 When a court considers whether to exercise its 'just and equitable' discretion, it will have regard to all the relevant circumstances of the case. This will almost always include the length and reasons for the delay, and the impact and prejudice on the parties if the claim is heard, or not heard, out of time. The court may also have regard to:

- the extent to which the strength of the evidence is likely to be affected
- the extent to which the defendant or defender (in Scotland) has cooperated with any requests for information
- the promptness with which the claimant or pursuer (in Scotland) acted once they knew of the facts giving rise to the claim
- the steps taken by that person to obtain appropriate legal advice once they knew of the possibility of taking action

Courts are not required to go through each of these factors. The only requirement is that they do not leave a significant factor out of account.

Burden of proof

14.26 A claimant or pursuer (in Scotland) (section 136) who alleges that they have experienced an unlawful act must prove the facts from which a court could decide, in the absence of any other explanation, that such an act has occurred.

14.27 If a claimant or pursuer has proved facts from which a court could conclude that there has been an unlawful act, then the burden of proof shifts to the defendant or defender (in Scotland). To successfully defend a claim, the defendant or defender will have to prove, on the balance of probabilities, that they did not act unlawfully. If the defendant or defender fails to do so, the court must find that the act was unlawful.

Example

14.28 An Irish Traveller seeks to hire a hall for a function. The owner agrees at first, but on learning of their ethnic origin becomes unwilling to let the person hire the hall. The person can show that the owner was willing to let another person who is of a different ethnic origin hire the hall. If the owner is to avoid a finding of direct race discrimination, they must give an explanation of their refusal. This explanation must show that the Irish Traveller's race was not part of the decision to refuse.

14.29 Where the basic facts are not in dispute, a court may simply consider whether the defendant or defender is able to prove, on the balance of probabilities, that it did not commit the unlawful act.

14.30 These rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence (section 136, paragraph 5).

Settling complaints without recourse to the court

14.31 Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the civil courts. A settlement of this nature can include any terms the parties agree to (with approval from the court if proceedings have commenced) and can cover compensation, future actions by the defendant or defender (in Scotland), agreement on costs, and other lawful matters.

Conciliation

14.32 The Equality and Human Rights Commission (EHRC) no longer has a specific power to provide conciliation services. This power, under section 27 of the Equality Act 2006, was repealed by section 64, paragraph 1(b) of the Enterprise and Regulatory Reform Act 2013 with effect from 25 June 2013. However, for some cases in England and Wales, mediation services are available through the courts service, and, in Scotland, other mediation services may be available. These can be used instead of waiting for a case to be heard by a judge. Mediation has the advantage of generally reducing costs and may successfully settle a claim without the need for a contested hearing. Further information about conciliation services can be found on Scottish and United Kingdom government web pages.

Obtaining information

14.33 Until 6 April 2014, section 138 of the Equality Act 2010 provided that an individual could follow a statutory procedure to use a questionnaire to question a person they think may have contravened the Act. The questions and answers were admissible as evidence in court or tribunal proceedings. This procedure was abolished on 6 April 2014 by the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014.

14.34 It remains good practice for persons who think that they may have been unlawfully discriminated against, harassed or victimised under the Act to seek relevant information before making a claim through the civil courts. In England and Wales, the Civil Procedure Rules pre-action protocol should be followed (read paragraph 14.37). This may avoid the complaint escalating to a formal legal claim.

Use of judicial review

14.35 If the complaint under the Act is about the lawfulness of a decision, action, or a failure to act by a public authority or a private person carrying out a public function, the person complaining may bring proceedings for judicial review (section 113, paragraph 3(a)).

14.36 Remedies potentially available through a judicial review action both in England and Wales and in Scotland include:

- a declaration of the rights and responsibilities of the parties to the claim
- a prohibiting order, which stops a public body from taking an unlawful decision or acting in a way that would be unlawful
- a mandatory order, which requires a public body to take a particular action or make a decision within a specified period of time
- a quashing order, by which the court can set aside an administrative decision or action of a public authority

Special rules apply where it is alleged that a mandatory order might prejudice a criminal case (read paragraph 14.53 and paragraph 14.54).

14.37 An action for judicial review must be brought in the High Court in England and Wales or the Court of Session in Scotland. A claimant or petitioner (in Scotland) must obtain permission from the High Court or Court of Session. An application for permission must be made promptly and, in any event, not later than three months after the grounds for judicial review first arose, unless any specific statutory exceptions apply to shorten the time limit. In England and Wales, there are some exceptions listed in the Civil Procedure Rules (CPR 54.5). A detailed explanation of the civil procedure rules is beyond the scope of the Code. The court will generally expect any appeal mechanisms against the decision to have been exhausted before granting permission for judicial review. Judicial review is a remedy of last resort.

Immigration cases

14.38 Complaints about unlawful acts relating to certain decisions made under the relevant immigration provisions by the Secretary of State, or by an immigration officer or an official, and which relate to the entitlement of a person to enter or remain in the United Kingdom are heard by the First-tier Tribunal, which deals with appeals against immigration decisions (section 115; Part 5, The Special Immigration appeals Commission Act 1997; Nationality Immigration and Asylum Act 2002).

14.39 The First-tier Tribunal can determine whether an unlawful act under the Act has taken place, but it does not have jurisdiction to award compensation. If it finds that an unlawful act has taken place, then the claim for a remedy arising out of that finding may be brought before the civil courts.

14.40 The finding made by the First-tier Tribunal is binding and cannot be challenged before the civil court. The court's jurisdiction is limited to giving the person a remedy for the act of discrimination.

14.41 There are special time limits for claims about discrimination in the context of immigration decisions in the civil courts (section 118, paragraph 5). During the period that an appeal against the immigration decision is possible, it is not possible to bring a claim for discrimination in the civil courts. If the First-tier Tribunal decides that the immigration authority contravened the Act, then once that appeal period is completed the claimant has six months within which to bring a claim for discrimination in the civil courts.

National security

14.42 The Act includes the possibility of special rules being applied to proceedings for the purpose of safeguarding national security (section 117). Read paragraphs 13.21 to 13.24.

14.43 The court rules allow the court to exclude the claimant or pursuer (in Scotland) from part or all of the proceedings, where the court considers it expedient in the interests of national security. The court may also exclude their representative and the assessor in the case if it considers it necessary.

14.44 The court may take steps to keep secret part or all of the reasons for its decision.

14.45 The Attorney General for England and Wales or the Advocate General for Scotland may appoint a person to represent the interests of a claimant or pursuer in such proceedings. However, that representative is not responsible to the person whose interests they are appointed to represent.

Remedies

14.46 In England and Wales, the county court has the power to award all the remedies which the High Court can grant in proceedings in tort (such as in a claim for negligence) or in a claim for judicial review (section 119, paragraph 2). In Scotland, the sheriff court has the power to make any order which could be made by the Court of Session in proceedings for reparation or in a petition for judicial review (section 119, paragraph 3). These may include:

- an injunction or interdict (in Scotland), which is an order to perform, or refrain from performing, a particular act
- damages to compensate for any loss suffered
- legal costs or expenses (in Scotland)
- any of the other orders a court may make in a claim for judicial review (read paragraph 14.35)

Damages

14.47 Damages may include compensation for injured feelings, whether or not it includes compensation on any other basis (section 119, paragraph 4).

14.48 An award of damages can include compensation for any loss the claimant or pursuer (in Scotland) has suffered.

14.49 In England and Wales, where a defendant acts unlawfully under the Act, the courts may, very occasionally, award 'exemplary' damages, which are punitive. These damages are not available in Scotland.

14.50 At the court's discretion, exemplary damages may be awarded in two situations:

- for oppressive, arbitrary, or unconstitutional action by servants of the government
- where the defendant has calculated that their conduct is likely to make a profit for themselves which exceeds any compensation that they may later have to pay for their wrongdoing

Damages for complaints of indirect discrimination

14.51 Where the civil court makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer (in Scotland) (section 119, paragraph 5), it must not award damages unless it first considers whether to dispose of the case by providing another remedy, such as a declaration or prohibitive order (section 119, paragraph 6).

14.52 Indirect discrimination will be intentional where the defendant or defender (in Scotland) knew that certain consequences would follow from their actions, and they wanted those consequences to follow. A motive, for example, of promoting business efficiency, does not mean that the act of indirect discrimination is unintentional.

Effect on criminal matters

14.53 Civil courts must consider and prioritise avoiding risk of prejudice to criminal investigations and proceedings that come to their attention. Nevertheless, they may progress with civil proceedings if satisfied that no prejudice will be caused to criminal matters.

14.54 The civil courts must not grant an interim injunction or interdict (in Scotland) unless satisfied that no criminal matter would be prejudiced by doing so (section 114, paragraph 6(a)). However, where the civil courts find grounds for prejudice to a criminal matter, they must grant a stay or sist (in Scotland) of proceedings (where proceedings are paused) unless satisfied the matter will not be prejudiced (section 114, paragraph 6(b)).

The Equality and Human Rights Commission

14.55 The EHRC has enforcement powers in relation to the Act, under the Equality Act 2006 (section 20 to 33; Equality Act 2006), which include powers to:

- undertake investigations
- issue unlawful act notices
- agree action plans
- enter agreements
- seek injunctions or interdicts (in Scotland)
- undertake public sector duty assessments
- issue public sector duty compliance notices

Details of these can be found on the EHRC's website.

14.56 The EHRC also has the power to provide legal assistance for claims of discrimination made under the Act (Equality Act 2006 section 28). This can include legal representation and can extend to discrimination cases with a human rights element. However, this power does not permit assistance in cases that only raise human rights issues.

14.57 The EHRC also has the power to:

- bring legal proceedings in its own name
- intervene in legal proceedings brought by others (Equality Act 2006 section 30)

Appendix

The meaning of disability in the Equality Act 2010

1 This Appendix is included to explain who has the protected characteristic of disability under the Equality Act 2010 (the Act) in the areas covered by this in areas covered by this code of practice (the Code).

The definition of disability in the Act

2 Under the Act, a person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (section 6, paragraph 1). This Code uses the term 'impairment' to align with the language in the Act.

However, special rules apply to people with some conditions such as progressive conditions (read paragraph 24) and some people are automatically deemed disabled for the purposes of the Act (read paragraph 21).

Equality Act protection for people who have recovered from a disability

3 People who have had a disability under the definition in the Act are protected from discrimination and harassment even if they have since recovered, although those with past disabilities are not covered in relation to Part 12 (transport) and section 190 (improvements to let dwelling houses) (section 6, paragraph 4).

The meaning of 'impairment' in the Act

4 'Impairment' covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing (section 6, paragraph 1).

5 The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including learning disabilities and neurodivergent conditions such as autism.

6 There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause[87].

'Substantial' adverse effects of impairments

7 A substantial adverse effect is something which is more than a minor or trivial effect (section 212). If the impairment has a more than minor or trivial effect on the abilities of the person compared to those they would have without the impairment, then the effect is substantial[88].

8 When considering whether an effect is more than minor or trivial, account should be taken of, for example:

- the time taken to undertake an activity
- the overall effect of an impairment where the condition impacts on lots of activities
- the effect of more than one impairment
- whether a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or because of a loss of energy and motivation

9 An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how he or she carries out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so, or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

10 The effect of an impairment may be direct or indirect. As long as there is a causal link between the impairment and its effect, it does not matter that there is an intermediate step between the two[89].

Example

11 A woman has an immunodeficiency, which does not in itself have any effect on her ability to carry out normal day-to-day activities. However, it does make her susceptible to recurrent infections. The recurrent infections have a substantial adverse effect on her ability to carry out normal day-to-day activities. Because there is a causal link between the immunodeficiency and the infections, the immunodeficiency would meet the substantial adverse effect threshold.

'Long-term' effects of impairments

12 A long-term effect of an impairment is one:

- which has lasted at least 12 months, or
- where the total period for which it lasts is likely to be at least 12 months, or
- which is likely to last for the rest of the life of the person affected (schedule 1, paragraph 2(1))

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

Effects that come and go over a period of time

13 If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the effect is treated as continuing if it is likely to recur (schedule 1, paragraph 2(2)). If an adverse effect recurs episodically, this may indicate that a further episode could happen, although that will not always be the case. So, for example, where a particular event causes an adverse effect, and that event is unlikely to continue or recur, the adverse effect may be unlikely to recur[90].

'Normal day-to-day activities'

14 Normal day-to-day activities are activities which are carried out by most people on a regular and frequent basis.

15 Day-to-day activities include, but are not limited to, activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself.

16 Normal day-to-day activities also include any activity which relates to a person's effective participation in working life, such as a job interview[91]. When considering a particular activity, it should be defined broadly[92]. For example, day-to-day activities in working life can include standing for long periods[93] or lifting and moving heavy items[94].

17 The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport to a professional standard. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

The impact of treatment or other measures on the definition of disability

18 Someone with an impairment may be receiving medical treatment or taking other measures which alleviate or remove the effects (though not the impairment). In such cases, the treatment or other measures are ignored and the impairment is taken to have the effect it would have had without such treatment or other measures (schedule 1, paragraph 5(1)). This does not apply if substantial adverse effects are not likely to recur even if the treatment or other measures stop (that is, the impairment has been cured following treatment).

People who wear spectacles

19 The rule about ignoring the effects of treatment or other measures does not apply to the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered (schedule 1, paragraph 5(3)).

People who have disfigurements

20 People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the long-term requirement (schedule 1, paragraph 3(1)).

People who are automatically treated as disabled under the Act

21 Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act (schedule 1, paragraph 6(1)). In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act (Disability Regulations 2010, SI 2010/212, reg 7).

Long Covid

22 Long Covid is a new illness which arose during the COVID-19 pandemic. Long covid can last anywhere between a few months and a few years and the effects can be constant or fluctuating. Symptoms vary and may include fatigue, nausea and respiratory symptoms.

23 Long Covid symptoms may have a long-term, substantial effect which could fall within the definition of disability in the Act. The courts will look at symptoms on a case-by-case basis. It will be for claimants to demonstrate that their impairment satisfies the legal test.

Conditions that are going to get worse over time

24 Progressive conditions are conditions which are likely to change and develop over time. People with progressive conditions will be taken to have an impairment which has a substantial adverse effect, before it actually has that effect, if:

- they have a progressive condition
- their condition results in an impairment which has (or had) an effect on their ability to carry out normal day-to-day activities
- the effect is not (or was not) yet a substantial adverse effect, and
- the condition is likely to result in them having an impairment which has a substantial adverse effect (schedule 1, paragraph 8)

Individuals will be covered by the Act in these circumstances, provided that the effect meets the long-term requirement of the definition.

Menopause

25 Menopause symptoms can be serious and can have a substantial and long-term adverse effect on a woman's ability to carry out normal day-to-day activities. In these circumstances, menopause symptoms can fall under the definition of disability in the Act, but it will be for claimants to demonstrate that their impairment satisfies the legal test.

For other women, menopause symptoms can be easily managed, without much impact on their day-to-day life. In these cases, menopause symptoms are unlikely to fall under the definition of disability in the Act.

Menopause-related claims may be brought on the grounds of disability, sex and / or age discrimination and harassment.

Endnotes

1 Read Rights of Children and Young Persons (Wales) Measure 2011 and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024
2 Elliott v Dorset County Council [2021] IRLR 880
3 Elliott; Ahmed v Metroline Travel Ltd [2011] 2 WLUK 278
4 All Answers Ltd v W [2021] EWCA Civ 606
5 Aderemi v London and South East Railway Limited [2013] ICR 591 at §14 and Elliott at §28
6 Elliott v Dorset County Council [2021] IRLR 880
7 Elliott v Dorset County Council [2021] IRLR 880
8 Mandla v Dowell Lee [1983] 2 AC 548
9 Chandhok v Tirkey [2015] ICR 527
10 Forstater v CGD Europe [2021] ICR 1 and Mackereth v DWP [2022] EAT 99
11 Mba v Mayor & Burgesses of the London Borough of Merton [2013] EWCA Civ 1562 and Eweida, Chaplin, Ladele & McFarlane v United Kingdom (2013) applications numbers 48420/10, 59842/10, 51671/10 and 36516/1
12 Read, for example, Bellinger v Bellinger [2003] UKHL 21 at paragraph 5
13 Rowstock Limited & Another v Jessemey [2014] EWCA Civ 185
14 R (Marouf) v Secretary of State for the Home Department UKSC [2023] 23
15 R (Marouf) v Secretary of State for the Home Department UKSC [2023] 23
16 Thomas Cook Tour Operations Ltd v Campbell (No.1) [2014] EWCA Civ 1668, October 30, 2014; Campbell v Thomas Cook Tour Operations Ltd (No.2) Sheffield County Court, Case No.2 YK 74402 [2014] EqLR 655, September 29, 2014
17 Unite the Union v Nailard [2018] EWCA Civ 1203
18 Sheffield City Council v Norouzi [2011] IRLR 897 and Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327
19 Chief Constable of West Yorkshire Police v Khan [2001] UKH
20 Nagarajan v London Regional Transport [2000] 1 AC 501
21 Reynolds v CLFIS (UK) Ltd and others [2015] EWCA Civ 439
22 Reynolds v CLFIS (UK) Ltd and others [2015] EWCA
23 Bennett v Mitac Europe Ltd [2022] IRLR 2
24 Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337
25 Price v Powys County Council [2021] ICR 1246
26 Bull & Another v Hall & Another [2013] UKSC 73
27 Nagarajan v London Regional Transport [2001] 1 AC 501
28 Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL and Page v NHS Trust Development Authority 2021 ICR 941
29 Mellor v MFG Academies Trust 1802133/2021
30 Seldon v Clarkson Wright & Jakes [2012] UKSC 16
31 Woodcock v Cumbria Primary Care Trust
32 Higgs v Farmor's School [2025] EWCA Civ 109
33 Chief Constable of West Midlands Police and ors v Harrod and ors [2017] IRLR 539
34 Ishola v Transport for London [2020] EWCA Civ 112
35 Essop v Home Office [2017] UKSC 27

36 Essop v Home Office [2017] UKSC 27
37 Essop v Home Office [2017] UKSC 27
38 Essop v Home Office [2017] UKSC 27
39 Ministry of Defence v DeBique [2010] IRLR 471
40 Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729
41 Heskett v Secretary of State for Justice [2020] EWCA Civ 1487, Hill v Revenue Comrs [1999] ICR 48
42 Bank Mellat [2013] UKSC 39; Akerman-Livingstone v Aster Communities Ltd [2015] 3 All ER 725)
43 Bank Mellat [2013] UKSC 39
44 Heskett v Secretary of State for Justice [2020] EWCA Civ 1487, Hill v Revenue Comrs [1999] ICR 48
45 The Equality Act 2010 (Amendment) Regulations 2023 ratifying C-83/14 CHEZ Razpredeleine Bulgaria AD v Komisia za zashtita ot diskriminatsia (CHEZ)
46 Trustees of Swansea University Pension Scheme v Williams [2019] 1 WLR 93; McCue v Glasgow City Council [2023] UKSC 1
47 Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305; York City Council v Grosset [2018] EWCA Civ 1105
48 Charlesworth v Dransfields Engineering Services Ltd [2017] UKEAT/0197/16; Pnaiser v NHS England [2015] UKEAT/0137/15
49 City of York Council v Grosset [2018] EWCA Civ 1105
50 Gallop v Newport City Council [2013] EWCA Civ 1583
51 City of York Council v Grosset [2018] EWCA Civ 1105
52 Gallop v Newport City Council [2013] EWCA Civ 1583
53 A Ltd v Z [2020] ICR 199
54 Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at §§41, 47 and 58
55 R (VC) v Secretary of State for the Home Department [2018] EWCA Civ 57 at §153 and R (Rowley) v Minister for the Cabinet Office [2022] 1 WLR 1179 at §24
56 Griffiths v Secretary of State for Work and Pensions at §58
57 R (VC) v Secretary of State for the Home Department
58 First Group plc v Paulley [2017] UKSC 4
59 Finnigan v Northumbria Police Chief Constable [2013] EWCA Civ 1191
60 Latif v Project Management Institute [2007] IRLR 579
61 Royal Bank of Scotland Group plc v Allen [2009] EWCA Civ 1213
62 Plummer v Royal Herbert Freehold Limited [2018] 5 WLUK 5
63 Conteh v Parking Partners Ltd [2011] EqLR 332
64 Pemberton v Inwood [2018] ICR 1291
65 Grant v HM Land Registry [2011] EWCA Civ 769
66 Unite the Union v Nailard [2018] EWCA Civ 1203
67 Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925
68 Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925 and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337
69 Page v Lord Chancellor [2021] EWCA Civ 254 per Underhill LJ, Reynolds v CLFIS(UK) Ltd [2015] ICR 1010

70 Commission for Racial Equality v Imperial Society of Teachers of Dancing [1983] IRLR 473
71 Anyanwu v South Bank Students' Union [2001] IRLR 305
72 R (Z and another) v Hackney London Borough Council and another [2020] UKSC 40 confirms that the four-stage approach to proportionality per Akerman-Livingstone v Aster Communities Ltd [2015]3; Bank Mellat [2013] UKSC 39 applies in positive action context
73 RBS Group plc v Allen [2009] EWCA Civ 1213
74 MM v Work and Pensions Secretary [2013] EWCA Civ 1565
75 Hampson v Department of Education and Science [1991] 1 AC 171
76 R (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd) v Office for Standards in Education Children's Services and Skills, [2020] EWHC 1679 (Admin)
77 R (Z) v Hackney LBC [2020] 1 W.L.R. 4327 (SC)
78 Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales [2013] 1 WLR 2105 and R (Cornerstone) v OFSTED [2021] EWCA Civ 1390
79 R (Z) v Hackney LBC [2020] 1 WLR 4327 (SC)
80 Fuchs v Land Hessen (C-159/10), [2012] I.C.R. 93 (2011)
81 Fuchs v Land Hessen (C-159/10), [2012] I.C.R. 93 (2011)
82 For Women Scotland v The Scottish Ministers [2023] CSIH 37 P578/22
83 The Royal London Mutual Insurance Society Ltd [2018] EWHC 2215 (Ch) at [33]-[59]
84 Carltona Ltd v Commissioners of Works and Others [1943] 2 All ER 560 and R (on the application of Goloshvili) v Secretary of State for the Home Department (Liberty intervening) [2019] EWHC 614 (Admin) at [52]
85 Carltona Ltd v Commissioners of Works and Others [1943] 2 All ER 560 and R (on the application of Goloshvili) v Secretary of State for the Home Department (Liberty intervening) [2019] EWHC 614 (Admin) at [52]
86 Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24 at §25; and British Gas Services Ltd v McCaull [2001] IRLR 60. The date a claimant becomes aware that an unlawful act occurred may be relevant to discretion to extend time: Mensah v Royal College of Midwives UKEAT/124/94
87 J v DLA Piper UK [2010] IRLR 936
88 Elliott v Dorset City Council [2021] IRLR 880
89 Sussex Partnership NHS Foundation Trust v Norris [2012] EqLR 1068
90 Sullivan v Bury Street Capital Ltd [2021] EWCA Civ 1694
91 Sobhi v Commissioner of the Police of the Metropolis [2013] EqLR 785
92 Banaszczyk v Booker [2016] IRLR 273
93 Aderemi v London and South Eastern Railway Ltd [2013] EqLR 198
94 Banaszczyk v Booker [2016] IRLR 273

Equality and Human Rights Commission

E03578801 05/26

ISBN 978-1-5286-6395-3

equalityhumanrights.com