

# Information Sheet

## The Equality Act 2010

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### Introduction

The Equality Act 2010 is a massive piece of legislation. Its principal purpose is to simplify and consolidate the UK's existing equality legislation. The Act is wide-ranging, covering, for example, businesses that sell goods and services. This information sheet covers employment and education.

### A. Employment

The law on discrimination in employment is now in one place. Consequently, the Act replaces:

- > The Equal Pay Act 1970
- > The Sex Discrimination Act 1975
- > The Race Relations Act 1976
- > The Disability Discrimination Act 1995
- > The Employment Equality (Religion or Belief) Regulations 2003
- > The Employment Equality (Sexual Orientation) Regulations 2003
- > The Employment Equality (Age) Regulations 2006

Most of the Act comes into force in October 2010.

### Protected Characteristics and Prohibited Conduct

The Act covers the same groups protected by existing legislation. These are "protected characteristics" and they are protected from "prohibited conduct".

"Protected characteristics" are distinguishing qualities of individuals.

"Prohibited conduct" is types of behaviour outlawed by the Act.

### The following characteristics are "protected characteristics" under the Act:

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

### “Prohibited conduct” includes:

- › direct and indirect discrimination
- › discrimination arising from disability
- › victimisation and harassment

Unlawful discrimination occurs when protected characteristics and prohibited conduct are connected in specified ways; for example, because of an employee's or prospective employee's sexual orientation (a protected characteristic) her employer treats her less favourably than other employees (the prohibited conduct of direct discrimination).

### Direct Discrimination

This occurs when an employee or prospective employee is treated less favourably because they have a protected characteristic. The motive or intention behind the treatment is generally irrelevant. The law recognises that discrimination can be conscious or unconscious; for example, people may have prejudices that they do not even admit to themselves or they may act out of good intentions.

The phrase “because of” a protected characteristic is intended to have the same meaning as the phrase “on grounds of” in previous equality legislation. It means that the protected characteristic is an effective cause of the less favourable treatment, but it need not be the only or even the main cause.

A person is treated “less favourably” if he or she is put at a disadvantage compared with others. If the disadvantage is obvious, it will be clear that the treatment has been less favourable; for example, the person may have been refused a job. Less favourable treatment could also involve being denied a choice or excluded from an opportunity.

It is not possible for an employer to balance or eliminate less favourable treatment by offsetting it with more favourable treatment; for example, extra pay to make up for loss of job status.

For direct discrimination because of pregnancy or maternity, the test is whether the treatment is **unfavourable** rather than less favourable (and hence there is no need for a comparator).

Except in the case of pregnancy or maternity and racial segregation, there has to be a comparator. This means that the employer's treatment of the employee must be less favourable than the way the employer treats, has treated or would treat another employee to whom the protected characteristic does not apply. It may be possible to construct a hypothetical comparator using evidence of how the employer has treated people in the past.

Direct discrimination cannot be justified except where the protected characteristic is age. In the Act, justification means that the treatment is a “proportionate means of achieving a legitimate aim”. Although this expression is not defined in the Act, we know from European law that a “legitimate aim” must be legal, should not be discriminatory in itself and it must represent a real, objective consideration. Treatment is “proportionate” if it is an appropriate and necessary means of achieving that legitimate aim.

### Discrimination by Perception

It is also direct discrimination where the person treated less favourably is thought to have a protected characteristic, even though in fact they do not. If an employer treats an employee or prospective employee less favourably because they think that the employee has a protected characteristic, then that will be direct discrimination even though the employer is mistaken about this.

Single people and people in relationships outside marriage or civil partnerships (whether or not they are cohabiting) are not protected on this ground.

## Discrimination by Association

It is direct discrimination if an employer treats an employee or prospective employee less favourably because of his/her association with another person who has a protected characteristic. Discrimination by association can occur in various ways; for example, where he/she is a parent, child, partner, primary carer or friend of someone with a protected characteristic. One recent case law example was an employee who was her disabled son's carer.

Discrimination by association could also occur if a person experiences less favourable treatment because of campaigning to help someone with a protected characteristic or refusing to act in a way that would disadvantage a person who has or people who have (or who an employer believes has or have) the protected characteristic.

## Indirect Discrimination

Indirect discrimination occurs when a policy or practice that applies in the same way for everybody has an effect which particularly disadvantages people who share a protected characteristic. Indirect discrimination is unlawful unless the employer can show that it is justified as a proportionate means of achieving a legitimate aim (see above for justification).

## Combined Discrimination: dual characteristics

Combined discrimination occurs when, because of a combination of two relevant protected characteristics, a person is treated less favourably than others are or would be treated.

Combined discrimination is similar to direct discrimination, but it concerns treatment because of a combination of two characteristics, rather than a single characteristic.

## Disability

People who have a disability, who have had a disability or who are perceived to have a disability, or are associated with a disabled person, are protected against discrimination on this ground.

A person has a disability if they have a physical or mental impairment which has a:

- > long-term; and
- > substantial adverse effect on their ability to carry out day-to-day activities.

"Physical or mental impairment" includes sensory impairments.

"Long-term" means that it has lasted, or is likely to last, for at least a year or for the rest of the affected person's life. "Substantial" means more than minor or trivial.

Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act.

Progressive and recurring conditions will amount to disabilities in certain circumstances.

A House of Lords judgment, **Malcolm v Lewisham BC**, narrowed the meaning of disability, making it more difficult to claim for less favourable treatment. This is no longer good law because the Act introduces a concept of discrimination arising from a disability, which is:

"(1) A person (A) discriminates against a disabled person (B) if:

- > A treats B unfavourably because of something arising in consequence of B's disability; and
- > A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

The provision does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

It is not unlawful to treat a disabled person more favourably than a non-disabled person or more favourably than a person with a different disability. Nor is it unlawful to treat a non-disabled person less favourably than a disabled person.

The duty to make reasonable adjustments under the Act is substantially the same as under existing legislation. The Act specifically states that employees are under a duty to take reasonable steps to provide aids/ auxiliary services if these could alleviate any disadvantages and costs and not be passed on to the employee.

### **Marriage and Civil Partnerships**

People who are married or in a civil partnership are protected against discrimination on this ground. The status of being unmarried or single is not protected.

Discrimination based on association or perception does not apply to marriage and civil partnership. Only people who are in fact married or civil partners and who themselves experience less favourable treatment on this ground are protected.

### **Race**

The Act does not exhaustively define “race”. It simply defines race as including colour, nationality (including citizenship) and ethnic or national origin.

### **Segregation**

When the protected characteristic is race, deliberately segregating a person or group of persons from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator. Segregation on race grounds is always an act of unlawful direct discrimination. The segregation will only be unlawful if it is a deliberate act or policy rather than a situation that has occurred inadvertently; for example, congregation (i.e. where individuals choose to group together) is not segregation.

### **Religion or Belief**

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.

Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, whether they have another religion, another belief or no religion or belief.

“Religion” means any religion and includes a lack of religion. The term religion includes the Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for tribunals to determine what constitutes a religion.

“Belief” means any religious or philosophical belief and includes a lack of belief.

“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.

A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include humanism and atheism.

For a 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 information available at the moment;
- > 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; and
- > it must be compatible with human dignity and not conflict with the fundamental rights of others.

## Sex

Sex is a protected characteristic and refers to a man or a woman of any age. In relation to a group of people it refers to either men or women.

## Age

A different approach to less favourable treatment applies to the protected characteristic of age, because some age-based rules and practices are seen as acceptable.

Less favourable treatment of a person because of their age is not direct discrimination provided that it can be shown that the less favourable treatment is a proportionate means of achieving a legitimate aim.

The concept of “legitimate aim” is taken from European law, but it is not defined by the Act. The aim should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Legitimate aims can include legitimate employment policy, labour market and vocational training objectives. The health, welfare and safety of individuals may also qualify as legitimate aims.

Although business needs and economic efficiency may be legitimate aims, case law suggests that an employer simply trying to reduce costs or improve competitiveness cannot expect to satisfy the test.

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

Although not defined by the Act, the term “proportionate” has been clarified by cases drawing on European law. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But something may be “necessary” in this context without being the only possible way of achieving the legitimate aim. It is sufficient that less discriminatory measures could not achieve the same objective. A balance must be struck between the discriminatory effect of the treatment and the reasons for applying it, taking into account all the relevant facts.

If challenged in an employment tribunal, an employer will need to produce evidence supporting the decision.

## Gender Reassignment

A person is protected under the Act’s gender reassignment provisions if that person is proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. This is a broader definition than previously.

## Occupational Requirements

The Act creates a general exception to the prohibition on direct discrimination in employment for occupational requirements. It applies where the job genuinely requires that the person employed is or is not of a particular sex, race, disability, religion or belief, sexual orientation or age, and applying this requirement is a proportionate means of achieving a legitimate aim. The exception also applies where not being a transsexual person, married or a civil partner is a requirement for the work. Someone who does not fulfil the requirement cannot make a claim of unlawful discrimination.

## Victimisation and Harassment

Victimisation occurs when a person is treated badly because they have done something in relation to the Act; for example, making or supporting a grievance or an employment tribunal claim. The test is not of less favourable treatment, so there is no need for the person to identify a comparator.

There is a uniform test of harassment for all the protected characteristics except pregnancy/maternity and marriage/civil partnerships.

In the Act, harassment is defined as unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

Previous legislation referred to unwanted conduct “on the grounds of” the various characteristics, not unwanted conduct that is “related to” a protected characteristic. Employees will be able to complain of behaviour that they find offensive even if it is not directed at them and the ‘victim’ need not possess the relevant characteristic themselves.

### Third Party Harassment

Since 2008 employees have been able to bring a claim against their employer for sexual, or sex-related, harassment at work by someone from outside their employer’s organisation.

The Act extends protection against third party harassment to all protected characteristics (other than pregnancy/maternity and marriage/civil partnerships) where the employer has failed to take such steps as would have been reasonably practicable to prevent the harassment.

### Employment Tribunals

In discrimination claims, tribunals will be given the power to make recommendations for actions by the employer which apply to the whole workforce, not just, as at present, to the claimant. This is to enable tribunals to recommend action (e.g. targeted staff training) which could prevent further discrimination by the employer against any employee, not just the claimant who is often no longer employed by that employer.

### Equal Pay

The Act retains many of the Equal Pay Act’s provisions.

### Comparators

An individual who claims they have suffered discrimination in respect of their contractual pay must identify an actual comparator of the opposite sex who is in the same employment (which usually means employed by the same employer), doing equal work and who is better paid.

Case law had established that under equal pay law a comparison can be made with the predecessor in post. The Equality Bill did not initially make it clear that that would still be the case. Therefore, the Bill was amended to ensure there would be no change.

However, the new section would also allow a comparison with a successor. This was not permitted under the **Equal Pay Act 1970**.

### Hypothetical Comparators

Under previous equal pay law, if the claimant could not point to an actual comparator then he or she could not make a claim, even if they had strong evidence that their contractual pay was in fact less favourable because of their sex. For example, if an employer said to a female employee “*I would pay you more if you were a man*”, the employee would only be able to make a claim if there was a man in the same employment doing equal work who was paid more. In contrast, if an employer said “*I would pay you more if you were white*”, the absence of a white employee doing the same work for more money would be no obstacle to a race discrimination claim.

The Act attempts to address this difference. It says that where there is direct sex discrimination in contractual pay but no actual comparator, an individual will be able to bring a sex discrimination claim based on how an employer would treat a hypothetical comparator of the opposite sex. The claim would have to be brought under the sex discrimination provisions in the Act rather than the equal pay rules. This means that the shorter three-month time limit would apply, not the equal pay 6 months time limit.

## Recruitment

### Pre-employment health questions

The Act limits the circumstances when employers can ask job candidates about their health before they have made a job offer.

This is not a free-standing right and the employee cannot make a claim should the employer infringe the prohibition. The Equality and Human Rights Commission can take enforcement action.

Before the job offer, employers can only ask questions that are necessary for the purpose of:

- > establishing whether reasonable adjustments are needed for the selection process assessment;
- > establishing whether a candidate will be able to carry out a function intrinsic to the work concerned;
- > monitoring diversity; and
- > taking positive action (see below).

Once a job has been offered, the employer can ask appropriate health-related questions.

### Positive Action

The Act allows (but does not compel) an employer to take certain positive action measures if it reasonably thinks that:

- > people who share a protected characteristic suffer a disadvantage connected to the characteristic, or have needs that are different from the needs of those who do not share that characteristic; or
- > participation in an activity by persons who share a protected characteristic is disproportionately low.

In these circumstances, proportionate steps can be taken to meet their needs or to enable or encourage them to overcome or minimise the disadvantage or participation in the relevant activity.

The Act also allows employers to recruit or promote someone because of their protected characteristic, in preference to another candidate, if he/she is "as qualified as" the other candidate and:

- > the employer reasonably thinks that:
  - > people who share a protected characteristic suffer a disadvantage connected to the characteristic, or
  - > participation in an activity by persons who share a protected characteristic is disproportionately low, and
- > the action taken must be with the aim of, and a proportionate means of, enabling or encouraging people who share the protected characteristic to:
  - > overcome or minimise that disadvantage, or
  - > participate in that activity, and
- > the employer must not have a blanket policy which automatically treats people more favourably in relation to recruitment and promotion because of their protected characteristic.

### Public Sector Single Equality Duty

The Act introduces a new single equality duty to replace the existing race, disability and gender equality duties by 2011. The new general public sector duty will apply not only to public sector bodies but also to organisations in the private and third sectors that carry out "functions of a public nature".

### B. Education

There are clearly implications in the Act for the education system. To give one example, a student in further education (FE) or higher education (HE) who has a disabled child (perhaps Attention Deficit Hyperactivity Disorder) and due to the child's condition the institution prohibits his/her attendance at a degree awards ceremony. This is potentially actionable against the college/university even though the student herself (the mother) is not prohibited from attending. This is because the perceived discrimination to the child is extended to the mother.

The Act will also have an impact on the curriculum within schools, tertiary education and higher education. Section 91 (2a), which deals with student admission and treatment in FE and HE, states that:

“The responsible body of such an institution must not discriminate against a student-

- a. in the way it provides education for the student;
- b. in the way it affords the student access to a benefit, facility or service;
- c. by not providing education for the student;
- d. by not affording the student access to a benefit, facility or service;
- e. by excluding the student;
- f. by subjecting the student to any other detriment.”

Exactly the same formula applies in relation to the admission of pupils to schools.

The Act also includes a duty on schools and in the FE and HE sectors to make reasonable adjustments in respect of disabled pupils and students.

Schools, colleges and HE institutions will be covered by the new public sector duty introduced in the Act:

- > to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act;
- > to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- > to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

All previous legislation covering race, gender and disability are now duties that need to be recognised by public bodies in order to avoid discrimination and promote equality.

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### C. Further Reading

Equality and Human Rights Commission Codes of Practice:

*The Equality Act 2010: Employment*

*The Equality Act 2010: Equal Pay*

These can be downloaded from the Commission’s website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

There are three useful guides to the Act:

- > ACAS *The Equality Act – What’s new for employers*
- > Government Equalities Office *Equality Act 2010 – What do I need to know?  
A summary guide to your rights*
- Equality Act 2010 – What do I need to know?  
A summary guide for public sector organisations*