

Equality in Employment Guidance

**This Guidance should be read in conjunction with the Trust's
Equality in Employment policy**

SUMMARY

The legislation covering equality in employment is comprehensive. It affects every aspect of employment practice from advertising a post to after employment has ended. This guidance note briefly outlines the main provisions so schools can ensure their employment practices are consistent with the law and good practice. Schools should seek further advice from the Trust's HR Manager on any questions where equal treatment is an issue.

CONTENTS

- 1 INTRODUCTION**
- 2 PROHIBITED CONDUCT**
 - 2.1 Direct discrimination
 - 2.1.2 Discrimination by association
 - 2.1.3 Discrimination by perception and segregation
 - 2.1.4 Indirect discrimination
- 3. ELIMINATING AND MITIGATING DISCRIMINATION**
- 4. JUSTIFYING DISCRIMINATION**
- 5. DISCRIMINATION ARISING FROM A DISABILITY**
- 6. HARASSMENT**
 - 6.1 Victimisation
 - 6.2 How does the law work and what are the penalties?
- 7. EQUALITY IMPACT ASSESSMENTS (EIAs)**
- 8. STATUTORY CODES OF PRACTICE**
- 9. MONITORING EQUAL OPPORTUNITIES**
- 10. EQUAL PAY**
- 11. FURTHER SUPPORT**

1 INTRODUCTION

The Equality Act 2010 harmonised and replaced many previous pieces of legislation. It concerns goods and services as well as employment; schools therefore have duties to their pupils and parents as well as to their staff. This guidance focuses purely on employment matters.

All employees and other workers have the right not to be unlawfully discriminated against, harassed or victimised on a range of grounds. These are known as the “protected characteristics”, of which there are nine:

- Age: people of all ages are protected.
- Disability: only disabled people are protected, which means disabled people can be treated more favourably in order to eliminate disadvantage; hence the need to make reasonable adjustments in the workplace to accommodate their needs).
- Gender reassignment: people are now protected as soon as they start to manifest any aspect of an intention to reassign their gender – i.e., they do not have to be undergoing a medical procedure.
- Marriage and civil partnership: people are not protected from discrimination for being single.
- Pregnancy and maternity: a woman is protected as soon as she is pregnant, and during the period of any statutory maternity leave to which she is entitled; she should not suffer a detriment at any time because of maternity leave.
- Race: including national and ethnic origin, and potentially caste ; people of all races are protected.
- Religion and belief: this covers any religion, and philosophical beliefs that meet a number of set criteria; people of no religion or belief are equally protected.
- Sex: both sexes are equally protected.
- Sexual orientation: people of any sexual orientation are protected.

The right to make a complaint of unlawful discrimination is not restricted to people in employment and no qualifying period of employment is required. In some cases, job applicants and former workers may also make a complaint to an employment tribunal.

There is also separate legislation protecting employees from discrimination on the grounds of trade union membership and activity, and part-time or fixed-term working. This guidance will not focus on these issues, as they are separate to the main equality legislation. For more information and assistance, contact the Trust’s HR team.

2 PROHIBITED CONDUCT

Discrimination and harassment may arise in a variety of employment decisions, particularly appointment, training and promotion, performance appraisals, treatment during employment (including harassment and victimisation), redundancy situations, and dismissal.

The act prohibits:

- direct discrimination
- indirect discrimination without justification
- discrimination arising from a disability
- harassment
- victimisation

related to any of the protected characteristics.

A brief definition of each of these is provided below.

2.1 Direct discrimination: less favourable treatment because of a protected characteristic.

Example 1: a school refuses to employ a teacher because s/she is homosexual.

Once it has been established that direct discrimination has occurred, a tribunal will not allow any legal justification or defence: it is always unlawful, apart from in very limited circumstances.

Age is the one strand where a justification defence is allowed, in a similar way to indirect discrimination (see below).

Example 2: redundancy payment factors increase with age. This is a deliberate attempt to assist older people, who often find it more difficult to re-enter the jobs market when made redundant. Despite directly discriminating against younger people, it has been recognised as justified.

In limited circumstances, Occupational Requirements can be attached to a job.

Example 3: Faith schools can require their headteacher to be of a particular faith or denomination, as the role is key to the ethos of the school. However, it would not be legal to attach such a requirement to many other jobs within the school, like support staff roles.

The Equality Act has now formalised some particular types of direct discrimination, as described below.

2.1.2 Discrimination by association: less favourable treatment because of an association with another person with a protected characteristic.

The protection is most likely to apply to those with caring responsibilities (associative discrimination on the grounds of disability), but could also apply to other groups, for example people whose relative or partner is of a particular race or sexual orientation.

2.1.3 Discrimination by perception: less favourable treatment because a person is believed to possess a protected characteristic, even if they do not.

Example 1: a heterosexual person is believed to be gay and is therefore treated less favourably.

Example 2: a job applicant is not shortlisted because their name leads an employer to believe they are from a minority ethnic background, even though they are in fact White English.

Segregation applies only to race, where a person, or group, is separated from others on the grounds of race.

It must be a deliberate act or policy, rather than a situation that has occurred inadvertently, or congregation, where individuals choose to group together.

2.1.4 Indirect discrimination: where the effect of certain requirements or practices has an adverse impact on a group.

Indirect discrimination is usually not intentional, but creates a barrier, for a group of people. An individual bringing a claim of indirect discrimination has to be able to show that the detriment affects a group, not just them.

Indirect discrimination is not always unlawful; employers can present a defence if they can justify their actions.

Where indirect discrimination has been identified, at least one of three things needs to occur: eliminate – mitigate – justify. The process of Equality Impact Assessments (see section 5) helps organisations to be systematic in considering the potential for differential impacts, and how to eliminate, mitigate or justify impacts identified.

3. Eliminating and mitigating discrimination

In order to be legally compliant, employers must take steps to eliminate and/ or mitigate any identified negative impacts as far as possible, before reaching the position of justification.

Each school should consider its practices, particularly when any changes are being made, in order to eliminate and minimise indirect discrimination as much as possible. Consultation with staff, unions or particular groups may be necessary in order to help identify potential negative impacts that were previously not considered.

Example: in order to provide adequate lunch-time cover, it is believed shift patterns and hours for all part-time teaching assistants need to change. This could cause negative impacts for a number of groups, e.g., those with caring responsibilities (related to disability and sex), disabled staff whose condition precludes working certain hours, or particular religions, if it prevents worship at that time of day.

The first thing the school considers is how to eliminate the negative impact – whether the proposed change needs to be imposed, or if there are other options, such as asking for

volunteers, deploying people in other roles, or an opt-out of the change for those with issues related to being in a protected group.

If the evidence shows this is not practical or possible, next, the school considers how to mitigate the negative impact. For instance, it could ensure rotas are arranged several months in advance, to give people adequate notice to make other caring arrangements, make reasonable adjustments for disabled staff and/ or build in extra flexibility for those with issues related to being in a protected group, for instance, by being able to swap with colleagues if something particularly important comes up.

4. Justifying discrimination

Where it is not possible to eliminate or mitigate a negative impact, employers can justify their actions, if they can show them to be a “proportionate means to achieving a legitimate aim”.

“Proportionate means” – both the level of the negative impact, and whether anything else could be done instead, should be considered.

“Legitimate aim” – the intention behind the action must in itself be defensible and reasonable. Reducing costs alone is unlikely to be considered a legitimate aim, although it can be a factor.

The school needs to be able to provide detailed evidence of its justification and considerations to demonstrate its intention to be reasonable: a blank assertion that the action is necessary will be insufficient legal defence.

Example 1: it would be unlawful indirect discrimination to impose a blanket ban on job share or part-time working options, as this discriminates against those with caring responsibilities, who are more likely to be women.

Example 2: it would be potentially justifiable indirect discrimination for a school to require all teachers to attend a parent’s evening on a Friday night. Despite this having a negative impact on practising Muslims and Jews, as important worship occurs at that time, it could be justified if the school can show why the parent’s evening has to be on a Friday. It could be further mitigated by rotating the days of the week for parent’s evenings throughout the year.

5. Discrimination arising from a disability: where the less favourable treatment is not directly because of the person’s disability, but relates to something arising from the disability.

Unlike other discrimination claims, this type of claim does not require a comparator: the person does not have to prove that a non-disabled person in similar circumstances would have been treated differently. As such, it is intended to provide extra protection for disabled people. Employers can defend such claims if they can show their actions to have been a proportionate means to achieving a legitimate aim.

A key issue for this type of discrimination is whether the employer knew, or ought reasonably to have known, of the disability. It is possible to make a defence that the disability was undisclosed, and the employer could not reasonably be expected to have known about it.

Example: a dyslexic person is not promoted because of their poor spelling, which mars their written work. Whilst a non-dyslexic person might lawfully be passed over for promotion for

the same reason, it will be important for the employer to be able to show that all reasonable adjustments were considered and made first, before acting in this way. If this did not occur, and the employer knew about the dyslexia, the action would constitute unlawful discrimination

6. Harassment: unwanted conduct that has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading or offensive work environment, and that is related to a protected characteristic.

Behaviour of this sort that is not linked to the protected characteristics is defined as bullying, which is not protected under the Equality Act; however it relates to the employer's duty of care under health and safety legislation. Staff are often unclear on these concepts, and may use them interchangeably, so it is important to ask further questions when an allegation is made in order to be clear which category it should be investigated under.

The Act specifies three types of harassment: general harassment; harassment because of rejection of, or submission to, conduct of a sexual nature; and harassment based on sex or gender reassignment.

As harassment is defined by its "purpose or effect", the impact on the victim is taken into account, even where the perpetrator did not intend to cause offence or distress. Therefore harassment cannot be denied by saying that it was unintentional, or intended humorously, or because of unawareness that someone had a particular protected characteristic. There is a test of reasonableness, which means that a reasonable person in possession of the same information would regard the action as amounting to harassment. This helps to ensure against over-reactions to fairly low-level or neutral behaviour.

The emphasis on impact also means that it is not necessary to provide a comparator; only to show that the conduct reasonably had that effect. So it is also not acceptable to provide the well-known "equality of misery" defence by saying "I treat everyone equally badly"!

Staff can bring claims of harassment even when the conduct is not directly related to a protected characteristic of their own, or where the conduct was not aimed at them.

Example 1: a person could be harassed because they are perceived to be a member of a group when they are not, for instance, heterosexual workers who are harassed as if they are gay.

Example 2: the harassment could be based on an association with someone else, for instance, people in inter-racial partnerships.

Example 3: the conduct could be aimed at a colleague, but create an offensive environment for the complainant.

If the conduct is related to one of the equality strands and can reasonably be said to have created an offensive, intimidating or distressing environment for the claimant, it will constitute harassment.

Any complaints of harassment should be investigated under the appropriate policy.

6.1 Victimisation: workers may also bring a claim if they have been treated worse because

- they have made, or are contemplating making, a complaint about discriminatory treatment;
- it is believed they have made, or may make, such a complaint; or
- they have supported someone else in making such a complaint, e.g., by being a witness.

6.2 How does the law work, and what are the penalties?

- Vicarious liability: where a complaint arises out of an act of another worker, rather than the school itself, as is most likely in the case of harassment, the school may still be held to be vicariously liable, even if it did not have any knowledge of the conduct. The only way it can defend against this is to be able to show that all reasonable steps have been taken to prevent harassment and discrimination from occurring. This includes demonstrating that the school has sound employment policies and practices, which are made clearly known to staff.
- Reverse burden of proof: in discrimination claims to tribunal courts, once a person has shown they did suffer a detriment, the normal “burden of proof” is reversed, which means it is for the employer to prove that the reason for the detriment was not unlawful discrimination.
- Balance of probability: it should be noted that claims are assessed on the “balance of probability” and not the stronger criminal test of “beyond reasonable doubt”.
- Comparator: claims of direct and indirect discrimination require a comparator, so a person must demonstrate that there is a person, or group, who has been treated more favourably in similar circumstances. The only exceptions are pregnancy and maternity and racial segregation, as they are deemed to be unique situations with no appropriate comparison.
- Qualifying period: there is no qualifying period of employment to make a discrimination claim, so contractors and workers, job applicants and ex-employees can all bring claims
- Time limits for discrimination claims are strict: they must be brought within three months of an incident occurring, or the last incident occurring, unless there are exceptional circumstances where a delay is acceptable or reasonable.
- There is no strict time limit for internal grievances, or complaints from non- or ex-employees; however it is reasonable to expect these to refer to matters in the not-too-distant past, as otherwise it becomes hard to find an audit trail, or extend memories back, to the events in question.
- Penalties: discrimination awards have no maximum limit.

7. Equality Impact Assessments (EIAs)

Equality Impact Assessments are a way of ensuring that the potential for differential impacts on all groups are considered in an organisation’s policies, processes and decisions. They

recognise that discrimination is usually unintentional and indirect (see section 2.2). Conducting EIAs is one of the best ways for an organisation to ensure a systematic, thorough and transparent approach to integrating equality.

There is no set format for an EIA. It is recommended that EIAs are carried out on all policies, procedures and decisions that may have an impact on staff or service users, and are updated any time changes are made. Contact the Trust's HR Manager for further guidance.

EIAs are not a legal requirement. However, they are an important tool for schools in demonstrating their fulfilment of the public sector equality duty. Trade unions will often wish to see an EIA when policies or processes are being changed. Therefore all schools may wish to conduct EIAs when developing any local policies to demonstrate commitment to this agenda. (Appropriate action will be taken centrally in relation to collectively agreed policies.)

8. Statutory Codes of Practice

In October 2007 the Equality and Human Rights Commission (EHRC) replaced three previously separate equality commissions: the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. It is a statutory body, and has published codes of practice for employment, which have statutory force, that supplement the legislation. Failure to comply with the relevant code of practice may be cited in evidence by a complainant. Additional useful information can be found on the EHRC's website: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/>

9. Monitoring equal opportunities

It is good practice to monitor equal opportunities by keeping statistics on the makeup of your workforce and job applicants. The EHRC codes of practice recommend this type of monitoring.

10 Equal pay

Equal pay legislation, starting with the Equal Pay Act 1970, requires that men and women should receive equal pay for carrying out like work, or work of equal value.

11. Further Guidance and Support

Please contact the Trust's HR Manager for help and guidance for any cases or complaints relating to equality matters in employment.

APPENDIX 1

EQUALITY IMPACT ASSESSMENT

Description of proposed change:

[insert summary of proposed change to working practices]

Supporting documents attached:

[insert list of documents e.g. relevant policies / procedures / timetables / calendars etc]

Effective date:

Questions (see below for explanations)	Comments / Evidence
1. Purpose of the change	

<p>2. How does it seek to achieve this?</p>	
<p>3. Who benefits and how? (who therefore doesn't and why?)</p>	
<p>4. Are there any associated aims or policies linked to this one?</p>	
<p>5. List any research or references or disability networks used above</p>	

6. General Observations

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Notes

Question 1: The purpose of the proposed change is the intention of what it (the policy or product) was meant to achieve. This needs to be in some detail and very clear in meaning. It is this “intention” that the impact assessment will seek to measure.

Question 2: This question seeks to explore how the school sets up systems, practices, understandings or conventions to deliver on that intention. This is about process mechanics. It requires the relevant member of the SLT to walk through the process or practices and consider what barriers appear or supports are on hand.

Question 3: This section is about determining who benefits from the proposed change as described at Q1. This is where involvement of SLT members and a range of other staff colleagues can provide input to identify any barriers to participation and/or individuals or groups of people who may be adversely affected.

- Where possible, actual research or experience should be used or pointed to.

- It would be acceptable, within confidentiality limits, for members to engage with disabled networks they may be involved with to support and evidence at this stage

Question 4: Finally, this last question acknowledges that policies and practices rarely operate in isolation. An impact in one area may have knock on effects and Q4 is about identifying any such effects.