

Services, public
functions and
associations
Statutory Code
of Practice

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functions and
associations

Statutory Code of Practice



Equality Act 2010 Statutory Code of Practice Services, public functions and associations www.equalityhumanrights.com

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**Equality and
Human Rights
Commission**

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The Equality Act 2010 represents the culmination of years of debate about how to improve British equality law. It offers individuals stronger protection against discrimination. It gives employers and businesses greater clarity about their responsibilities. And it sets a new expectation that public services must treat everyone with dignity and respect.

Foreword

When the Act received Royal Assent in April 2010, it was a moment to celebrate. However, getting the legislation onto the statute books was not an end in itself. What matters is that it should lead to real change: more responsible behaviour from companies, more thoughtful planning of public services and, above all, greater confidence that people will be treated fairly as they go about their everyday lives.

The Equality and Human Rights Commission has a key role to play in bringing the Act to life. We have a set of powerful tools to enforce the law. We can, for example, take organisations to court and intervene in individual discrimination cases. But we only want to intervene when things go wrong as a last resort. Our first priority is to provide information, support and encouragement so that organisations can get it right in the first place.

That is why we are publishing guidance that will give individuals, businesses, employers and public authorities the information they need to understand the Act, exercise their rights, and meet their responsibilities.

The guidance comes in two separate forms. The non-statutory guidance, available separately, is designed to be a first port of call for everyone who has an interest in equality. It is intended to be practical and accessible.

This document is a Statutory Code of Practice. This is the authoritative, comprehensive and technical guide to the detail of law. It will be invaluable to lawyers, advocates, human resources personnel, courts and tribunals, everyone who needs to understand the law in depth, or to apply it in practice.

Reflecting the content of the Act itself, this code replaces several existing codes, reuniting and, where necessary, harmonising their contents. The code draws on case law and precedent to illustrate where and how different provisions can be brought to bear in real-life situations.

The initial texts that we drafted have been through a rigorous process of consultation. Colleagues in businesses, trade unions, charities, voluntary groups, government departments and other public bodies have all commented. Their contributions have enriched and improved the text immeasurably, and we are grateful for their help.

Clear and authoritative codes are vital to enable any law to fulfil its promise. We hope that this Code will help you use the Equality Act 2010 to the fullest extent possible.



A handwritten signature in black ink, appearing to read 'Trevor Phillips', with a large, stylized flourish above the name.

Trevor Phillips
Chair, Equality and
Human Rights Commission

Chapter 1: Introduction

Purpose of the Equality Act 2010

1.1

The Equality Act 2010 (the Act) consolidates and replaces the previous discrimination legislation for England, Scotland and Wales. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as ‘protected characteristics’.

1.2

An important purpose of the Act is to unify the legislation outlawing discrimination against people with different protected characteristics where this is appropriate. There are, however, some significant differences and exceptions, which this Code explains.

1.3

As well as consolidating existing law, the Act makes discrimination unlawful in circumstances not covered previously. Discrimination in most areas of activity is now unlawful subject to certain exceptions. These areas of activity include, for example, employment and other areas of work, education, housing, the provision of services, the exercise of public functions and membership of associations.

1.4

Different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and the exercise of public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education and general qualifications bodies. Part 7 deals with discrimination by membership associations.

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

Status of the Code

1.5

The Commission has prepared and issued this Code on the basis of its powers under the Equality Act 2006. It is a Statutory Code. This means it has been approved by the Secretary of State and laid before Parliament.

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 take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

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

1.6

This Code covers discrimination in services and public functions as set out in Part 3 of the Act and discrimination by associations as set out in Part 7.

1.7

Part 3 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against when using any service provided publicly or privately, whether that service is for payment or not. This does not necessarily mean that service providers should treat everybody in exactly 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, positive action, single sex services and disabled people so that they can receive the same standard of service as far as this is possible. The steps that service providers should take to ensure that they do not discriminate are explained in this Code.

1.8

Public authorities carrying out ‘public functions’ are also covered by this part of the Act, and their duty not to discriminate in carrying out these functions is explained in this Code. Other organisations in the private or voluntary sectors are also covered by the public functions provisions of the Act. ‘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.

1.9

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 include those bodies which have membership criteria such as private clubs and political parties. Only associations with at least 25 members have obligations under this part of the Act.

1.10

This Code applies to England, Scotland and Wales. However, services provided, or public functions exercised outside Great Britain may be covered by the Act.

Age as a protected characteristic

1.11

For those aged 18 years and over, age is a protected characteristic. Protection will be provided against age discrimination for those over 18. The Act disapplies age as a protected characteristic for those aged under 18 years in relation to services and public functions (Part 3 of the Act). In relation to associations (Part 7 of the Act), age is a protected characteristic irrespective of the person’s age.

The provisions relating to age are not expected to come into force before 2012. Therefore, this Code does not cover discrimination because of age in the provision of services, the exercise of public functions or by associations.

Marriage and Civil Partnership

1.12

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 characteristic in the provision of services, the exercise of public functions or by associations.

However, a civil partner treated less favourably than a married person can bring a claim for sexual orientation discrimination.

Purpose of the Code

1.13

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.

1.14

The Equality and Human Rights Commission (the 'Commission') has also produced practical guidance for service providers 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 obtained from the Commission, or downloaded from the Commission's website.

1.15

The Code, together with the practical guidance produced by the Commission, will:

- help service providers, those exercising public functions and membership associations to understand their responsibilities and 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 because of a protected characteristic;
- help lawyers and other advisers to advise their clients, and

- give guidance to the courts on matters designed to ensure or facilitate compliance with the Act and which is admissible in evidence and must be taken into account by it in any case in which it appears to the court to be relevant.

Human Rights

1.16

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 Fundamental Rights and Freedoms (the Convention). The public functions covered by this Code are functions of a public nature as defined in the Human Rights Act 1998 (HRA).

1.17

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 the Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a public authority is involved in the case or not. So, in any discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.

1.18

Human rights issues can arise in relation to the exercise of any public function where any Convention right is engaged. If a public authority or any other body discriminates when carrying out a function of a public nature, this may also amount to a breach of the HRA if a Convention right is engaged because discrimination in the enjoyment of Convention rights is a breach of the Convention (under Article 14). Where discrimination in the enjoyment of Convention rights is based on a characteristic protected under the Equality Act, this could also be a breach of the Equality Act.

1.19

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

1.20

While 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. Small service providers may have more informal practices, have fewer written policies, and may be more constrained by financial resources. Large and small service providers may carry out their duties in different ways. However, no service provider is exempt from duties under Part 3 because of size. Small associations, with fewer than 25 members, are exempt from the provisions of the Act (under Part 7) that apply to associations.

How to use the Code

1.21

Chapter 1 (this chapter) gives an introduction to the Code.

Chapter 2 explains the protected characteristics of disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. As explained above, age and marriage and civil partnership are 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 Codes.

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. This chapter explains the measures the Act permits organisations to take which may involve treating groups differently to address disadvantage, meeting different needs or improving low levels of participation.

Chapter 11 examines 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 examines 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. This chapter includes the provisions that relate to political parties.

Chapter 13 explains exceptions which permit differential treatment in some, limited, circumstances.

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

Appendix 1 contains further information about the meaning of disability in the Act.

Examples in the Code

1.22

Examples of good practice and how the Act is likely to work in a variety of situations are shown in shaded boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples use as many different protected characteristics as possible in a variety of contexts relating to services, public functions and associations, in order to demonstrate the breadth and scope of the Act.

Use of the terms ‘service provider’, ‘services’ and ‘service user’

1.23

As explained above, the Act imposes duties on service providers and those exercising public functions (under Part 3) and on associations (under Part 7). The term ‘service provider’ is used in this Code to refer to all legal persons with responsibilities under these parts of the Act. The term ‘services’ includes goods and facilities and refers to all relevant activities carried out by ‘service providers’. Similarly, the term ‘service user’ refers to people who are users of these ‘services’: for example, customers of services, users of facilities, consumers or purchasers of goods, people who benefit from or are subject to public functions; and people who are members, associates and guests of associations. People who attempt to or want to use a service, benefit from a public function or join an association may also be ‘service users’, even if they cannot actually use the ‘service’ because of discrimination.

References in the Code

1.24

In this Code, ‘the Act’ means the Equality Act 2010. References to particular sections and Schedules of the Act are shown in the margins, abbreviated as ‘s’ and ‘Sch’ respectively. Occasionally other legislation or regulations are also referred to in the margins.

Changes to the law

1.25

This Code refers to the provisions in the Equality Act which came into force on 1 October 2010.

There are expected to be changes to the Act made by Order, in particular to the protected characteristic of age in 2012, in relation to the areas covered by this Code.

Other legislation may have an effect on the duties explained in the Code. Decisions of the courts when applying and interpreting the Act may clarify particular provisions.

The Act contains provisions relating to dual discrimination (also known as combined discrimination) and the new public sector equality duty. These provisions are not expected to come into force before April 2011. The government is considering how these provisions can be implemented in the best way for business and the public sector respectively.

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 Codes issued by the Commission. Further information can be obtained from the Commission. See below for contact details.

Further information

1.26

Copies of the Act and regulations made under it can be purchased from The Stationery Office. Separate codes covering other aspects of the Act are also available from The Stationery Office. The text of all the Equality and Human Rights Commission's codes (including this Code) and guidance relating to the codes can also be downloaded free of charge from the Commission's website where Word and PDF versions are also available: www.equalityhumanrights.com

1.27

Free information about the Equality Act can be obtained by contacting the Equality and Human Rights Commission's Helpline, details of which are below.

England

Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, Arndale Centre, Manchester M4 3AQ

Main number 0845 604 6610

Textphone 0845 604 6620

Fax 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Main number 0845 604 5510

Textphone 0845 604 5520

Fax 0845 604 5530

Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Main number 0845 604 8810

Textphone 0845 604 8820

Fax 0845 604 8830

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

Introduction

2.1

Part 2 of the Act contains the key concepts of equality.

2.2

The Act protects people from discrimination and harassment based on 'protected characteristics'. As explained at paragraph 1.23 in Chapter 1, the term 'service provider' and terms which flow from this are used generically to refer to all those who have responsibilities in the areas covered by this Code.

2.3

The 'protected characteristics' are: disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Age

What the Act says

2.4

The Act provides that the protected characteristic of age, specifically age 18 and above in the case of services and public functions and all ages in respect of associations, is a protected characteristic for the areas covered by this Code. However the provisions relating to age in these areas are not expected to come into force before 2012. Therefore the reference to protected characteristics in this Code does not include age.

Disability

What the Act says

2.5

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

2.6

s.6(4) 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).

2.7

People who currently have a disability are protected because of this characteristic against harassment and discrimination- including discrimination arising from disability (Chapter 6) and a failure to comply with the duty to make reasonable adjustments (Chapter 7). People who have had a disability in the past are also protected against harassment and discrimination (see Appendix paragraph 3). 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 (see paragraphs 4.19 to 4.20). In some circumstances a non-disabled person may be protected where they experience harassment (see Chapter 8) or some other unlawful act such as victimisation (see Chapter 9).

2.8

The Act says that 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 normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing.

s.6 (1)

2.9

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

Sch. 1,
Para 3**2.10**

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.

Sch. 1,
Para 2(1)**2.11**

Substantial means more than minor or trivial.

s.212(1)

2.12

Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day-to-day activities, it is still to be treated as though it does have such an effect.

Sch. 1,
Para 5**2.13**

This means that 'hidden' impairments are also covered (for example, mental illness or mental health problems, diabetes and epilepsy) where they meet the definition in the Act.

2.14

Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.

Sch. 1,
Para 6**2.15**

Progressive conditions and those with fluctuating and recurring effects will amount to disabilities in certain circumstances.

Sch. 1,
Para 2(2)
& 8**2.16**

For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix 1 to this Code.

Who has rights under Part 3 of the Act?

Gender reassignment

What the Act says

2.17

- s.7(1) The Act defines gender reassignment as a protected characteristic. 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.

2.18

- s.7(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

2.19

Under the Act ‘gender reassignment’ is a personal process (that is, moving away from one’s birth sex to the preferred gender), rather than a medical process.

2.20

The reassignment of a person’s sex may be proposed but never gone through; the person may be in the process of reassigning their sex ; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

Example:

A person who was born physically female decides to spend the rest of his life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully passes as a man without the need for any medical intervention. He would be protected as someone who has the protected characteristic of gender reassignment.

2.21

This broad, non-medical definition is particularly important for gender variant children: although some children do reassign their gender while at school, there are others who are too young to make such a decision. Nevertheless they may have begun a personal process of changing their gender identity and be moving away from their birth sex. Manifestations of that personal process, such as mode of dress, indicate that a process is in place and they will be protected by the Act.

2.22

The Act requires that a person should have at least proposed to undergo gender reassignment. It does not require such a proposal to be irrevocable. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.

2.23**Example:**

A person born physically male tells her friends she intends to reassign her sex. She attends counselling sessions to start the process. However, she decides to go no further. She is protected under the law because she has undergone part of the process of reassigning her sex.

2.24

Protection is provided where, as part of the process of reassigning their sex, someone is driven by their gender identity to cross-dress, but not where someone chooses to cross-dress for some other reason.

Example:

Before going to a party in a local hotel, a guest lets it be known that he intends to come dressed as a woman for a laugh. However, the management says he cannot attend the event dressed as a woman as it would create a bad image for the business if there was bad behaviour on the premises.

The management also tells a transsexual woman that she can't come dressed as a woman as they don't feel comfortable with the idea, notwithstanding the fact that they know she has been living as a woman for several years.

The guest would not have a claim for discrimination because he does not intend to undergo gender reassignment and because the reason he is told not to come dressed as a woman relates to the management's concern that overly boisterous behaviour would give a bad impression of the business, not because they think he is a transsexual person.

The transsexual woman would have a claim as the reason for the less favourable treatment was because of her protected characteristic of gender reassignment.

2.25

Where an individual has been diagnosed as having ‘Gender Dysphoria’ or ‘Gender Identity Disorder’ 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 (see Chapters 6 and 7).

Gender Recognition Certificates**2.26**

The Gender Recognition Act 2004 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act; see also the Data Protection Act 1998 which deals with processing sensitive personal information).

2.27

Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person’s right to privacy. If a service provider requires proof of a person’s legal gender, then their (new) birth certificate should be sufficient confirmation.

Pregnancy and maternity**What the Act says****2.28**

s.4 The Act lists pregnancy and maternity as a protected characteristic.
s.13(6) & 13(7) Pregnancy and maternity discrimination is considered at paragraphs 4.34 to 4.48.

Race

What the Act says

2.29

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

2.30

A person has the protected characteristic of race if they fall within a particular racial group. A racial group can also be made up of two or more distinct racial groups. See paragraphs 2.39 to 2.42 for the meaning of 'racial group'. s.9(2)

Nationality

2.31

Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins (see below). s.9(1)(b)

Ethnic Origins

2.32

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. 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. s.9(1)(c)

2.33

There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language; a common literature; a common religion or common geographical origin; or being a minority or an oppressed group.

2.34

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.

2.35

The courts have confirmed that the following are protected ethnic groups: Sikhs, Jews, Romany Gypsies, Irish Travellers, Scottish Gypsies and Scottish Travellers.

National Origins**2.36**

s.9(1)(c) 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. For example, as England and Scotland were once separate nations, the English 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.

2.37

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.

2.38

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'**2.39**

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

2.40

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

2.41

A racial group can be made up of two or more distinct racial groups. 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.

s.9(4)

2.42

Racial groups can also be defined by exclusion. For example, those of 'non-British' nationality could form a single racial group.

Religion or belief**What the Act says****2.43**

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.

s.10(1) & (2)

2.44

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.

2.45

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

Meaning of religion**2.46**

'Religion' means any religion and includes a lack of religion. 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.

s.10(1)

Who has rights under Part 3 of the Act?

2.47

A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

Meaning of belief

s.10(2) 2.48 Belief means any religious or philosophical belief and includes a lack of belief.

2.49

'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.

2.50

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

2.51

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

2.52

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.

Example:

A woman believes in a philosophy of racial superiority for a particular racial group. It is a belief around which she centres the important decisions in her 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**2.53**

While people have an absolute right to hold a religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10).

2.54

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; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or a belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination: this would usually amount to indirect discrimination.

Example:

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****2.55**

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.

s.11(a) & (b)
& s.212(1)

Who has rights under Part 3 of the Act?

2.56

A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraphs 2.17 to 2.27) or sexual orientation (see paragraphs 2.60 to 2.64).

s.13(6)(a)
& s.13(7)

2.57

There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity or because she is breastfeeding (see paragraphs 4.34 to 4.48).

Sexual orientation

What the Act says

s.12(1)

2.58

Sexual orientation is a protected characteristic. It means a person's sexual orientation towards:

- persons of the same sex (that is, the person is a gay man or a lesbian);
- persons of the opposite sex (that is, the person is heterosexual); or
- persons of either sex (that is, the person is bisexual).

2.59

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

2.60

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.

2.61

Section
s.12(2)

When the Act refers to the protected characteristic of sexual orientation, it means the following:

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

2.62

Gender reassignment is a separate protected characteristic and unrelated to sexual orientation, despite a common misunderstanding that the two characteristics are related (see paragraph 2.17).

Restrictions on protection under the Act

2.63

For some protected characteristics, the Act does not provide protection in relation to all types of prohibited conduct:

- For pregnancy and maternity, there is no express protection from direct discrimination by association or perception (see paragraphs 4.19 to 4.20); indirect discrimination (see Chapter 5); or harassment (see Chapter 8). However, in these three situations described above, the sex discrimination provisions may provide protection.
- Apart from discrimination by association or perception, protection from direct discrimination because of disability only applies to disabled people.
- Indirect disability discrimination and discrimination arising from disability only applies to disabled people (see Chapter 5 and 6).
- A service provider is only under a duty to make reasonable adjustments for a disabled service user or potential service user (see Chapter 7).

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

Introduction

3.1

This chapter provides an overview of who has obligations under the provisions of the Act covered by this Code and in what circumstances.

3.2

In practice, more than one obligation under the Act may be relevant to a person or organisation. For example, those exercising public functions may also be providing services to the public, or a section of the public, and will in those respects be subject to the duties imposed on service providers, as well as on those exercising public functions.

3.3

This chapter also explains the potential liability of employers and principals for the actions of their employees and agents.

3.4

It suggests steps that service providers, those carrying out public functions and associations may wish to take to ensure they are meeting their obligations under the Act.

3.5

As explained in Chapter 1, the term ‘service provider’ and ‘service user’ and terms which flow from these are used generically to refer to all those who have duties or are protected in the areas covered by this Code.

Services to the public**3.6**

The Act imposes obligations on everyone 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, for example, a meal in a restaurant. 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.

s.29

More detail is provided on services to the public in Chapter 11.

Public functions**3.7**

The Act imposes obligations on any person who exercises public functions as defined in the Act. The public function provisions apply in relation to a function of a public nature, exercised by a public authority or another person (including a private organisation), where the function is not covered by the services, premises, work or education provisions of the Act.

s.31(4)

More detail is provided on public functions in Chapter 11.

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

Associations

3.8

s.107 The Act 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, and
- it is not a trade union or professional organisation.

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

More detail is provided on associations in Chapter 12.

Relationships which have ended

3.9

s.108 It is unlawful to discriminate against or harass someone after a relationship covered by the Act has come to an end, where the treatment arises out of and is closely connected to a relationship which used to exist between them; and which would have been prohibited if the relationship was still continuing.

3.10

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

Example:

A builder addresses abusive and hostile remarks to a previous customer because of her race after their business relationship has ended. This would be harassment.

3.11

Reasonable adjustments must be made for disabled people even after a relationship has ended if they are put at a substantial disadvantage in comparison to people without a disability.

Example:

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

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

Failing to ensure that he was sent and able to reply to this discount offer in the appropriate format is likely to amount to a failure by the retailer to make a reasonable adjustment, even though the man is no longer undertaking a course with them.

3.12

If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be covered by the victimisation provisions.

s.108(7)

Contracts**3.13**

The Act prevents service providers from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts.

s.142-144

Unenforceable terms**3.14**

A term of a contract that promotes or provides for treatment that is prohibited by the Act is unenforceable. 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 to which they are entitled.

s.142

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

3.15

s.144 The Act also says that a term of a contract that attempts to exclude or limit the anti-discrimination provisions of the Act is unenforceable by a person in whose favour it would operate. However, this does not prevent the parties to a claim in the county court or sheriff court from entering into an agreement which has the effect of settling the claim.

Removal or modification of terms

3.16

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 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 has the opportunity to make representations.

The order can be retrospective in its effect.

Territorial scope

3.17

The provisions of Parts 3 and 7 do not apply, and cannot be enforced, in Northern Ireland.

3.18

The Act does not limit the scope of the services and public functions provisions to activities which take place in Great Britain. Whether or not an act which takes place outside Great Britain is covered by the Act's provisions will be determined by the county court or the Sheriff court. The exception to this is services provided by an information society service provider where different territorial rules apply. See paragraphs 11.9 and 11.10 for further details of this provision.

3.19

s.115
s.29(9) There are a number of specific cases where the Act expressly provides for particular provisions of the Act to apply (or potentially apply) outside the UK: for example, the Act applies to the provision of services and the exercise of public functions in relation to race and religion or belief discrimination in the granting of entry clearance where the act in question takes place outside the UK.

What is not covered by the Code?

Education

3.20

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. Discrimination by a responsible body is dealt with in the Education Code.

s.84-94

3.21

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

3.22

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. These are discussed in Chapter 11.

s.95-97

Premises

3.23

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 also the sale of property. This Code does not deal with Part 4 of the Act.

s.32-38

3.24

There will be some situations however where the circumstances will fall within Part 3 and where this Code will apply:

- where the provision of accommodation is generally for the purpose of short stays by individuals who live elsewhere; or s.32(3)(a)
- where accommodation is provided solely for the purpose of providing a service or exercising a public function. s.32(3)(b)

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

3.25

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

3.26

Sch.3
Part 9 Part 3 of the Act applies to the transport infrastructure, such as stations and airports, transport services for example, ticketing and also the use of certain specified vehicles (including trains coaches and taxis). However, the Part 3 provisions of the Act as they apply to the provision and use of transport vehicles are not dealt with in this Code.

Sch. 2,
Para 3 Part 12 of the Act makes provision for regulations setting access standards for taxis, public service vehicles, and light rail vehicles; and also makes provisions relating to specific duties placed on the drivers of taxis and private hire vehicles.

Ships and hovercrafts

3.27

s.30 The services provisions (and, in addition, in relation to disability, the public function provisions) will only apply to ships and hovercraft in the way set out in regulations made by a Minister.

Employment services

3.28

s.55-56 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'. These provisions are covered in the Employment Statutory Code of Practice.

Exceptions

3.29

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

Liability of employers and principals

What the Act says

3.30

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 such 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.

s.109

3.31

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

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

3.32

The phrase 'in the course of employment' has a wide meaning: employees who commit an unlawful act against customers and service users, members, guests or associates of an association, 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.

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

The employer's defence

3.33

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. A principal will not be liable for unlawful discrimination carried out by its agents where the agent acted in contravention of the principal's express instructions not to discriminate. In such circumstances the agent will not have acted 'with the authority of the principal'.

Example:

A shop owner becomes aware that her employee is refusing to serve a transsexual customer. The employer instructs the employee to treat transsexual customers in the same way as other customers and advises the employee that discrimination is a disciplinary offence. However, the employee continues to treat transsexual customers less favorably. One such customer brings a claim against both the employee and the employer. The employer may avoid liability by showing that she took all reasonable steps to stop the employee from acting in a discriminatory way. Paragraphs 3.39 to 3.43 list some steps which, depending on all the circumstances, may be considered reasonable.

3.34

A service provider would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, a service provider should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.

Liability of employees and agents

What the Act says

3.35

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 (see paragraph 3.33). 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.

S.110

Knowledge that the act is unlawful

3.36

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

3.37

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.

3.38

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

Meeting obligations under the Act: avoiding discrimination and good practice

3.39

Service providers need to take steps to ensure that discrimination is not occurring.

3.40

As explained above, a service provider will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.

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

3.41

Service providers are more likely to be able to comply with their duties under the Act and prevent their employees from discriminating against service users or customers if they take the following steps:

- establish a policy to ensure equality of access to and enjoyment of their services by potential service users or customers 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 by staff as part of disciplinary rules and procedures
- ensure that performance management systems address equality and non-discrimination
- maintain an easy to use, well-publicised complaints procedure
- review practices to ensure that they do not unjustifiably disadvantage particular groups, and
- consult customers, staff and organisations representing groups who share protected characteristics about the quality and equality of their services and how they could be made more inclusive.

3.42

In relation to the duty to make reasonable adjustments for disabled people, the following actions will help service providers to 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.

3.43

Small businesses and organisations who provide services may find a less formal approach sufficient – such as talking to staff and service users or customers and thinking about whether their services are being used by all sections of the community. The points above regarding communications with staff on the unacceptability of discrimination will still be essential.

Chapter 4:

Direct discrimination

Introduction

4.1

This chapter explains what the Act says about direct discrimination in the provision of services, the exercise of public functions and associations for all of the protected characteristics covered by this Code. It discusses how the requirement for a comparator may be met. It also refers to provisions in the Act making it unlawful to treat a woman unfavourably because of her pregnancy and maternity.

4.2

As explained in Chapter 1, the terms ‘service provider’ and ‘service user’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

What the Act says

4.3

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

4.4

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

- in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person;
- where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (see Chapters 11 and 13)

What is 'less favourable' treatment?

4.5

To decide whether a service provider has treated a service user 'less favourably', a comparison must be made with how they have treated other service users or would have treated them in similar circumstances. If the service provider's treatment of the service user puts the service user at a clear disadvantage compared with other service users, then it is more 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.

s.31(7)

Example:

A group of women complain to a health spa manager that they feel uncomfortable around another member of the spa who is a transsexual woman. In response, the manager apologises to the transsexual woman but tells her that she will not be able to use the spa again. This is less favourable treatment of her, as it puts her at a clear disadvantage compared to the spa's other clients and will not be lawful if the spa's conduct is because of gender reassignment.

4.6

The service user does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the service user can reasonably say that they would have preferred not to be treated differently from the way the service provider treated- or would have treated- another person.

4.7

Under the Act it is not possible for the service provider to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, by offering an alternative service at a discount.

Direct discrimination

Example:

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.

4.8

- s.17 For direct discrimination because of pregnancy and maternity, the test is whether the treatment is **unfavourable** rather than less favourable. Hence there is no need for the woman to compare her treatment with that experienced by other service users (see paragraphs 4.34 to 4.48 for a further discussion of pregnancy and maternity discrimination).

Segregation

4.9

- s.13(5) When the protected characteristic is race, deliberately segregating a service user or group of service users from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because racial segregation is always discriminatory. But it must be a deliberate act or policy rather than a situation that has occurred inadvertently.

Example:

A youth club has had trouble with racial conflicts between young people. It decides to open on Tuesdays and Thursdays for black young people only, and on Wednesdays and Fridays for white young 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:

At another youth club where all young people are welcome at every session, if black boys always choose to separate themselves from white boys, playing different sports or simply standing together in a group, as 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.

4.10

Segregation linked to other protected characteristics may be direct discrimination. However, it is necessary to show that it amounts to less favourable treatment. If the protected characteristic is sex, separating men and women service users may be permitted in certain circumstances, (see exceptions for competitive sport, communal facilities and separate services in Chapter 13).

There are also exceptions for single sex services (see paragraphs 13.54 to 13.56) and single characteristic associations (see paragraphs 12.46 to 12.51).

Shared protected characteristics

4.11

Direct discrimination can take place even though the service provider and service user share the same protected characteristic giving rise to the less favourable treatment.

s.24(1)

Example:

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

‘Because of’ a protected characteristic

4.12

‘Because of’ a protected characteristic has the same meaning as the phrase ‘on grounds of’ a protected characteristic in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

Example:

After an incident on the 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. It is likely that religion or belief is one of the causes of the less favourable treatment of the Sikh prisoners, although their recent conduct may be another cause.

4.13

In some instances, the discriminatory basis of the treatment will be obvious from the treatment itself.

Example:

A Gypsy couple are refused service in a pub that displays on its door a 'No Gypsies or Travellers' sign. It is obvious from the notice on the door and the treatment the Gypsy couple receive that their less favourable treatment is because of race.

4.14

In other cases the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the service provider treated the service user less favourably to determine whether this was because of a protected characteristic.

Example:

A transsexual woman is seated at a restaurant waiting for a member of staff to take her order. She observes the staff serving other single customers who arrived after she did. In this case it will be necessary to look at why the restaurant staff did not serve the transsexual woman to determine whether her less favourable treatment was because of gender reassignment.

4.15

Direct discrimination is unlawful, no matter what the service provider's motive or intention, and regardless of whether the less favourable treatment of the service user is conscious or unconscious. Service providers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the service user differently because of a protected characteristic.

Example:

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.

4.16

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.

Example:

A general 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.

4.17

A service provider cannot base its 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:

A student travel agency is aware that the local university charges non-EU foreign students higher fees than it charges UK or other EU 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 and other EU students, and £275 for non-EU students. The regulations permitting higher fees for most non-EU students apply only to further and higher educational institutions and do not apply to providers of commercial services. Thus, while the differential fees imposed by the university are authorised under statute, there is no parallel statutory basis for the travel agency to mirror this difference of treatment. The travel agency's differential pricing is likely to be less favourable treatment because of nationality (non-EU nationality).

4.18

A service user experiencing less favourable treatment 'because of a protected characteristic' does not have to possess the characteristic themselves. For example, the person might be associated with someone who has the characteristic ('discrimination by association'); or the person might be wrongly perceived as having the characteristic ('discrimination by perception').

Discrimination by association

4.19

It is direct discrimination if a service provider treats a service user less favourably because of the service user's association with another person 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 service user has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.

Example:

A boy wishes to join his local football club, but he is rejected because his parents are a lesbian couple. This is direct discrimination by association because of sexual orientation because of the boy's association with his parents.

Example:

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 appear to be English 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.

Direct discrimination because of a protected characteristic could also occur if a service user is treated less favourably because they campaigned to help people with a particular characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the service provider believes to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here (see paragraphs 9.15 to 9.24).

Example:

Officers of an established tennis club convene an emergency meeting when they see the captain of their women's team on television speaking on behalf of an organisation which campaigns for fairer treatment of transsexual people. They decide that to maintain the club's reputation they must remove her as captain of their women's team. This could amount to direct discrimination because of gender reassignment.

Example:

A local business association was planning an open day for all of the shops on the high street. The board instructed the chair of the committee making the arrangements, 'to avoid trouble', that she should not include any of the take-away shops all of which are ethnic minority run businesses. When she refused to do that, the board warned her that if there was any sign of 'trouble' she could be suspended from the association. Her treatment could amount to direct race discrimination.

Discrimination by perception

4.20

It is also direct discrimination if a service provider treats a service user less favourably because the service provider mistakenly thinks that the service user has a protected characteristic. However, this does not apply to pregnancy and maternity.

Example:

A woman with a medical condition that makes her appear 'masculine' is wrongly perceived to be undergoing gender reassignment and refused entry to a women-only sauna session at her local leisure centre. This is likely to be less favourable treatment because of gender reassignment.

Comparators

4.21

- s.13(1) In most circumstances, direct discrimination requires that the service provider's treatment of the service user is less favourable than the way the service provider treats, has treated or would treat another service user to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'. However, no comparator is needed in cases of racial segregation or pregnancy and maternity discrimination (see paragraph 4.9 and paragraphs 4.34 to 4.48).

Who will be an appropriate comparator?

4.22

- s.23 (1) The Act says that in comparing people for the purpose of direct discrimination there must be no material difference between the circumstances relating to each case. 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; what matters is that the circumstances which are relevant to the treatment of the service user are the same or nearly the same for the service user and the comparator.

Example:

A man is not accepted as a member of a prestigious cycling club while a woman who applied at the same time is accepted. The man has recently bought his first bicycle; 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 woman, the man would not be able to refer to the woman as an appropriate comparator.

Example:

A woman and her husband play pool to the same standard and she often wins. 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:

A cafe 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 considers might upset other customers. The customer is treated less favourably than another customer who does not have a disfigurement and who is given a full choice over where they drink their coffee. This customer without a disfigurement is the comparator.

Hypothetical comparators

4.23

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.

4.24

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.

4.25

Referring to the example above, of the person with a severe disfigurement, if it turned out that a customer who is allowed to drink in the main café has a different impairment, such as severe arthritis, there would be a significant difference in the circumstances of the two customers. So the individual with arthritis would not be an actual comparator. However, the difference in treatment of the two customers could help to define a hypothetical comparator who might be treated more favourably than the person with the severe disfigurement.

4.26

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:

A young black man enrolled on a 10-week computer course at a private business college. He arrived late for the first three classes. The college manager told him that his late arrival disturbed the concentration of the other students and if he arrived late a fourth time he would not be able to continue and he would forfeit his fee. In the absence of an actual comparator the black student could compare his 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; he 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 showing the black student had been treated less favourably because of race.

4.27

Who could be a hypothetical comparator may also depend on the reason why the service provider treated the claimant as they did. In many cases it may be more straightforward for the court to establish the reason for the service user's treatment first. This could include considering the service provider's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

Example:

Three Somali refugee families who have recently been re-housed try to register with a GP at the nearby health centre, but none are accepted. They are told that the health centre does not have suitable staff for their health needs. The three Somali families bring a claim of direct race discrimination against the health centre. As no other families have been trying to register at the same time, they do not have an actual comparator. They are told by refugees who have lived in the area for some time that no Somali families have ever been able to register at that health centre, and all have been given the same explanation. A court might first look at the treatment of the three families and evidence of treatment of other Somali families in the past to establish whether the treatment of the three families was because of race. If this is found to be the case, the court would move on to consider whether they were treated less favourably than hypothetical comparator(s) would have been treated.

4.28

Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'

Comparators in disability cases

4.29

The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. 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).

s.23(2)(a)

4.30

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

Example:

A disabled man with a chronic heart condition is a member of a golf 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 golf handicap as him, who doesn't have this disability, is selected for the team. This new team member could be a comparator to the man with a disability.

Comparators in sexual orientation cases

4.31

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.

s.23(3)

Example:

A woman who is married books an anniversary holiday. 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 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.

Advertising an intention to discriminate

4.32

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:

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.

When is it lawful to treat a person more favourably?

More favourable treatment of disabled people

4.33

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

Example:

For a special exhibition, a museum offers a concessionary entrance fee for disabled people and on Tuesdays and Thursdays 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.

Discrimination because of pregnancy and maternity

4.34

s.17 The Act protects women from discrimination because of their pregnancy and maternity in the provision of services, exercise of public functions and associations.

4.35

It is discrimination to treat a woman unfavourably because:

- she is, or has been, pregnant; s.17(2)
- she has given birth, and the unfavourable treatment occurs within a period of 26 weeks beginning with the day on which she gave birth; or s.17(3)
- she is breastfeeding, and the unfavourable treatment occurs within the period of 26 weeks beginning with the day on which she gave birth. s.17(4)

4.36

A woman is protected even when her baby is stillborn, so long as she was pregnant for at least 24 weeks before she gave birth.

4.37

Outside the 26-week period, she may be protected by the sex discrimination provisions. (See below.)

4.38

The unfavourable treatment will be pregnancy and maternity discrimination if the woman would not have received the treatment but for the fact that she is or has been pregnant, has given birth within the previous 26 weeks or is breastfeeding a baby that is not more than 26 weeks old.

What does 'unfavourable' mean?

4.39

For pregnancy and maternity discrimination to occur, a woman must have been treated 'unfavourably'. This means that she must be put at a disadvantage. If the disadvantage 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 has been provided with a service in a different manner. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment. Even if a service provider thinks that they are acting in the best interests of a pregnant woman or a woman who has recently given birth, they may still be considered to have treated the woman unfavourably.

Example:

A shopkeeper, concerned about what she perceives to be the possible risks of non-prescription medicine for pregnant women, and acting out of good intentions, refuses to sell paracetamol to a pregnant woman. This is likely to be unfavourable treatment because of pregnancy. As the shopkeeper 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 (see paragraph 13.72).

What does 'because of' mean in relation to pregnancy and maternity?

4.40

'Because of' in this context should be understood in the same way as 'because of' discussed above in relation to direct discrimination (paragraph 4.12 to 4.18). Pregnancy and maternity needs to be a cause of the unfavourable treatment but does not need to be the only or even the main cause.

Example:

A woman applies for a mortgage from her local building society and lets slip that she is pregnant. She is subsequently refused a mortgage. She asks why and is told by the loans manager that they are concerned that she may not be able to maintain repayments. Although the reason given for the refusal is her inability to maintain repayments, the cause of that assessment is her pregnancy and the refusal is likely to be pregnancy discrimination.

4.41

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

4.42

Pregnancy and maternity discrimination includes unfavourable treatment of a woman based on a stereotype whether or not the stereotype is accurate.

Example:

A club that organises salsa evenings deletes a woman from their list as soon as they learn that she is pregnant, on the assumption that 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.

4.43

Another way to identify whether pregnancy and maternity is a cause of the unfavourable treatment is to ask 'but for the woman being pregnant or recently having given birth, would she have been treated in that way?'

Direct sex discrimination: pregnancy and maternity

4.44

Treating a woman less favourably because she is breastfeeding a baby who is more than 26 weeks old amounts to direct sex discrimination. s.13(6)(a)

4.45

The direct sex discrimination provisions apply, and the special provisions for pregnancy and maternity discussed above do not apply, when a woman is breastfeeding a child more than 26 weeks old. s.17(6)

4.46

Where the claim is direct sex discrimination she will 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. If a hypothetical comparator is used, it would be to establish how the woman herself would have been treated were she not breastfeeding. (For a fuller discussion of comparators see paragraphs 4.21 to 4.28).

Example:

A woman is breastfeeding her eight-month-old baby on the bus and is asked to stop feeding or get off the bus at the next stop, as other passengers have said they are offended by this. She could claim direct sex discrimination, and would need to show that had she not been breastfeeding she would not have been asked to leave the bus.

4.47

In considering discrimination against a man, it is not relevant to take into account any special treatment given to a woman in connection with pregnancy or childbirth. s.13(6)(b)

Example:

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 a man cannot compare himself to a woman in connection with pregnancy, childbirth or breastfeeding.

Exceptions for pregnancy and maternity

4.48

See 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.

Chapter 5: Indirect Discrimination

Introduction

5.1

This chapter explains indirect discrimination and ‘objective justification’. The latter concept applies to discrimination arising from disability, positive action and to some of the exceptions permitted by the Act.

s.19

5.2

Indirect discrimination applies to all the protected characteristics except pregnancy and maternity (although in pregnancy and maternity situations, indirect sex discrimination may apply).

5.3

As explained in paragraph 1.23 the terms ‘service provider’ and ‘service user’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

What does the Act say?

5.4

Indirect discrimination may occur when a service provider applies an apparently neutral provision, criterion or practice which puts persons sharing a protected characteristic at a particular disadvantage.

s.19(1), 19(2)

5.5

For indirect discrimination to take place, four requirements must be met:

- the service provider applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular service user;
- the provision, criterion or practice puts, (or would put), people who share the service user's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
- the provision, criterion or practice puts, (or would put), the service user at that disadvantage;
- the service provider cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.

What constitutes a provision, criterion or practice?

5.6

s.19(1) The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. 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, as well as a 'one-off' or discretionary decision.

Example:

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.

Is the provision, criterion or practice a neutral one?

5.7

The provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way, but expressly applies to people

with a specific protected characteristic, it is likely to amount to direct discrimination.

Example:

A GP practice decides that it will not see asylum seekers as patients. This would be direct discrimination against a group of non-UK citizens.

Example:

By contrast, a bank requires evidence of a permanent residence before it allows an account to be opened. An asylum seeker attempts to open an account. The bank notes that the asylum seeker has no permanent residence and refuses the application. The requirement for a permanent residence is a neutral one and so this would be indirect discrimination unless it can be justified.

What does 'would put' mean?

5.8

It is a requirement of the Act that the provision, criterion or practice puts **or would put** people who share the service user's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts or would put the particular service user 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.

s.19(2)(c)

5.9

However, for a claim of indirect discrimination to succeed, the service user must show that they would experience a disadvantage if the provision, criterion or practice were applied to them.

Example:

A local authority consults with people living in the area on its proposed plans for work. It announces renovation work to be carried out on a block of flats in which the only ramped entrances will be closed at the same time. 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 one-off decision.

Example:

A practising Jew wishes to join a yoga class on a Wednesday evening but the advertising leaflet states that all new members must first take part in a full day's long introductory session which is only available on a Saturday. He is therefore deterred from joining the class because he has to observe the Sabbath. This will be indirect discrimination unless the policy can be justified.

What is a disadvantage?

5.10

'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 so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the service user does not have to experience actual loss (economic or otherwise). It is enough that the person can reasonably say that they would have preferred to be treated differently.

5.11

Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic.

Example:

A club offers free membership to all spouses but does not extend this to civil partners. This will indirectly discriminate against lesbians and gay men.

Example:

When a local council holds its consultation meetings on a 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 childcare responsibilities. This is enough to demonstrate disadvantage and she does not have to show that the absence of women is attributable in particular cases to childcare responsibilities.

5.12

In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, a dress code may create a disadvantage for service users with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.

5.13

Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. Statistics relating to the service provision in question can be obtained through the questions procedure (see Chapter 14). It may also be possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage.

5.14

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 as to whether there is any disadvantage and, if so, the nature of it.

5.15

There are other cases 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:

A person has a belief that pork renders them ritually unclean for the purposes of the rites of their religion for a certain period of time. They have a medical condition requiring medication. They claim that their GP is indirectly discriminating against them by prescribing tablets which contain pork gelatine. The Court would be assisted by evidence of the significance of this belief in the person's religion in order to establish that it amounted to a particular disadvantage.

The comparative approach

5.16

s.19(2)(b) Once it is clear that there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between service users with the protected characteristic and those without it. 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.

s.23(1)

5.17

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

Example:

A nursing home refuses to look after anyone with sickle cell anaemia. This excludes a larger number of persons 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 so affected, the racial consequences of the rule will become apparent and the nursing home will have to justify the rule.

The ‘pool for comparison’

5.18

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. 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 to use.

Example:

A local authority plans on introducing an information leaflet about its services for local residents. It does not produce an easy-read version of the document in order to save money. A person with a learning disability 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 translations places persons with their disability 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 many of these would have no interest in using the local authority's services. The local authority changes its policy.

However, it should be noted that the local authority is also under a duty to make reasonable adjustments. It should also have considered making the information available in an easy read format as a reasonable adjustment.

Making the comparison

5.19

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.

5.20

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

s.19(2)(c)

Carrying out a formal comparative exercise

5.21

If the court is asked to undertake a formal comparative exercise to decide an indirect discrimination claim, it can do this in a number of ways. One established approach involves the court asking these questions:

- What proportion of the pool has the particular protected characteristic?
- Within the pool, does the provision, criterion or practice affect service users without the protected characteristic?

- How many of these service users are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
- Within the pool, how does the provision, criterion or practice affect service users who share the protected characteristic?
- How many of these service users are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?

5.22

Using this approach the court will then compare (x) with (y). It can then decide whether 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 numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

Example:

A local authority makes a hall available for residents' meetings of those living in the local authority ward in which it is situated. 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 at a particular disadvantage when compared with other religious groups.

- a) The court looks at the information on the religious make-up of the 'pool' (which is 5,000 residents living in the ward). Of these, 1,000 state that they are of the Jewish religion (a protected characteristic). The proportion of the pool with the particular protected characteristic is one fifth.
- b) The court knows that non-Jewish residents are unlikely to be prevented from using the hall on a Friday evening by their religious beliefs. It estimates that none of the 4,000 non-Jewish residents will be disadvantaged by this practice.
- c) However, at least 500 Jewish residents - those holding Orthodox beliefs- will be prevented by their religion from using the hall.
- d) Therefore, 50 per cent of Jewish residents will be disadvantaged by the practice.

- e) 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 (none). From this comparison, the court concludes that the group with the protected characteristic (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.

Is the service user concerned put at that disadvantage?

5.23

It is not enough that the provision, criterion or practice puts, (or would put), at a particular disadvantage a group of people who share a protected characteristic. It must also have that effect (or be capable of having it) on the individual service user concerned. So it is not enough for a person merely to establish that they are a member of the relevant group. They must also show they have personally suffered (or could suffer) the particular disadvantage as an individual. (See paragraph 5.9).

Example:

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

5.24

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 applies the provision, criterion or practice without the intention of discriminating against the service user, the court may decide not to order a payment of compensation (see Chapter 14 on Enforcement.)

s.119(5) & (6)

Example:

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

When can a provision, criterion or practice be objectively justified?

5.25

s.19(2)(d) 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. This is often known as the 'objective justification' test. The test applies to other areas of discrimination law for example, discrimination arising from disability (see paragraph 6.12).

5.26

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

5.27

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

- Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

What is a legitimate aim?

5.28

The concept of 'legitimate aim' is taken from European Union (EU) Directives and decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. 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.

5.29

Although reasonable business needs and economic efficiency may be legitimate aims, a service provider solely aiming to reduce costs cannot expect to satisfy the test. For example, the service provider cannot simply argue that to discriminate is cheaper than not to discriminate.

5.30

Examples of legitimate aims include:

- ensuring that services and benefits are targeted at those who most need them;
- the fair exercise of powers;
- ensuring the health and safety of those using the service provider's service or others, provided risks are clearly specified;
- preventing fraud or other forms of abuse or inappropriate use of services provided by the service provider; and
- ensuring the wellbeing or dignity of those using the service.

What is proportionate?

5.31

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. A court may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the service provider's reasons for applying it, taking into account all the relevant facts.

5.32

Although not defined by the Act, the term ‘proportionate’ is taken from the EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an ‘appropriate and necessary’ means of achieving a legitimate aim. But ‘necessary’ does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

5.33

The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the service provider’s justification if there are other good reasons for adopting it.

Example:

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 activities. Although ensuring health and safety is a legitimate aim, the blanket application of the policy is likely to be unjustified because customers with disabilities which restrict strenuous exercise could still be admitted to undertake parts of the course which do not create a safety risk. Also some conditions which doctors may not classify as ‘good health’ do not, in practice, impede the ability to safely undertake strenuous exercise.

5.34

In a case involving disability if the service provider has not complied with its duty to make relevant reasonable adjustments, it will be difficult for the service provider to show that the treatment was proportionate.

5.35

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

Example:

A British citizen is not eligible for an ex gratia scheme payment to people interned by the Japanese during the war, on the basis that she cannot satisfy the criteria of being either born in the UK or having at least one parent or grandparent born in the UK. This will constitute indirect race discrimination if it cannot be objectively justified. Although the criteria are apparently neutral, they are closely linked to race and so they may be difficult to justify.

Public authorities and justification of indirect discrimination

5.36

A significant factor in determining whether a public authority is able to justify what may be indirect discrimination is the extent to which the authority has complied with their public sector equality duties.

Example:

In the example above, the government department would need to pay due regard to the positive duty to eliminate unlawful race discrimination and to promote equality of opportunity and good race relations. If the department has not properly carried out these duties, it will be more difficult for it to justify the criteria.

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

5.37

As well as having an obligation not to indirectly discriminate against disabled people, service providers also have an anticipatory duty to make reasonable adjustments for disabled people (more detail of which is given in Chapter 7). These two duties frequently overlap and it is sensible to consider them together.

5.38

When planning its service, a service provider will need to consider whether its practices indirectly discriminate against disabled persons. If a practice indirectly discriminates against disabled persons, then the service provider must consider whether the practice can be justified.

5.39

If the service provider plans to make reasonable adjustments for disabled persons and makes those adjustments, then it will not have to change the practice for non-disabled persons, but will simply adjust the practice appropriately.

Example:

A stately home has guided tours of grounds which depart at 30minute 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 persons, the park management realise:

- that the practice is indirectly discriminating against such disabled persons 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 the slower group would be held up;
- they could achieve the same level of profit from guided tours by removing the strict timetable and permitting tours to overlap; and
- the indirectly discriminatory effect on persons with a mobility impairment is unnecessary because they can achieve their business aim of profit by adopting other means of achieving tour group volumes.

As a result they remove the practice of following a strict timetable not just in the case of persons with mobility disabilities, but for all visitors.

5.40

In many cases when the service provider 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 explains the duty of providers of services to the public, those carrying out public functions, and associations not to treat disabled people unfavourably when using their services for a reason connected with disability. Protection from this type of discrimination, which is known as ‘discrimination arising from disability’, only applies to disabled people. The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 11 and 12.

s.15

6.2

As explained in paragraph 1.23, the terms ‘service provider’ and ‘service user’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

What is discrimination arising from disability?

What does the Act say?

6.3

s.15 The Act says that treatment of a disabled person amounts to discrimination where:

- a service provider treats the disabled person unfavourably;
- this treatment is because of something arising in consequence of the disabled person's disability; and
- the service provider cannot show that this treatment is a proportionate means of achieving a legitimate aim,

s.15(2) unless the service provider does not know, and could not reasonably be expected to know, that the person has the disability.

Example:

An association – in the form of a private members' club – rejects an applicant for membership because she cannot, as a result of her disability, attend its monthly meetings. Even though the club would reject others who cannot attend their monthly meetings, the woman has been treated unfavourably because of something arising in consequence of her disability. This will be unlawful unless the club can show that the treatment is a proportionate means of achieving a legitimate aim.

How does it differ from direct discrimination?

6.4

Direct discrimination occurs when the service provider treats someone less favourably because of disability itself. By contrast, 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:

A mother seeks admission to a privately run nursery for her son who has Hirschsprung's disease, which means that he does not have full bowel control. The nursery says that they cannot admit her son because he is not toilet trained and all the children at the nursery are. 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.

How does it differ from indirect discrimination?

6.5

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 puts (or would put) the disabled person at that disadvantage (see paragraph 5.5).

6.6

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. If the service provider can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability, it will not be discrimination arising from disability (see paragraphs 6.14 to 6.19). However as with indirect discrimination, the service provider may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraph 6.12).

Is a comparator required?

6.7

Both direct and indirect discrimination require a comparative exercise (see Chapters 4 and 5). But in 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:

A disabled person is refused service at a bar because they are slurring their words, as a result of having had a stroke. In these circumstances, the disabled person has been treated unfavourably because of something arising as a consequence of their disability. It is 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 or could not reasonably be expected to know the person was disabled.

What is unfavourable treatment?

6.8

s.15(1)(a) For discrimination arising from disability to occur, a disabled person must have been treated ‘unfavourably’. This means that he or she 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 thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

What does ‘something arising in consequence of disability’ mean?

6.9

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

6.10

The consequences of a disability include anything which is the result, effect or outcome of a disabled person’s disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. 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.

6.11

So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the service provider did not know or could not reasonably have been expected to know that the person was disabled.

Example:

A member of staff at Jobcentre Plus refuses to interview a member of the public, who wishes to complete an application for Jobseeker’s Allowance, because he is swearing. However, his swearing is a result of his having Tourette syndrome. The refusal to interview is unfavourable treatment which is because of something that arises in consequence of the disabled person’s disability.

When can discrimination arising from disability be justified?

6.12

Unfavourable treatment will not amount to discrimination arising from disability if the service provider can show that the treatment is a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained in detail in paragraphs 5.25 to 5.35.

s.15(1)(b)

6.13

It is for the service provider to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

Example:

Although there are adequate means of escape, a cinema manager turns away a wheelchair user because she assumes that he could be in danger in the event of a fire. While ensuring the health and safety of customers may be a legitimate aim, the refusal is clearly not a proportionate means of achieving that aim, as there are adequate means of escape for wheelchair users. The refusal of admission will therefore be unlawful.

What if the service provider does not know that the person is disabled?

6.14

If the service provider can show that they:

s15(2)

- did not know that the disabled person had the disability in question; and
- could not reasonably be expected to know that the disabled person had the disability,

then the unfavourable treatment does not amount to discrimination arising from disability.

6.15

It is not enough for the service provider 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.

Example:

A pub employee orders a customer who is lying prone on a bench seat to leave the premises. However, the customer has Chronic Fatigue Syndrome and is lying down because she needs to as a result of her disability. The pub employee refuses to accept her explanation and makes no attempt to talk to the bar staff, who had served her with only one drink. Because relevant information was available about the disabled person, the service provider could reasonably have been expected to know that she was disabled. As a result, the pub is likely to be liable for discrimination arising from disability unless it can show that the treatment is objectively justified.

6.16

A service provider 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. When making enquiries about disability, service providers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

6.17

Where a service provider has an ongoing relationship with a disabled person – for example, the provision of banking services or the collection of Council Tax – they could take steps to find out if a person has a disability, for example, on a customer registration form.

Example:

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 disability-related steps to make their claiming easier.

6.18

Where there is no ongoing relationship, a service provider will nevertheless need to consider whether there is a disability and, as a result, the particular treatment will amount to unfavourable treatment because of something arising in consequence of their disability. This may involve something as simple as giving a disabled person the opportunity to disclose their disability by asking them if there is any reason for their behaving in a particular way.

Example:

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 he needs any help. The customer discloses that he has diabetes and his legs are hurting him, meaning that it would be difficult for him to go up to the counter and order food and drink himself.

6.19

If one of a service provider's employees or agents knows of a disability, the service provider will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

Can service providers treat a disabled person more favourably?

6.20

It is never unlawful to treat a disabled person more favourably than a non-disabled person. Therefore, service providers may provide services on more favourable terms to a disabled person compared to a non-disabled person.

Relevance of reasonable adjustments

6.21

Service providers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 7).

6.22

If a service provider has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified

6.23

Even where an service provider has complied with a duty to make reasonable adjustments in relation to the 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.

Chapter 7:

Disabled persons: reasonable adjustments

Introduction

7.1

This chapter explains the duty to make reasonable adjustments for disabled people in relation to services to the public, public functions and associations. 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 of activity, are detailed in Chapters 11 and 12.

7.2

The principles relating to the duty to make reasonable adjustments in relation to these three areas of activity are similar. Therefore, in this chapter, as explained in paragraph 1.23, the term ‘service provider’ and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Code, unless the text makes clear otherwise.

7.3

The duty to make reasonable adjustments requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding discrimination. It requires service providers to anticipate the needs of potential disabled customers for reasonable adjustments.

7.4

The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. The purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large (and their equivalents in relation to associations or the exercise of public functions).

What is the duty to make reasonable adjustments?

7.5

One form of discrimination against a disabled person occurs where a service provider fails to comply with a duty to make reasonable adjustments imposed on them in relation to that disabled person.

s.21(2)

7.6

The duty to make reasonable adjustments comprises three requirements.

7.7

For service providers and those exercising public functions, these requirements are:

s.20
Sch.2

- Where a provision, criterion or practice puts disabled people at a substantial disadvantage compared with those who are not disabled, to take reasonable steps to avoid that disadvantage.
- Where a physical feature puts disabled people at a substantial disadvantage compared with people who are not disabled to avoid that disadvantage or adopt a reasonable alternative method of providing the service or exercising the function.,
- Where not providing an auxiliary aid puts disabled people at a substantial disadvantage compared with people who are not disabled, to provide that auxiliary aid.

7.8

For associations, these requirements are:

s.20 Sch. 15

- Where a provision, criterion or practice puts disabled members, associates or guests at a substantial disadvantage compared with those who are not disabled, to take reasonable steps to avoid that disadvantage. This requirement applies in relation to access to a benefit, facility or service; members or associates retaining their rights, or avoiding having them varied, or being admitted to membership or invited as a guest.

- Where a physical feature puts disabled members, associates or guests at a substantial disadvantage compared with people who are not disabled, to avoid that disadvantage or adopt a reasonable alternative method of doing so. This requirement applies to access to a benefit, facility or service; or being admitted to membership or invited as a guest.
- Where, but for the provision of an auxiliary aid, disabled people would be put at a substantial disadvantage compared to those who are not disabled, to provide that auxiliary aid. This requirement applies in relation to access to a benefit, facility or service; members or associates retaining their rights, or avoiding having them varied, or being admitted to membership or invited as a guest.

7.9

Relevant disabled persons in the context of the preceding paragraph are those who:

- are, or are seeking to become or might wish to become, members;
- are associates; or
- are, or are likely to become, guests.

Accessible information

7.10

- s.20 (6) The Act states that where the provision, criterion or practice, or the need for an auxiliary aid or service, 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. This is discussed further at paragraphs 7.44 and 7.48 below.

What disadvantage gives rise to the duty?

7.11

- s.212 (1) The Act states that disadvantage must be substantial, which is defined as more than minor or trivial.

7.12

- Sch.2,
Para 2
(5)(a) & (b)
- In the context of a person being subjected to a detriment in the exercise of a function, substantial disadvantage means:
- being placed at a substantial disadvantage in relation to the conferment of a benefit (such as receiving a grant); or

- suffering an unreasonably adverse experience when being subjected to a detriment (for example, when under arrest).

7.13

The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability.

Are there any limits on the duty to make reasonable adjustments?

7.14

Where the duty to make reasonable adjustments arises, a service provider cannot justify a failure to make a reasonable adjustment. However, the Act does place specific restrictions on the duty in relation to service providers, those exercising public functions and associations.

7.15

A service provider 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.

Sch.2,
Para 2 (7)

7.16

Those exercising public functions will not be required to take any steps which are outside their powers.

Sch.2,
Para 2

7.17

Associations will not be required to take any steps which alter the nature of the benefit, facility or service concerned or the nature of the association.

Sch. 15,
Para 2 (7)

7.18

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. See Chapter 12 for further details.

Sch. 15,
Para 2 (8)

To whom is the duty to make reasonable adjustments owed?

7.19

In relation to services and public functions, the duty to make reasonable adjustments is owed to disabled people generally. It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services or who is affected by the exercise of a public function. In relation to associations, the pool of disabled people to whom the duty is owed is more tightly drawn, but still includes not only members, those seeking membership, associates and guests, but also those who might wish to become members and those who are likely to be guests.

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

7.20

In relation to all three areas of activity (services, public functions and associations) the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association.

7.21

Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to 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. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment.

Example:

A person with a visual impairment regularly receives printed letters regarding his social security benefits, 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 customers' needs for alternative formats. This 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.

Does the duty to make reasonable adjustments apply even if the service provider does not know that the person is disabled?

7.22

Because this is a duty to disabled people at large, it applies regardless of whether the service provider knows that a particular person is disabled or whether it currently has disabled customers, members etc.

7.23

When disabled customers request services, the service provider must already have taken all reasonable steps to ensure that they can be served.

Must service providers anticipate every barrier?

7.24

Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take reasonable steps to overcome are 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.

7.25

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 use white canes will not be affected by this policy. The duty will still be owed to members of both groups.

7.26

Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty.

Example:

A disabled person attending the annual general meeting of an association experiences a flare-up of their medical condition, as a result of which 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.

How long does the duty continue?

7.27

The duty to make reasonable adjustments is a continuing duty. Service providers should keep the duty and the ways they are meeting the duty under regular review in light of their experience with disabled people wishing to access their services. In this respect it is an evolving duty, and not something that needs simply to be considered once only, 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:

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 have to take at this stage. However, the complex then starts building work and this encroaches on paths within the complex, making it difficult for assistance dog users to negotiate their way around. Offering an initial tour is therefore no longer an effective adjustment as it does not make the complex accessible to 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 have to take in the circumstances then existing.

7.28

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

Example:

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 stage. 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 a number of the replacement computers and to give priority access to those computers. This is likely to be a reasonable step for the library to take at this time.

What is meant by 'reasonable' steps?

7.29

The duty to make reasonable adjustments places service providers under a responsibility to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case. It will vary according to:

- the type of service being provided;
- the nature of the service provider and its size and resources; and
- the effect of the disability on the individual disabled person.

7.30

However, without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:

- whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;

- the extent to which it is practicable for the service provider 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 service provider's financial and other resources;
- the amount of any resources already spent on making adjustments; and
- the availability of financial or other assistance.

Example:

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 purchase a vehicle tax disc. He experiences pain if he has to stand for more than a couple of minutes. Other customers would not expect to have to undergo similar discomfort in order to buy a vehicle tax disc. Thus, the post office's queuing policy places the disabled customer at a substantial disadvantage. Consideration will have to be given as to how the queuing policy could be adjusted so as 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.

7.31

It is more likely to be reasonable for a service provider with substantial financial resources to have to make an adjustment with a significant cost than for a service provider with fewer resources.

Example:

The operator of a booking office at a small heritage railway decides to communicate with passengers who have speech or hearing impairments by exchanging written notes. This is likely to be a reasonable step for this service provider to have to take.

However, it is unlikely to be a sufficient reasonable adjustment for the operator of a ticket office at a mainline rail terminus to make for passengers. Instead, it installs an induction loop system and a textphone. These are likely to be reasonable steps for a large station to take.

7.32

The resources available to the service provider as a whole are likely to be taken into account as well as other demands on those resources. Where the resources of the service provider 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:

A small retailer has two shops within close proximity 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.

7.33

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

7.34

Service providers should bear in mind that there are no hard and fast solutions. Action which may result in reasonable access to services being achieved for some disabled people may not necessarily do so for others.

Example:

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, and who do not use BSL but can lip-read. The conference organiser will need to consider the requirements of these delegates also.

7.35

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. Where there is an adjustment that the service provider could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the service provider to take some lesser step that would not render the service in as accessible a manner.

7.36

Similarly, a service provider will not have taken reasonable steps if they attempt to provide an auxiliary aid or service which in practice does not help disabled people to access the service provider's services.

7.37

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

7.38

In the example at 7.34, despite providing qualified BSL interpreters for deaf delegates who use BSL, the conference organiser fails to ensure that those delegates have the option to be seated near and in full view of the interpreters (who are themselves in a well-lit area). 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.

7.39

If, having considered the issue thoroughly, there are genuinely no steps that it would be reasonable for a service provider to take to make its services accessible, the service provider 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

7.40

s.20 (7) The Act prohibits service providers who are under a duty to make reasonable adjustments for a disabled customer from requiring those customers to pay to any extent the costs of making those adjustments.

Example:

A library service, which provides a free creative writing class, 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.

What happens if the duty to make reasonable adjustments is not complied with?

7.41

Where a service provider does not comply with the duty to make reasonable adjustments in the circumstances outlined in Chapters 11 and 12, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 14 for more detail about claims).

What is the duty to change a provision criterion or practice?

7.42

A service provider might have a provision, criterion or practice which – perhaps unintentionally – places disabled people at a substantial disadvantage in using their services. In such a case, and in the circumstances described in paragraphs 7.7 and 7.8 above, the service provider must take such steps as it is reasonable for them to have to take, in all the circumstances, to change the provision, criterion or practice so that it no longer has such an effect. 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.

What is a provision criterion or practice?

7.43

There is no definitive list of what is a provision, criterion or practice. Further details can be found at paragraph 5.6 in this Code.

Provision of information

7.44

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.

Example:

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 clients. It ensures that information is provided using clear accessible language, which makes it easier for some people with hearing impairment (for whom English is in effect a second language) and learning disabilities 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 7.47 below.

What is the duty to provide auxiliary aids or services?

7.45

A service provider must take such steps as it is reasonable for them to have to take, to provide auxiliary aids or services in the circumstance described in paragraphs 7.7 and 7.8 and above to remove the disadvantage experienced by disabled people.

7.46

Service providers 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 constitute a failure to make an adjustment.

What is an auxiliary aid or service?

7.47

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

- a special piece of equipment;
- the provision of a sign language interpreter, lip-speaker or deaf-blind communicator;
- extra staff assistance to disabled people;
- an electronic or manual note-taking service;
- induction loop or infrared broadcast system;
- videophones;
- audio-visual fire alarms;
- readers for people with visual impairments;
- assistance with guiding ; and
- telephone services to supplement other information.

Example:

A person with both learning disabilities and mobility impairments needs to move to a more accessible property. The local authority choice-based letting scheme advertises properties in a weekly paper as 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 him 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

7.48

The Act states that where the absence of an auxiliary aid or service places a disabled person at a substantial disadvantage, and this relates to the provision of information, the steps which it is reasonable for a service provider to take, include steps to ensure that the information is provided in an accessible format.

Example:

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 have to take.

7.49

Nothing in the Act requires a service provider to provide an auxiliary aid or service to be used for personal purposes unconnected to the services being provided or to be taken away by the disabled person after use.

Example:

A solicitors' firm lends a digital recorder to a client with multiple disabilities who is unable to communicate in writing or to attend the firm's office. The client uses this auxiliary aid in order to record his instructions or witness statement and returns it afterwards.

7.50

The Act leaves open what particular auxiliary aids or services might be provided in specific circumstances. The duty remains with the service provider to determine what reasonable steps they need to take.

Physical features

What is the duty to make reasonable adjustments to physical features?

7.51

A service provider 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

7.52

The Act 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.

s.20 (9)
Sch.2,

Para 1 & 2 &

Sch.15,

Para 1 & 2(3)

& 2(5) - 2(8)

Removing the physical feature

7.53

Removing the physical feature may be a reasonable step, and the most effective one, for a service provider to take.

Example:

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 have to take.

Altering the physical feature

7.54

Altering the physical feature so that it no longer has the effect of making it substantially difficult for disabled people to use the services may also be a reasonable step for a service provider to take.

Example:

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 the bar so that wheelchair users can be served more easily. This is likely to be a reasonable step to have to take.

Providing a reasonable means of avoiding the physical feature

7.55

Providing a reasonable means of avoiding the physical feature may also be a reasonable step for a service provider to take.

Example:

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 those 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 have to take.

7.56

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 in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience or anxiety.

Example:

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, so that a disabled person meeting officials often has 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 making services available**7.57**

Where the substantial disadvantage caused by a physical feature cannot be avoided, service providers should consider whether there is a reasonable alternative method of making services available to disabled people. The Act requires that any alternative method of making services available must be a 'reasonable' one. Relevant considerations in this respect may include whether the provision of the service in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience.

Example:

The changing facilities in a women-only 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 on their dignity.

7.58

Where there is a physical barrier, the service provider's aim should be to make its services accessible to disabled people and, in particular, to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large. When considering which option to adopt, service providers must balance and compare the alternatives in light of the policy of the Act, which is, as far as is reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public.

7.59

If a service provider decided to provide a service through an alternative method, and a disabled person brought a claim against them for a failure to make reasonable adjustments, the court determining the claim would be able to consider the other options which the service provider could have adopted to avoid the substantial disadvantage to the disabled person.

Example:

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 for others allowing access only with discomfort or difficulty. 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.

When disabled people, who are unable to attend a presentation because the room is inaccessible to them, make enquiries, they are merely sent copies of comparatively brief promotional literature. This is unlikely to be a reasonable alternative method of making the service available, and may well 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 or removing the relevant physical features, or by avoiding them (for example, by holding the meeting at another venue) or whether there was a more effective alternative method of providing the service that could reasonably have been adopted.

What is a 'physical feature'?**7.60**

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; and
- 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.

7.61

Physical features include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, 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). Physical features also include the sheer scale of premises (for example, the size of a shopping centre). This is not an exhaustive list.

Example:

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 shops in the town centre.

7.62

Sch.21 Where physical features within the boundaries of a service provider's premises are placing disabled people at a substantial disadvantage, then the duty to make reasonable adjustments will apply. This will be the case even if the physical features are outdoors – for example, the paths and seating in a pub garden.

7.63

A physical feature includes features brought by or on behalf of the service provider onto premises other than those occupied by the service provider.

Example:

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.

Leases, binding obligations and reasonable adjustments

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

7.64

The service provider 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 they cannot alter the premises without someone else's consent.

7.65

In these circumstances, the Act provides that it is always reasonable for the service provider to have to request that consent, but that it is never reasonable for the service provider to have to make an alteration before having obtained that consent.

Sch. 21,
Para 2

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

7.66

Special provisions apply where a service provider occupies premises under a lease or tenancy agreement, the terms of which prevent it from making an alteration to the premises.

Sch.21,
Para 3

7.67

In such circumstances, if the alteration is one which the service provider proposes to make in order to comply with a duty to make reasonable adjustments, the Act enables the lease to be read as if it provided:

- a) for the service provider to make a written application to the landlord for that consent;
- b) for the landlord not to withhold the consent unreasonably;
- c) for the landlord to be able to give consent subject to reasonable conditions; and
- d) for the service provider to make the alteration with the written consent of the landlord.

7.68

If the service provider fails to make a written application to the landlord for consent to the alteration, the service provider will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the service provider to have made the alteration.

7.69

Whether 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).

7.70

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.

7.71

Sch.21,
Para 4 If the service provider 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 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. The court will decide whether the landlord's refusal or any of the conditions are unreasonable. If it decides that they are, it may make an appropriate declaration or authorise the service provider to make the alteration under a court order (which may impose conditions on the service provider).

7.72

Sch. 21,
Para 5 In any legal proceedings on a claim involving a failure to make a reasonable adjustment, the disabled person concerned or the service provider may ask the court to direct that the landlord be made a party to the proceedings. The court will grant that request if it is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the court has determined the claim.

7.73

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

7.74

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

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

7.75

If the court orders the landlord to pay compensation, it cannot also order the service provider to do so.

What about the need to obtain statutory consent for some building changes?

7.76

A service provider 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 and fire regulations approval. The Act does not override the need to obtain such consents.

7.77

Service providers 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 other adjustment – one that does not require consent – in the meantime.

7.78

Service providers should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to consider providing the service by a reasonable alternative means.

Special provisions regarding transport vehicles

7.79

While the duty to make reasonable adjustments applies to the use of certain transport vehicles, it is framed differently from the duty applied to services in general (including transport infrastructure such as stations).

Sch. 2,
Para 3

Reasonable Adjustments in Practice

7.80

When a service provider is considering making reasonable adjustments, the following measures may be helpful and constitute good practice that may help avoid acts of discrimination. In some circumstances, they may either be a means to identify reasonable adjustments or actually 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 customers 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;;
- properly maintaining auxiliary aids and having contingency plans in place in case of the failure of the auxiliary aid;
- training employees to appreciate how to respond to requests for reasonable adjustments;
- encouraging employees to develop additional serving skills for disabled people (for example, communicating with hearing impaired people); and

ensuring that employees are aware of the duty to make reasonable adjustments and understand how to communicate with disabled customers so that reasonable adjustments can be identified and made.

Chapter 8: Harassment

Introduction

8.1

This chapter explains the Act's general test for harassment. It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment, and less favourable treatment for rejecting or submitting to harassment.

8.2

Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the service user to show that another person was, (or would have been), treated more favourably. For an explanation of direct discrimination, please see Chapter 4

8.3

As explained at paragraph 1.23 the terms 'service provider' and 'service user' and terms which flow from these are used generically to refer to all those who are potentially legally responsible for harassment or who are protected in the areas covered by this Code respectively.

What does the Act say?

8.4

The Act prohibits three types of harassment. These are:

- harassment related to a 'relevant protected characteristic'; s.26 (1)
- sexual harassment; and s.26(2)
- less favourable treatment of a service user because they submit to or reject sexual harassment or harassment related to sex or gender reassignment. s.26 (3)

8.5

The 'relevant protected characteristics' for this Code are:

- Disability;
- Gender reassignment;
- Race; and
- Sex

8.6

Pregnancy and maternity are not protected directly under the harassment provisions. However, pregnancy and maternity harassment would amount to harassment related to sex.

8.7

s.212(5) The definition of harassment as described below does not apply to the protected characteristics of sexual orientation or religion or belief in the provision of services, the exercise of public functions or the acts of associations. However, where unwanted conduct related to either of these protected characteristics results in a person suffering a detriment, that person could bring a claim of direct discrimination (see Chapter 4).

Harassment related to a protected characteristic

8.8

s.26(1) This type of harassment occurs when a service provider engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

- violating the service user's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the service user.

Example:

A publican continually refers to a transsexual woman as 'Sir' and 'he' when serving him in a pub, despite her objections.

It is likely that the woman would succeed in a harassment claim if she were able to persuade the court that the conduct had the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

8.9

Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

8.10

The word unwanted means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can amount to harassment.

Example:

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.

'Related to'

8.11

Unwanted conduct 'related to' a relevant protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. It includes the following situations:

a) Where the conduct is related to the service user's own protected characteristic.

Example:

Where a woman using the gym equipment in her local leisure centre is regularly subjected to comments from other male gym users such as 'watch what you say in front of her, it's her time of the month again', this could amount to harassment.

8.12

Protection from harassment also applies where a person is generally abusive to service users but, in relation to a particular service user, the form of the unwanted conduct is determined by that service user's protected characteristic.

Example:

A woman is waiting to be served at a DVD rental store with a group of men. The shop assistant who is talking loudly with a couple of male customers about a new film makes lewd comments about some of the sex scenes in the film. Although the comments are not specifically directed at or concern women, the woman who finds the comments humiliating and offensive may have a claim of harassment.

b) Where there is any connection with a protected characteristic.

8.13

Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the service user has that characteristic themselves. This means that protection against unwanted conduct is provided where the service user does not have the relevant protected characteristic, including where the service provider knows that the service user does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The service user 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 which spoils their meal by creating a degrading and humiliating environment in the restaurant for them as well as for the adults they support. The support workers could bring a claim of harassment related to disability.

- The service user may be wrongly perceived as having a particular protected characteristic.

Example:

When shopping in a supermarket, a woman who is wearing an AIDS awareness ribbon is subjected to abuse in front of other shoppers by a shop employee who wrongly assumes the woman has HIV/AIDS. The woman finds this behaviour deeply offensive and humiliating. She could bring a claim of harassment related to disability.

- The service user is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example:

A member of staff at a neighbourhood fast food outlet calls a teenage boy ‘Paki’ when he comes into the shop. The staff member knows the boy was born in Britain and his family comes from Turkey, and he regards this name calling as just a joke. The boy has told him to stop, and now hates coming to the shop, especially with his mates, as he dreads being insulted and verbally abused for a characteristic he does not possess.

- The unwanted conduct related to a protected characteristic is not directed at the particular service user but at another person or no-one in particular.

Example:

A shopkeeper 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.

- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic.

Example:

A female member of a mountaineering club has a relationship with the President of the club. On seeing her with another male member of the club, the President suspects that she is having an affair. As a result, the President makes her life difficult by continually criticising her climbing skills in front of other members. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

8.14

In all of the circumstances listed above, there is a connection with the protected characteristic and so the service user could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 8.8.

Sexual harassment

- s.26(2) **8.15** Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 8.8 and which is of a sexual nature.

8.16
Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

Example:

A garage displays topless photographs of women on its walls. Customers who find this offensive could bring a claim for harassment.

Less favourable treatment for rejecting or submitting to unwanted conduct

- s.26(3) **8.17** The third type of harassment occurs when a service user is treated less favourably by a service provider because that service user 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 for them any of the circumstances defined in paragraph 8.8.
- s.26(3)(a) **8.18** Under this type of harassment, the initial unwanted conduct may be committed by the service provider who treats the service user less favourably, or by another person.

Example:

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.

‘Purpose or effect’

8.19

For all three types of harassment, if the **purpose** of subjecting the service user to the unwanted conduct is to create any of the circumstances defined in paragraph 8.6, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of the conduct on that service user .

8.20

Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the **effect** of creating any of the circumstances defined in paragraph 8.8.

Example:

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 visitor to the hospital who overhears these comments, notwithstanding the fact that this conduct was not directed at the patient or visitor.

Example:

At a club meeting, the club manager makes derogatory comments and jokes about women to a mixed audience of men and women. It is not the club manager’s purpose to offend or humiliate anyone in the audience, however this may amount to harassment where the effect of the jokes and comments creates a humiliating or offensive environment for a man or woman in the audience.

8.21

- s.26(4) In deciding whether conduct had that effect, each of the following must be taken into account:
- s.26(4)(a) a) The perception of the service user; that is did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the service user regards the treatment.
- s.26(4)(b) b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include:
- the personal circumstances of the service user experiencing the conduct, for example, their health, including mental health, mental capacity, cultural norms, or previous experience of harassment; or
 - the environment where the conduct took place; for example, whether it was within an organisation or institution where there is a regular and continuing relationship between the service provider and service user such as a hospital or residential care establishment, community home or a prison.
- s.26(4)(c) c) Whether it is reasonable for the conduct to have that effect; 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.

8.22

Where the service provider is a public authority it may also be relevant in cases of alleged harassment whether the alleged perpetrator was exercising any of her/his Convention rights protected under the Human Rights Act 1998. For example, the right to freedom of thought, conscience, and religion or freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case.

Statutory defence

Liability of employers and principals

8.23

Employers and principals (as service providers) can avoid liability for harassment carried out by their employees or agents if they take all reasonable steps to prevent harassment occurring. See paragraphs 3.33 and 3.34 for further details.

s.109(4)

Chapter 9: Victimisation and other unlawful acts

Introduction

9.1

This chapter explains what the Act says about the unlawful acts of:

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

As explained in paragraph 1.23, the term ‘service provider’ and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Code.

Victimisation

What the Act says

9.2

- s. 27(1) The Act prohibits victimisation. It is victimisation for a service provider to subject a person to a detriment because the person has done a ‘protected act’ or because the service provider believes that the person has done or may do a protected act in the future.

Example:

A gay man sues a publican for discrimination on the basis that she makes persistent derogatory remarks to other customers about his sexuality. Because of this, the publican bars him from the pub altogether. This would be victimisation.

9.3

An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to a ‘protected act’ (see paragraph 9.5). Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation. Only individuals (not organisations) are protected from victimisation.

9.4

In the above example at paragraph 9.2, if another customer complains to the pub about the unfair treatment of the gay customer because of his sexuality and the publican then bars this second customer, this would also be victimisation and the sexual orientation of that customer would be irrelevant.

What is a ‘protected act’?**9.5**

A protected act is any of the following:

- bringing proceedings under the Act;
- giving evidence or information in connection with proceedings brought under the Act;
- doing anything which is related to the provisions of the Act;
- making an allegation (whether or not express) that another person has done something in breach of the Act.

s.27(2)

s.27(2)(a)

s.27(2)(b)

s.27(2)(c)

s.27(2)(d)

9.6

Protected acts can occur in any field covered by the Act and in relation to any part of the Act. A service provider must therefore not victimise a person who has done a protected act in the field of employment, for example. This includes protected acts relating to age and marriage and civil partnership.

s.27(2)(c)

& (d)

Example:

The mother of a two-year-old disabled child complains to the staff at a children's centre that her daughter's physical and social needs are not being properly met. As the centre 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 centre'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.

Example:

In the above case, 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 of was not because of a protected characteristic.

What is a 'detriment'?**9.7**

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

9.8

For example, any denial of a reasonably valued choice can be a detriment. In the example above, the mother experiences the detriment of being denied the opportunity of a trip to the seaside with her daughter.

9.9

A detriment might also include a threat made to the service user which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Example:

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.

9.10

Detrimental treatment amounts to victimisation if a protected act is one of the reasons for the treatment, but it need not be the only reason.

What other factors are involved in proving that victimisation has occurred?**9.11**

Victimisation does not require a comparator. The individual need only show that they have experienced a detriment because they have done a protected act or because the service provider believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12

There is no time limit within which victimisation must occur after a person has done a protected act. However, the service user must be able to show a link between the detriment and the protected act.

Example:

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 despite the fact that the protected act (giving information which was used in a discrimination claim) took place three years ago.

9.13

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.

s.27 (3)

Example:

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 would not have done so if she had been a man. She is convicted and the magistrate remarked 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 pub but the landlord tells her that she is banned for life. As her allegations were false and made in bad faith, she cannot claim victimisation.

9.14

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

Example:

A businessman with a hearing impairment who uses an induction loop complains that he has been denied access to conference rooms because the owners did not make a mobile induction loop immediately available on request. He brings a discrimination case, for failure to make reasonable adjustments, which he loses. His good faith in bringing the claim is accepted by everyone. A few weeks later this man visits the centre again and tries to book a room but is told that there are no rooms available. As he leaves, he notices another booking being made. Clearly rooms are available. He believes he is being victimised because of his complaint of disability discrimination. Although he lost his discrimination claim he would be able to claim of victimisation.

Instructing, causing or inducing discrimination

What the Act says

9.15

s.111(1) It is unlawful to instruct someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act. Such an instruction would be unlawful even if it is not acted on.

Example:

A butcher successfully brings a claim for race discrimination against a member of the local business association. 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 discriminate even if their members disregard their instruction.

9.16

The Act also makes it unlawful to cause or induce, or to attempt to cause or induce, someone to discriminate against or harass a third person because of a protected characteristic or to victimise a third person because they have done a protected act.

s.111(2) & (3)
s.111(8)

9.17

An inducement may amount to no more than persuasion, and need not necessarily involve a benefit or loss. Nor does the inducement have to be applied directly: it may be indirect. It is enough if it is applied in such a way that the other person is likely to come to know about the inducement.

s.111 (4)

9.18

It is also unlawful for a person to instruct, cause or induce a person to commit an act of discrimination or harassment in the context of relationships which have come to an end.

Example:

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 as a result. The local authority has caused the playgroup to discriminate directly against these disabled children.

9.19

The Act also prohibits a person from causing or inducing someone to help another person to do an unlawful act.

s.111(2) & (3)

9.20

It does not matter whether the person who is instructed, caused or induced to commit an unlawful act carries it out. This is because instructing, causing or inducing an unlawful act is in itself unlawful. However, if the person does commit the unlawful act, they may be liable. The person who instructed, caused or induced them to carry it out may also be liable for it.

s.111(6)

Example:

The new manager of a sports club is buying equipment for the junior football team at a local shop. The shopkeeper offers the manager a discount if he keeps out of the team 'those asylum seekers who have just moved into the area'. The manager is tempted by this and so makes it a condition of team membership that players must have lived in the area for at least four years. This disadvantages young people with non-British nationality whose parents may be asylum seekers, refugees or migrant workers.

Any young person who was refused membership could claim for indirect discrimination related to nationality against the manager, and for inducement against the shopkeeper.

When does the Act apply?**9.21**

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

Example:

A local authority runs childcare 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 family as 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.

Who is protected?**9.22**

- s.111(5) The Act provides a remedy for:
- a) the person to whom the causing, instruction or inducement is addressed; and
 - b) the person who is subjected to the discrimination or harassment or victimisation if it is carried out

provided that they experience a detriment as a result.

9.23

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

9.24

Therefore, in the above example 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. Families who are denied fostering opportunities as a result of the social workers' compliance with this instruction may bring claims against the local authority as well as against the social workers.

Aiding contraventions**What the Act says****9.25**

The Act makes it unlawful knowingly to help someone discriminate against, harass or victimise another person. A person who helps another in this way will be treated as having done the act of discrimination, harassment or victimisation themselves.

S.112

9.26

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.

9.27

The Act also makes it unlawful to help with an instruction to discriminate or with causing or inducing discrimination.

Example:

A GP surgery shares its premises with a dental practice which operates from the first floor. 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. If a disabled patient finds out, they could claim for instruction to discriminate against the dental practice and for aiding an unlawful act against the GP surgery.

9.28

The prohibition of aiding discrimination applies to all of the areas covered by this Code.

What does it mean to help someone commit an unlawful act?**9.29**

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.

What does the helper need to know to be liable?**9.30**

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**9.31**

s.112(2) (3) & (4) 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 even if it transpires that it assisted with a contravention of the Act. It is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of an act.

9.32

‘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

s.158 This chapter explains the positive action provisions in the Act. As explained in paragraph 1.23, the term ‘service provider’ and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Code.

What is positive action?

10.2

People who share a protected characteristic may be socially or economically disadvantaged, or may be affected by the consequences of past or present discrimination or disadvantage. Certain groups may experience institutional or systemic discrimination, high levels of poverty and social exclusion, and/or segregation in housing, education or social welfare.

10.3

The Act contains provisions which enable service providers to take proportionate action to achieve fuller and more effective equality outcomes for members of groups that are socially or economically disadvantaged or excluded, or who otherwise face the consequences of past or present discrimination or disadvantage. These are known as the ‘positive action’ provisions.

10.4

Positive action, may involve treating members of a group who share a particular protected characteristic more favourably than other groups, and will be lawful if:

- one or more of the preconditions of recognising the disadvantage, meeting the particular needs or increasing the participation of a particular group is met (see paragraphs 10.10 and 10.11); and

- the proposed action is a proportionate means of achieving one of the stated aims (see paragraphs 10.21 to 10.24).

10.5

Positive action 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. Provided action is within the parameters laid down in the Act and meets the test of proportionality, it will not amount to discrimination under the Act.

10.6

Organisations in both the public and private sector will often wish to take positive action to improve their services or to increase take-up or participation by particular groups within the community, as good business practice or as a more effective way of providing services.

Distinguishing positive action and ‘positive discrimination’

10.7

Positive action is not the same as positive discrimination, which is unlawful. It may be helpful to consider the Act’s positive action provisions within the continuum of actions to improve services to people who share a protected characteristic.

- First, action taken to benefit those from one particular protected group that does not involve less favourable treatment of those from another protected group, or to eradicate discriminatory policies or practices will normally be lawful. For service providers this may include steps to improve awareness of and access to services, adjusting the services to meet the particular needs of a protected group, or training the staff to recognise such needs. However, such actions would not be classed as ‘positive action.’
- Second, there are actions that fall within the framework of the Act’s positive action provisions. These actions are only lawful if they meet the statutory conditions for positive action measures and do not exceed the limitations set out in the Act.

- Third, there are actions – often referred to as ‘positive discrimination’ – which involve preferential treatment to benefit members of a disadvantaged or under-represented group who share a protected characteristic, in order to address inequality. However, these actions do not meet the statutory requirements for positive action and will be unlawful unless a statutory exception applies. (Exceptions are discussed in Chapter 13 and the exception relating to political parties is discussed at paragraphs 12.54 to 12.62).
- It is important to note that it is not unlawful to treat a disabled person more favourably compared to a non-disabled person. (See paragraphs 10.27 and 10.28 below).

Example:

In monitoring users of its sports and leisure facilities, the local authority noted that Chinese people, and especially Chinese women, used these facilities far less than other groups, and in numbers which were disproportionately low compared with the size of the local Chinese community.

In meetings with members of the Chinese community, the local authority learns that many Chinese women have never been to a leisure centre and many are quite apprehensive about taking part in sport and fitness activities. The local authority considers the following actions to improve use by Chinese women:

- Provide better information in relevant languages, speak to community groups to explain the facilities provided at leisure centres and encourage Chinese families to come to regular open days. None of these steps is likely to involve less favourable treatment of any group sharing another protected characteristic and so such actions would be lawful without having to rely on the positive action provisions within the Act.
- Arrange a special open day for Chinese families and provide separate swimming and gym taster sessions for Chinese women. While these steps involve more favourable treatment of Chinese women, the disadvantage to other groups of leisure centre users is likely to be outweighed by the benefit of increasing participation by Chinese women. As these steps are proportionate ways of achieving the local authority’s aim, they would be lawful under the Act’s positive action provisions.

- Introduce special discounted fees only for Chinese women and limit access to leisure centres at certain times to Chinese women only. While these steps could increase participation by Chinese women, they involve preferential treatment of Chinese women and less favourable treatment of others who will be required to pay higher fees and will be denied use of the centre at certain times. As there are other less discriminatory steps the local authority can take to increase participation by Chinese women these steps are unlikely to be a proportionate way to achieve this aim and therefore are likely to be unlawful.

Voluntary nature of positive action

10.8

Positive action is optional, not a requirement. However, by taking positive action, organisations will often derive broader benefits to their business, the quality and take-up of services or improve the effectiveness and quality of public functions; associations can strengthen their membership base and improve the benefits and services they provide to all of their members.

What the Act says

10.9

Where a service provider reasonably thinks that people who share a protected characteristic:

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

then the service provider may take any action which is proportionate to meet the aims stated in the Act ('the stated aims').

10.10

The 'stated aims' are:

- | | |
|--|-------------|
| a) 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'); | s.158(2)(a) |
|--|-------------|

- s.158(2)(b) b) meeting those needs, ('action to meet needs'); or
 s.158(2)(c) c) enabling or encouraging persons who share the protected characteristic to participate in that activity ('action to encourage participation in activities').

10.11

Action may be taken when any one or all of these conditions exist. 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:

Research indicates that women in Britain experience significant disadvantages in pursuing successful careers in science subjects as reflected in their low participation in the profession and their lower status within it, fewer contributions to publications. One of the key factors contributing to this position is the lack of visible role models. A leading publisher of scientific publications establishes a literary prize for a female scientist. This will raise the profile of women currently working in science and encourage girls to consider it as a career.

Example:

A local police service was aware of the under-reporting of anti-Semitic crime. They were advised by Jewish organisations that many of their members had low levels of trust in the police and several had experienced anti-Semitic harassment by police officers. In order to provide better protection for the Jewish community, the police and local organisations established several different reporting points for anti-Semitic crime and a dedicated specially trained investigation team. 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 in that the police service was taking action that would potentially favour one religious group more favourably than other religious groups.

What does ‘reasonably think’ mean?

10.12

In order to take positive action, a service provider must reasonably think that one of the above conditions applies that is, disadvantage, different need or disproportionately low participation. This means that some indication or evidence will be required to show that one of these statutory conditions applies. It does not, however, have to be sophisticated statistical data or research. It may simply involve looking at the profiles of services users and/or making inquiries of other services providers in the area. It could involve looking at differential rates of take-up of benefits or services or access to memberships or differential rates of exclusions or rejections. A decision to take positive action could be based on qualitative evidence, such as consultations with users and non-users, surveys showing poor experiences of a service related to a protected characteristic, focus groups, complaints, inspection reports, discrimination claims, or evidence of similar problems gathered by other organisations.

Example:

A recent prisons inspection report highlighted significant health problems of foreign national prisoners 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 as foreign national prisoners were being given a preferential level of treatment, in the form of the monthly medical check-ups to meet an identified need.

Action to remedy disadvantage

What is a disadvantage for these purposes?

10.13

‘Disadvantage’ is not defined in the Act. It may, for example, include exclusion, rejection, lack of opportunity, lack of choice, or barriers to accessing services, (see paragraph 5.10). Disadvantage may be obvious from statistical sources, such as national data, but in other cases may be shown by qualitative evidence or from the results of monitoring that has been carried out.

What action might be taken to enable or encourage people to overcome or minimise the disadvantage?

10.14

s.158(2)(a)

The Act enables action to be taken to enable or encourage people who share a protected characteristic and who suffer a disadvantage connected to that characteristic to overcome or minimise the disadvantage. The Act does not limit the action that could be taken, provided it satisfies the statutory conditions and is a proportionate means of achieving the aim (more detail on this is given below). Such action could include identifying through consultation, surveys or a review of data possible causes of the disadvantage and then:

- targeting services at specific disadvantaged groups, for example by advertisements, outreach programmes, special arrangements to encourage increased take-up;
- providing services specifically aimed at a disadvantaged group; or
- providing services in a different way, at different times, at different locations.

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:

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 adopted a more visible policing profile in areas they knew were frequented by Muslims, including near the mosque and near certain schools and shops. The police visited Muslim shopkeepers to advise them on crime prevention, and uniformed women police constables met groups of Muslim women to discuss personal safety for them and their children.

Action to meet needs

What are ‘different’ or ‘particular’ needs?

10.15

A group of people who share a particular protected characteristic have ‘different needs’ if, due to past or present discrimination or disadvantage or due to 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, disproportionately, compared to the needs of other groups, they are not being met or the need is of particular importance to that group. For example, all pregnant women need good antenatal care. However, the high rate of infant mortality among Gypsies and Travellers may indicate that they have different needs for antenatal, maternity and child health services, such as requiring more frequent antenatal health checks.

What action might be taken to meet those needs?

10.16

The Act does not limit the action that service providers can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving the aim of meeting genuinely different needs (more detail on what proportionate means can be found in paragraphs 5.31 to 5.35). Such action could include:

- Reallocating resources in order 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.

s.158(2)(b)

- Adopting ways of providing a service 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, culturally or religiously appropriate mental health services.

Example:

A voluntary organisation runs support groups for prospective adoptive parents. In order to improve its work the organisation surveyed past and current group participants. It found that lesbian and gay participants were far less satisfied than other parents, because while they shared all of the concerns of the other parents they had additional issues and anxieties that they had not felt able to raise in the mixed groups. In order to meet their particular needs the organisation added to its programme a separate support group for lesbian and gay prospective adopters which they could attend in addition to the mixed support group.

Action to encourage participation in activities

What activities does this apply to?

10.17

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 or organised or facilitated by a service provider. It might include sporting activities, membership of a local patients committee, 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 services, benefits, facilities such as libraries, leisure services, services for children, disabled people or older people.

What does 'disproportionately low' mean?

10.18

s.158(1)(c) The Act says that action can only be taken where the service provider reasonably thinks that participation in an activity by people sharing a particular protected characteristic is 'disproportionately low'. This means that the service provider 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 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.

What action could be taken?

10.19

The Act permits action to be taken to enable or encourage people who share the protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit what action could be taken. It 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; or
- using outreach programmes and mentoring.

Example:

A local 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 clear to its members and to staff their absolute intolerance of racist behaviour and made diversity training mandatory for all staff.

The local authority then opts to go further by using some forms of targeted positive action. It teamed up with prominent African Caribbean musicians to search for talented African Caribbean young musicians. It held open trials for young people from this community offering the most talented musicians extra tuition for free and for a fixed period to enable them to audition for places in the orchestra the next time there are vacancies. The very low level of participation and the historical reasons for this, made the club conclude that such action was proportionate.

What does 'proportionate' mean?

10.20

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

10.21

'Proportionate' refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action whether it is to overcome a disadvantage, meet different needs or address under-representation of a particular group. Other relevant factors will include the objective of the action taken, or to be taken, including the cost of the action.

10.22

The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

10.23

Organisations need to consider:

- Is the action an appropriate way to achieve the stated aim?
- If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?

Paragraphs 5.31 to 5.35 provide a more detailed explanation of proportionality.

Example:

Figures from competition records show that fewer women than men compete as judo players and this is because of their low participation in the sport. A national judo organisation considers two options to meet its aim of increasing women's participation in judo. One option is to stage a major event with prize money for women twice the prize money for men. A second option is, for six months, to mount a major publicity campaign combined with the promotion of a discounted training programme for women judo players only.

The first option is unlikely to be a proportionate means of achieving greater participation by women; it would discriminate against male judo players and would not meet the appropriate and necessary test since it would only benefit women already active as judo players.

The second option is more likely to be a proportionate way to meet their aim. Although it would involve less favourable treatment of men (both in terms of more limited promotion of men within the sport and exclusions from discounted training fees) this action could meet the appropriate and necessary test since it is likely to be effective in attracting more women to the sport, and the less favourable treatment of men would be short-term.

Time-limited positive action

10.24

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 a precondition for positive action. This could make it unlawful to continue to take the action.

10.25

Therefore, when undertaking measures under the positive action provisions, it would be advisable for service providers to indicate that they intend to take the action only so long as the relevant conditions apply, rather than indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.

Example:

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 now no basis under the Act for the college to continue this positive action measure.

Positive action and disability

10.26

s.13(3) As indicated above at paragraph 10.7, it is not unlawful direct disability discrimination to treat a disabled person more favourably than a non-disabled person. This means that a service provider can, if they wish, restrict services to disabled people and this will be lawful.

10.27

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 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:

A theatre has carried out an analysis of theatre goers and 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. In addition, during the first two weeks, for the performances with a signer, Deaf customers, but not customers with other impairments, are offered a 15 per cent discount and this is publicised to the Deaf community. This would be lawful.

Positive action and the public sector equality duties

10.28

s.149(1) & (3) Public authorities and those carrying out 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.

Political parties and positive action

10.29

s.104 The Act recognises that certain groups who share particular protected characteristics are under-represented among elected decision-makers. It includes special provisions enabling political parties to take proportionate action in selecting candidates to reduce inequality in their representation in relevant elected bodies. This is described in paragraphs 12.54 to 12.62.

Implementing positive action lawfully

10.30

In order to identify possible causes of disadvantage, different needs and under-representation, and to develop appropriate positive action measures, service providers will benefit from the involvement of staff and members of groups sharing a relevant protected characteristic. Such groups should also be involved in the evaluation of positive action measures.

10.31

To ensure a sound basis for positive action measures and avoid unlawful discrimination service providers should consider drawing up an action plan which sets out:

- evidence of the disadvantage, particular needs and/or disproportionately low levels of participation, as appropriate, and an analysis of the causes;
- specific outcomes which the service provider is aiming to achieve;
- identification of possible steps;
- assessment of the proportionality of possible steps;
- the steps the service provider decides to take to achieve these aims, and
- measurable indicators of progress towards those aims, set against a timetable.

Service providers are advised to keep some form of written record with this information.

10.32

To ensure that there is understanding and support for their action it is important that service providers explain to staff and users of their services why positive action is being taken and that it is lawful. This explanation will need to include the basis on which they are proposing particular, time-limited, steps.

Example:

In response to evidence about lesbians' negative experiences with health professionals, a primary care trust 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 complaints from other patients were explained to staff in surgeries displaying the posters.

Chapter 11: Services and public functions

Introduction

11.1

This chapter explains how 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 imposed on persons providing a service and on those exercising public functions are essentially the same.

What does discrimination mean in this chapter?

11.2

Any reference to ‘discrimination’ in this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise:

- direct discrimination;
- indirect discrimination;
- discrimination arising from disability;
- pregnancy and maternity discrimination; and
- failure to make a reasonable adjustment.

Services

What is a 'service'?

11.3

A wide range of services are covered by the Act, including permitting access to and use of any place which members of the public are permitted to enter. Among the services which are covered are those provided to the public, or a section of the public, by local authorities, such as toilet facilities; government departments and their agencies; some charities; voluntary organisations; hotels; restaurants; pubs; post offices; banks; building societies; solicitors; accountants; 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; advice agencies; theatres; cinemas; hairdressers; shops; market stalls; petrol stations; telesales businesses; hospitals, and clinics. This list is for illustration only and does not cover all the services under the Act.

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. Services include the provision of goods and facilities.

s.29(1)
s.31(2)

11.5

Services are covered regardless of whether they are provided by a private, voluntary or public body. Thus, 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.

11.6

It is important to remember that it is the provision of the service that is affected by the Act, and not the nature of the service or business or the type of establishment from which it is provided. In many cases, a service provider is providing a service by a number of different means. In some cases, however, each of those means of service might be regarded as a service in itself and subject to the Act.

Services provided to the public by more than one provider

11.7

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 actually responsible for providing the service which has given rise to the alleged discrimination. In some cases, liability under the Act may be shared among a number of service providers. It is possible, for example, for two service providers to have full liability, and any obligations must be met by those providers. It is irrelevant how they decide between them what to do in order to meet their duties; what is important is that the obligations under the Act are in fact met. This is likely to be of particular importance in relation to the duty to make reasonable adjustments for disabled people.

Example:

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, the supermarket is likely to be responsible for ensuring that the cash machine is physically accessible to disabled customers using its premises.

Example:

A training company provides a non-residential conference at a hotel. With respect to the conduct of the conference, the treatment of the participants and accessibility of the venue, the training company is responsible for any duties that may arise under the Act. However, the hotel would be responsible for any services provided as part of the conference facilities, such as toilets, or services ancillary to the conference (for example, accommodation the night before the conference).

Website services

11.8

Websites provide access to services and goods, and may in themselves constitute a service, for example, where they are delivering information or entertainment to the public.

Example:

A council provides information about its leisure service through a website. The council is responsible for ensuring that reasonable adjustments have been made where needed, for example by changing the size of the font, to ensure that disabled users are able to get the information, without being placed at a substantial disadvantage (even if the council employs an external organisation to build and maintain its website).

11.9

The Act contains specific provisions regarding its territorial extent in relation to particular forms of internet services, termed ‘information society services providers’ in the Act (ISSPs). If an ISSP is established in Great Britain, then Part 3 applies to the provision of information society services where these are accessed in Great Britain or any EEA member state (other than the UK).

11.10

By contrast, where the ISSP is established in an EEA state other than the UK, then the Act does not apply to anything done in providing the information society services.

s.206 &
Sch.25

11.11

The Act adopts the same meaning given to ISSPs in Article 2 (a) of the E – Commerce Directive.¹ In brief, where services are normally provided for remuneration from a distance by means of electronic equipment to consumers, such as online shopping, direct marketing and advertising, these are termed ISSPs.

Example:

An internet holiday company established in Great Britain refuses to take bookings for shared accommodation from same-sex couples. In this instance, a case of direct sexual orientation discrimination could be brought in the British courts regardless of whether the service user was in the Great Britain or another EEA member state.

¹ Directive 98/34/ EC of the European Parliament and of the Council of 22 June 1998, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.

Example:

An internet retailer, which provides tickets to major sporting events, offers discounts to large groups of men but not women when booking hospitality packages for the football World Cup. The retailer is established in Germany so in this instance a case of direct sex discrimination would have to be brought in the German courts regardless of whether the service user was in Great Britain or another EEA member state.

11.12

Chapter 13 describes specific exceptions that apply to ISSPs if they are mere conduits, or if they provide ‘caching’ or ‘hosting’ for other ISSPs.

Public Functions**What is a public function?****11.13**

For the purposes of the Act, only those functions of a public authority which are not services and 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

s.31(4)
s.6(3)(b)
Human Rights
Act 1998

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. In relation to private or voluntary organisations this would cover activities carried out on behalf of the State and which are not similar in kind to services that could be performed by private persons.

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 children legislation;
- regulatory functions; and
- investigation of complaints.

This list is illustrative only and does not include all functions which fall under this Part of the Act.

Interaction with the services provisions

11.17

Whether or not an activity is a service to the public, or a public function, will depend on all 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 social care, library or leisure services. Activities such as these will be subject to the provisions of the Act relating to the provision of a service to the public.

s.31(3)

Example:

A police officer is organising a community safety meeting and prepares literature to hand out about crime prevention. In giving this information to the community, the police are likely to be providing a service.

Example:

Where a police officer is carrying out a search as part of a criminal investigation, they are likely to be carrying out a public function, and not a service.

What is unlawful discrimination in relation to services?

11.18

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.

s.29(1) In this context, a reference to a service provider not providing a service includes:

- s.31(7) • the service provider refusing to provide the person with the service;
- the service provider not providing the person with the service of the quality that is usually provided to the public (or the section of the public that includes that person); or
- 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).

11.19

s.29(2) 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; or
- by subjecting that person to any other detriment.

11.20

s. 31(7) 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.

11.21

Discrimination in the terms of service could include charging more for goods or services, or imposing extra conditions for using a facility or service.

11.22

‘Detriment’ is not defined by the Act and is a very broad term, taking many forms. For an explanation of ‘detriment’ see paragraphs 9.7 to 9.9.

Example:

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 subjected to a detriment; the less favourable treatment they receive could amount to direct discrimination because of sexual orientation. Because of the degree of overlap in these provisions, denying them access to the room would also constitute discrimination in the terms of the service and refusal of service.

Example:

The owner of a café asks a woman who is breastfeeding her three-month old 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 up her drink quickly. This could amount to discrimination because of pregnancy and maternity, as the woman is unable to access the service in the same way as others are able to.

Example:

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.

11.23

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. s.29(2)

Example:

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.

11.24

A service provider does not have to stock special products for all groups or particular groups of people to comply with the Act. However, if the provider would take orders from other customers for products that it does not normally stock, it would be likely to be unlawful to refuse to take such an order.

Example:

A newsagent who has ordered specialist newspapers and journals for other customers may be in breach of the Act if they then refused to meet the request of their Pakistani customers to order weekly Pakistani papers.

11.25

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 constitute discrimination if a Kosher butcher with a mainly Jewish clientele refused to sell their Kosher meat to people who are not Jewish.

What is unlawful discrimination in relation to the exercise of public functions?

11.26

s.29(6) The Act prohibits discrimination in the exercise of a public function. The provision is a broad one and 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. Examples could include being refused a discretionary welfare benefit such as the Social Fund or dismissing an application to adopt because of a protected characteristic.

Example:

A transsexual man applies for a licence to run a nightclub. He has far more conditions imposed on his licence than other licensees, because of a perception that his clientele will be rowdy on the streets. This is likely to be direct discrimination and will be unlawful.

Example:

A disabled person with Tourette syndrome makes involuntary noises during the course of an interview about their claim for Council Tax. 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 and will be unlawful unless it can be justified or the Council can show that it did not know, or could not reasonably be expected to know that the person had the syndrome.

Example:

A breastfeeding mother is asked to sit behind a screen in a planning inquiry hearing because a councillor is uncomfortable with her breastfeeding her newborn baby in public. She cannot see the Chair, 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.

Failure to make a reasonable adjustment in service provision and in the exercise of a public function

11.27

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:

s.29(7)

- a provision, criterion or practice; or
- a physical feature; or
- the lack of an auxiliary aid or service,

puts disabled people at a substantial disadvantage compared with non disabled people.

The duty to make reasonable adjustments is explained in more detail in Chapter 7.

11.28**Example:**

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 will not modify its procedures to allow visitors with mobility or sensory impairments to be evacuated safely, this is likely to be a failure to make a reasonable adjustment.

Example:

A prison has a policy of opening its library and health centre every morning from 10 a.m. until 11a.m. This means that disabled prisoners who have morning medical appointments at the health centre are not always able to use the library. The prison allows the library to open for an hour in the evening as well. This is likely to be a reasonable adjustment for the library to make.

Sch.2,
Para 2 (5)

11.29

In relation to the exercise of a public function, being placed at a substantial disadvantage means:

- a) If a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit.
- b) 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:

An ombudsman has a policy that all complaints 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 complaints procedure to make their complaint over the telephone. This is likely to be a reasonable step to take.

11.30

‘Unreasonably adverse’ is not defined in the Act. The exercise of some functions may have an adverse effect on the person who is on the receiving end of them – for example, being arrested. These are ‘negative’ functions. The aim of the reasonable adjustment duty in these circumstances is to ensure that disabled people do not have a substantially worse experience in relation to the exercise of these functions than other people as far as is reasonably possible. ‘Unreasonably adverse’ is intended to represent the same level of difficulty as ‘substantial’ disadvantage.

Example:

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.

Physical Features

11.31

In relation to physical features, the duty is to 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.

s.20(4)
s.29(7)

Limitations on the duty make a reasonable adjustment

11.32

Those exercising public functions are not required to take any steps which are beyond their powers to take.

Sch.2,
Para 2 (8)

Example:

A deaf person who uses British Sign Language wishes to take part in jury service, but can only do so with the assistance of a sign language interpreter. While disabled people are not prohibited from jury service, the court cannot provide a BSL interpreter as a reasonable adjustment, because criminal law does not permit there to be an 'extra' person in the jury room for any reason. In these circumstances, the public authority does not have the power to take the steps required to enable the deaf person to take part in jury service.

11.33

In relation to services, a service provider 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.

Sch.2,
Para 2 (7)

Example:

A restaurant that offers a 'dining in the dark' experience is unlikely to have to make the reasonable adjustment of leaving its lights on for a deaf customer who needs to be able to lip read to communicate as this would fundamentally alter the nature of the service being offered.

Other prohibited conduct

Harassment

11.34

s.29(3) & (6) 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.

Harassment is explained in more detail in Chapter 8.

Example:

A black man goes into a pub to watch a football match. While the match is in progress, the bartender and a number of customers make racist remarks about some of the footballers on the pitch. The man takes offence at these remarks. When he makes a complaint, the manager calls him a number of derogatory names related to his race. The black man could complain of harassment; he could also complain of direct discrimination because of race as the pub is providing a worse service to him than it is to other customers.

11.35

s.212(5) The prohibition on harassment in the provision of a service or in the exercise of a public function does not extend to sexual orientation or to religion or belief. However, unwanted conduct because of either of these protected characteristics, which causes someone a detriment amounting to less favourable treatment, could constitute direct discrimination.

Example:

A bed and breakfast owner is abusive to a lesbian couple because of their sexual orientation. The couple could bring a claim of direct discrimination.

Victimisation

11.36

s.29(6)
s.29(4)
s.29(5) The Act also makes it unlawful for a person to victimise a person when exercising a public function or in service provision by:

- not providing that person with the service;
- the terms on which the service is provided to that person;
- terminating the provision of the service to that person; or
- subjecting that person to another detriment.

Example:

A woman makes a complaint that a sales assistant at a video rental store is sexually harassing her. A month later when she tries to renew her membership she is told that a loyalty discount for existing members is no longer available. However, she then finds out that this is not true because a friend is offered the discount later that same day. She believes that she has been victimised because of her complaint and could have a remedy under the Act.

11.37

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

11.38

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

11.39

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.

11.40

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 may also fall within Part 3.

11.41

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. 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:

A school hires out their sports hall to local sports clubs for club activities. This is likely to be subject to Part 3 of the Act.

Example:

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:

A university organises a conference that is aimed at both students and the general public. Even if the majority of 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:

A parent wishes to complain about a school's policy that refuses girls the opportunity to do woodwork. As this relates to a decision taken by the responsible body of the school, it is covered by the education provisions of the Act.

11.42

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. Once again, 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

11.43

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 manage rented properties. This Code does not deal with Part 4 of the Act.

11.44

As stated in paragraph 3.23 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; s.32(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. s.32(3)(b)

11.45

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

11.46

Part 5 of the Act is concerned with work. Where Part 5 applies, the Part 3 services and public functions provisions will not.

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. 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 the Employment Code. s.31(5)

Sch.3,
Para 20 The sole exception to this is where an employer makes provision for financial services to their employees as a consequence of their employment. (See Chapter 13.)

11.47

s.31(5) 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. 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 the Employment Code.

11.48

Sch.3,
Para 20 The sole exception to this is where an employer makes provision for financial services to their employees as a consequence of their employment. (See Chapter 13.)

11.49

Example:

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).

Exemptions and exceptions

11.50

Chapter 13 sets out other exceptions which apply to the Act as a whole, including services and public functions. This chapter sets out the specific exemptions and exceptions which apply only to services or only to public functions.

Exemption for certain transport services

11.51

In relation to disability, the Act exempts certain transport services from the provisions relating to services and public functions. Specifically, these provisions will not apply to:

- transporting people by air or providing a service on an aircraft transporting people by air;
- anything governed by EC regulations; any breach of the EC regulations must be enforced as provided by the regulations and not under the Act;
- transport by land, unless the vehicle is included in the exceptions listed in Schedule 3 paragraph 34 (1). These exceptions include, and these non-discrimination provisions therefore apply to, hire vehicles of certain types, taxis, licensed private hire cars, public service vehicles, trains, trams and certain guided transport systems.

Schedule 2 paragraph 3 sets out more detailed exemptions for transport services in relation to the duty to make reasonable adjustments for disabled people.

11.52

Example:

An airline is required to make reasonable adjustments to its booking services to ensure that these are accessible to disabled people. However, it is not required to make adjustments to the cabin environment inside its aircraft, although under EC air accessibility regulations it must provide disability-equality and disability awareness training to all personnel working at the airport who deal with the travelling public.

Exceptions to the services provisions

11.53

There are a number of specific exceptions which relate to the provision of services, for example single-sex services. These are explained in more detail in Chapter 13.

Exceptions relating to the scope of public functions

11.54

The Act excludes certain types of functions and certain public authorities from the prohibition of discrimination, harassment and victimisation in the exercise of public functions.

Sch.3,
Part 9

Regulation
(EC)
No.1107/2006
of the
European
Parliament
and of the
Council of
5 July 2006.

Parliament and the legislative process

11.55

Sch.3,
Paras 1 & 2 The Act excludes from the prohibition of discrimination, harassment and victimisation a function of Parliament or a function exercisable in connection with official business of Parliament. Also excluded are any steps within the legislative process in Parliament, the Scottish Parliament or the National Assembly for Wales, including preparing, considering or approving an Act or a Bill of an Act (or a Measure in Wales) or an instrument under an Act. The exclusion also covers any instrument by the General Synod, Her Majesty in Council or the Privy Council.

Judicial functions

11.56

Sch.3
Para 3 The Act excludes from the prohibition of discrimination, harassment, and victimisation a judicial function, including anything done on behalf of a person exercising a judicial function. 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

11.57

Sch.3
Para 4 In relation to disability, gender reassignment and sex discrimination, the Act excludes from the prohibition of discrimination, harassment, and victimisation anything done for the purpose of ensuring the combat effectiveness of the armed forces.

Security services

11.58

Sch.3
Para 5 The Act excludes the security services from the prohibition of discrimination, harassment and victimisation. Specifically, the Act excludes:

- a) the Security Service;
- b) the Secret Intelligence Service;
- c) the Government Communications Headquarters;
- d) a part of the armed forces which is assisting the Government Communications Headquarters under requirement of the Secretary of State.

Good practice on avoiding discrimination and improving the delivery of services and the exercise of public functions

Positive Action

11.59

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 explains these provisions more fully.

11.60

Example:

Following a review of the profile of users of their advice sessions, a housing advice agency 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

11.61

It is important to note that it is never unlawful discrimination to treat a disabled person more favourably than a non-disabled person because of disability. This means that a service provider can, if they wish, lawfully restrict services to disabled people only or exercise these functions in a way that is more favourable for disabled people than for non-disabled people .

s.13(3)

Interaction with the public sector equality duties

11.62

Public authorities and those carrying out public functions who are subject to the public sector equality duties may find it easier to show they have met the requirements of the duties if they act in the way set out in this chapter. Conversely, complying with the equality duties will help them to meet their obligations under the services and public functions provisions.

Chapter 12:

Associations

Introduction

12.1

Part 7 This chapter explains how the Act applies to associations. It explains what constitutes an association and what is unlawful under the Act in relation to the members, associates and guests of an association and the duty of an association to make reasonable adjustments. It explains when associations can restrict their membership to persons who share a particular protected characteristic, indicates how associations can use the positive action provisions in the Act, including measures which political parties as associations can take to reduce inequality in their representation in Parliament, local government and other publicly elected bodies.

What is an association?

12.2

s.107(2) The provisions 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; and
- 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

s.107(4) It does not matter if the association is incorporated or otherwise, or if any of its activities are carried out for profit.

12.4

Associations that are charities are subject to additional provisions under the Act related specifically to charities, discussed in paragraphs 13.31 to 13.40.

s.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:

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.

12.6

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 above.

12.7

There are also organisations which people join in order 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 also not come within the Act's definition of an association.

12.8

A 'club' run by a group of friends without any formal structure, such as a book club or a women's group or a walking group, is not an association under the Act.

12.9

Associations under the Act can include:

- 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; or
- 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 associations are covered by the Act.)

12.10

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 of these areas; when an association carries out any of these additional functions it will be also be subject to other relevant parts of the Act.

Thus, 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:

A golf club would be a service provider if it opened its golf course, cafe and shop to members of the public on certain days of the week. It would be treated as an employer if it discriminated against one of its employees. It would be 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**12.11**

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.

12.12

‘Member’ means any type of member of an association. This could include, for example, a person who is a full member, a temporary member, an associate member or a student member.

s.107(5)

12.13

‘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.

s.107(6)

Example:

A number of separate trades clubs in Great Britain are affiliated to a single parent body which organises a reciprocal associates scheme amongst its affiliates. Therefore, a member of a trades club in one location would also be an associate of other trades clubs that are affiliated to the parent body and are part of the scheme.

12.14

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.

What is unlawful discrimination by an association?**12.15**

The Act makes it unlawful for an association to discriminate against its members, potential members, associates, guests and potential guests. Discrimination means:

- direct discrimination.
- indirect discrimination;
- discrimination arising from disability;
- pregnancy and maternity discrimination; or
- failure to make a reasonable adjustment.

These provisions are explained in Chapters 4, 5, 6 and 7.

12.16

Any reference to ‘discrimination’ in the following paragraphs of this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise.

Other unlawful conduct

12.17

The Act also makes it unlawful for an association to harass or to victimise its members, people seeking to be members, associates, guests and people seeking to be guests.

Harassment is explained in Chapter 8.

12.18

- s.103(2) The prohibition of harassment of members, associates and guests discussed
s.212(5) below does not apply where the protected characteristic is religion or belief or sexual orientation. In such cases, a person who has suffered a detriment could bring a claim of direct discrimination. (See Chapters 4 and 8 above.)

Victimisation is explained in Chapter 9.

What is unlawful in relation to people seeking to become members?

12.19

- s.101 The Act makes it unlawful for an association to discriminate against, harass or victimise a person seeking to become a member.

12.20

An association must not discriminate:

- s.101(1)
- in the arrangements it makes for selecting new members;
 - as to the terms for admission; or
 - by rejecting the person's application.

12.21

- s.101(4)(b) An association must not harass a person seeking to become a member.

12.22

- s.101(5) An association must not victimise a person seeking to become a member:
- in the arrangements it makes for selecting new members;
 - as to the terms for admission; or
 - by rejecting the person's application.

Example:

A person seeking to become a member of an association, who previously supported a former guest's claim for unlawful discrimination, needs two members to nominate her in order 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.

12.23

'Arrangements' can include how or to whom opportunities for membership are, or are not, publicised, forms of communication, application procedures, application forms, time of day, location and conduct of any selection process.

The arrangements an association makes for selecting new members can deter a person with a particular protected characteristic from applying or even considering whether to apply.

12.24

'Terms for admission' can include level of joining fee, conditions and initiation procedures.

Example:

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 explanation is that the extra amount is necessary to cover the extra demands that women make because of their higher expectations about changing facilities. This is likely to amount to direct sex discrimination as to the terms for admission.

What is unlawful in relation to members?**12.25**

The Act makes it unlawful for an association to discriminate against, harass or victimise a member.

12.26

An association must not discriminate against a member:

- a) in the way it affords or denies them access to a benefit, facility or service;
- b) by depriving them of membership;
- c) by varying their terms of membership; or
- d) by subjecting them to any other detriment.

s.101(2)

12.27

‘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, discount schemes, bar or restaurant services, receipt of journals or newsletters.

12.28

‘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.

12.29

For an explanation of ‘Detriment’ see paragraphs 9.7 to 9.9.

12.30

‘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 stated above in paragraph 12.26(a), (b) or (c). Even if an association considers that they are acting in the best interests of a person they may be subjecting that person to a detriment.

Example:

A woman member of an association has a three-month-old baby whom she breastfeeds. She is advised that she should not attend the AGM, which excludes her from voting on resolutions and officers, because her baby might need to be fed during the meeting and members would not be comfortable watching her breastfeeding her child. This is likely to be maternity discrimination.

12.31

s.101(4)(a) An association must not harass any of its members.

Example:

The leader of a boys’ club on a camping trip jokingly refers to one boy with severe facial burns as ‘scarface’ and the other boys laugh. The disabled boy finds this insulting and humiliating and asks to go home early. Because the comments are offensive and upset the boy, this is likely to be unlawful harassment related to disability.

12.32

An association must not victimise a member:

s.101(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:

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?**12.33**

An association must not discriminate against an associate:

s.101(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; or
- by subjecting them to any other detriment.

Example:

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.

- s.101(4)(c) **12.34** An association must not harass an associate.

Example:

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.

12.35

An association must not victimise an associate:

- s.101(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; or
 - by subjecting them to any other detriment.

Example:

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 avoids as far as possible those members against whom he gave evidence.

Guests and people seeking to be guests

- s.102 **12.36** 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.

What is unlawful in relation to people seeking to be guests?

- s.102(1) **12.37** An association must not discriminate:

- 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; or
- by not inviting, or not permitting the person to be invited, as a guest.

Example:

A club informs a member that he should not invite his gay partner and their child to a 'family night' event. This would be discrimination by the club because of sexual orientation.

12.38

An association must not harass a potential guest.

s.102(3)(b)

Example:

A disabled guest with a learning disability has difficulty signing in on the guest register at a club. He is made fun of by club officials, who mimic him and refer to him as 'a slow learner'. As a result he leaves before entering the club. The conduct is intended to violate the guest's dignity and cause him offence. This is likely to amount to harassment.

12.39

An association must not victimise a person seeking to become a guest:

s.102(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; or
- by not inviting, or not permitting the person to be invited, as a guest.

Example:

A woman is invited to a club's annual dinner as a guest but she is refused entry into the snooker room at the club although male guests are allowed in. She makes a complaint and as a result is not invited to the following annual dinner. This would amount to victimisation.

What is unlawful in relation to guests?**12.40**

An association must not discriminate against a guest:

s.102(2)

- in the way it affords or denies them access to a benefit, facility or service; or
- by subjecting them to any other detriment.

Example:

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 because of disability – in this case based on the disability of the child with whom she is associated.

12.41

s.102(3)(a) An association must not harass a guest.

Example:

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 East European workers in Great Britain, which he finds offensive, derogatory 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.

12.42

s.102(5) An association must not victimise a guest:

- in the way it affords or denies them access to a benefit, facility or service; or
- by subjecting them to any other detriment.

Example:

Using the example at 12.40, the club does not permit the guest to attend a talk given at the club because of her complaint. This would be victimisation.

Reasonable adjustments**12.43**

Sch. 15 The Act makes it unlawful for an association to fail to comply with a duty to make reasonable adjustments.

This duty, which is explained in more detail in Chapter 8, is anticipatory. This means that associations are required to consider and take action in relation to barriers that impede disabled people prior to an individual disabled person seeking to become a member or a guest, or as a member, associate or guest seeking to enjoy the rights and the benefits facilities or services the association provides or is expected to provide.

Example:

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. While 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 take.

12.44

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.

Sch. 15,
Para 2 (7)

Example:

A wine club meets specifically to drink and discuss the merits of different types of wine. A potential member who has hepatitis B and so cannot tolerate alcohol wishes to join the wine club for social reasons and asks that it 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.

12.45

If an association meets at the house of a member, there is no duty on that member to make adjustments to the physical features of their house. However, if the association wishes to make any necessary changes, including temporary ones such as the provision of a portable induction loop, they will need to seek the occupier's permission. Or the association may have to arrange a change of venue to ensure that disabled members have access to association benefits, facilities and services.

Sch. 15,
Para 2 (8)

Associations may restrict membership to persons who share a protected characteristic

12.46

The Act permits associations of any size or character, other than political parties, to restrict their membership to persons who share a protected characteristic. The only exception is that membership can never be restricted on the basis of colour.

Sch.16
Sch. 16,
Para 1(4)

Example:

The constitution of an association called the Black Jazz Players Club states that all members must have national origins in Africa or the Caribbean. Therefore, despite the use of 'black' in its name, since the restrictions on membership of the association are based on national origins and not colour these restrictions would not be unlawful.

12.47

Sch. 16, Para 1 (5) This provision does not apply to political parties. Under the Act it is never lawful for a registered political party² 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.

12.48

If an association restricts membership to persons who share a protected characteristic:

- Sch. 16, Para 1 (2) • the association may restrict the access of associates to a benefit, facility or service to associates who share the same protected characteristic; and
- Sch. 16, Para 1 (3) • the association may invite as guests or permit to be invited as guests only persons who share that same protected characteristic.

Example:

The constitution of a women's running club provides for the women members of local mixed sex running clubs to be associates; this would be lawful under the Act.

12.49

Associations that restrict membership to persons who share a particular protected characteristic must not discriminate in relation to any other protected characteristic.

Example:

A women's association must not refuse to accept disabled women as members.

12.50

Other exceptions that apply to associations and their treatment of their members, associates and guests are discussed in Chapter 13.

² A party registered in the Great Britain register under Part 2 of the Political Parties, Elections and Referendums Act 2000.

12.51

These include exceptions relating to national security, charities, single sex services, services and membership of religious organisations, different treatment of pregnant women for their health and safety, and selection of people for participation in competitive sport.

Positive action by associations**12.52**

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. Chapter 10 explains this more fully. s.158

12.53

An association may wish to take positive action in order 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:

A local business person'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 women members said that as 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**12.54**

The Act permits a registered political party³ to take certain steps in their selection of election candidates in order to reduce the inequality in the party's representation in the relevant elected body. s.104

³ A party registered in the Great Britain register under Part 2 of the Political Parties, Elections and Referendums Act 2000.

12.55

This applies to the following elections:

- elections to UK Parliament;
- elections to the European Parliament;
- elections to the Scottish Parliament;
- elections to the National Assembly for Wales;
- local government elections.

12.56

s.104(2) The Act provides that a registered political party may make arrangements
s.104(3) (known as selection arrangements) for regulating the selection of its candidates for a relevant election:

- s.104(3)(b) • if the purpose of the arrangements is to reduce inequality in the party's representation in the elected body concerned; and
- s.104(3)(c) • if these arrangements are a proportionate means of achieving that purpose⁴ (see paragraphs 5.31 to 5.35 for an explanation of 'proportionate').

12.57

s.104(4) 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.

12.58

A party's selection arrangements can include their procedures for encouraging prospective candidates to come forward, for identifying suitable candidates and in determining how a final shortlist will be chosen.

12.59

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.

⁴ The requirement in section 104(3)(b) that selection arrangements must be proportionate excludes the provision for all-women shortlists in separate legislation (see paragraph 13.60 below).

Example:

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.

Reserved places on political party shortlists

12.60

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. For all protected characteristics other than sex (see paragraph 12.63 below – women-only shortlists) regardless of the scale of inequality of representation, such selection arrangements cannot require that all persons short-listed must have that characteristic.

s.104(7)

12.61

For this purpose, persons share the protected characteristic of disability if they are disabled persons with any type of impairment.

s.104(5)

Example:

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 10 candidates for people from ethnic minorities and four places for disabled people as people from both protected groups are under-represented among the party's councillors. The party could not reserve all of the places on its shortlist for disabled people or for people from ethnic minorities.

12.62

If a party achieves equality in respect of a particular protected characteristic in its representation on an elected body they 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

s.105

12.63

The Act maintains the provision first introduced in 2002⁵ which permits registered political parties to select only women for their shortlist of candidates for election to a body in order to reduce inequality between women and men in that party's representation in the elected body concerned.

12.64

The Act extends the application of this provision until 2030 and permits a further extension by Order.

Avoiding unlawful discrimination

12.65

Some steps 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.
- Responding promptly and effectively to any complaint of discrimination, harassment or victimisation and making appropriate changes to provisions, criteria or practices.
- Identifying potential barriers for disabled people and making reasonable adjustments (Chapter 7 explains this more fully).

⁵ Sex Discrimination (Election Candidates) Act 2002.

Chapter 13: Exceptions

Introduction

13.1

The Act contains a number of exceptions which permit discrimination in the provision of services, the exercise of public functions or the activities of associations, which the Act otherwise prohibits.

13.2

The basic presumption under the Act is that discrimination because of the protected characteristics is unlawful unless any exception applies and any exception to the prohibition of discrimination should generally be interpreted restrictively.

‘Proportionate means of achieving a legitimate aim’

13.3

Certain exceptions discussed in this chapter are permitted under the Act only if they can be shown to be ‘a proportionate means of achieving a legitimate aim’. This is discussed in paragraphs 5.25 to 5.36.

13.4

Every time a service provider, person exercising public functions or an association proposes to rely on an exception for which this test is a pre condition, they need to ensure that their action in the particular case meets both parts of the test, that is it has a ‘legitimate aim’ and is a ‘proportionate means’ of meeting that aim.

In cases of dispute, ultimately whether an action is a proportionate means of achieving a legitimate aim will be determined by the courts.

Exceptions

13.5

Some exceptions permit discrimination where this enables service providers or those exercising public functions to provide a better and more appropriate service to persons who share a protected characteristic, for example, the ability in certain circumstances to provide single-sex services.

13.6

Where an exception permits discrimination in relation to one protected characteristic, service providers, persons exercising public functions and associations must ensure that they do not discriminate in relation to any of the other protected characteristics.

13.7

The exceptions discussed in this chapter should be distinguished from positive action which is discussed in Chapter 10. Unlike the exceptions described below, positive action measures should be time-limited and discontinued once their aim is achieved.

13.8

Some exceptions are discussed in Chapters 11 (Services and Public Functions) and 12 (Associations).

This chapter explains exceptions that apply generally to the provision of services, exercise of public functions and associations, as well as exceptions that may apply only to certain activities within these areas not covered in Chapters 11 and 12.

References to 'discrimination'

13.9

s.17 Many of the exceptions in the Act refer to 'discrimination' as it applies
s.25 to one or more protected characteristics, for example, 'religion or belief discrimination.' Apart from pregnancy and maternity discrimination, which is defined separately, the Act defines discrimination for all of the protected characteristics as including:

- direct discrimination; and
- indirect discrimination;
- discrimination arising from disability; and
- a failure to make a reasonable adjustment.

These forms of discrimination are discussed above in chapters 4, 5, 6, and 7.

General exceptions

Statutory authority

13.10

For the protected characteristics of:

- disability;
- religion or belief; and
- sexual orientation,

it is not a breach of the Act as it applies to services, public functions and associations to do anything that is required under another statute or under a requirement or condition imposed pursuant to another statute: by a Minister of the Crown; a member of the Scottish Executive; the National Assembly for Wales or the Welsh Ministers; the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

13.11

For the protected characteristic of sex, it is not a breach of the Act as it applies to public functions and associations to do anything that is required under another law.

13.12

This exception for statutory authority applies in relation to: an Act of Parliament or of the Scottish Parliament; an Act or Measure of the National Assembly for Wales; orders and regulations made under or for the purpose of such acts or measures; and it also applies to Measures of the General Synod of the Church of England.

13.13

This exception applies to laws passed before or after this Act was passed.

13.14

The non discrimination provisions of this Act may be overridden only where another law, or regulations or orders made under another law, require a difference of treatment because of a protected characteristic and a service provider, person exercising public functions or an association has no discretion or choice but to comply with the other law.

Sch. 22,
Para 1

Exceptions

Example:

A man with arthritis wishes to visit an old country house that is open to the public. However, he cannot get into the building as there is a steep flight of steps at the entrance with no ramp or handrail. He asks the owner why these have not been installed. The owner replies that because the house is a listed building she is not required to make any changes to it. As the exception only applies when a service provider has no option but to act in a certain way, the owner's refusal to seek consent to make the building more accessible is likely to amount to a failure to make a reasonable adjustment and hence unlawful under the Act.

Nationality discrimination authorised by statute or the executive

13.15

Sch. 23,
Para 1

The Act provides that:

- direct or indirect nationality discrimination; or
- indirect discrimination, where the provision, criterion or practice refers to place of residence or length of time a person has been present or resident in or outside the UK or an area within it,

is lawful in relation to services and public functions if it is done to comply with another law, Ministerial arrangement or condition.

13.16

As explained above at paragraph 13.14, it is only where an obligation under the law, Ministerial arrangement or condition leaves a service provider or a person exercising public functions with no choice other than to act in a particular way – in relation to a person's nationality or residence in the UK – that the non discrimination provisions of the Act may be overridden.

Example:

The National Health Service (Charges to Overseas Visitors) Regulations 1989 (as amended) allows a NHS Trust no choice regarding the imposition of 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.

National security

13.17

A service provider, person carrying out public functions or an association will not breach the Act if they do anything that it is proportionate to do for the purpose of safeguarding national security. s.192

13.18

This exception applies on a case-by-case basis. To be lawful the particular discriminatory act must be a proportionate means of safeguarding national security.

13.19

Service providers and others 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.

13.20

For example, at a time of heightened security, to impose a blanket ban on all persons of a particular nationality using public transport is unlikely to meet the test of proportionality.

13.21

However, at such times, to conduct intelligence-led surveillance of particular individuals who have that nationality may be proportionate. When the security situation improves to maintain such surveillance may no longer be proportionate for safeguarding national security.

Religious or belief organisations

13.22

In the case of religion or belief, and sexual orientation, the Act provides an exception for religious or belief organisations from the duty not to discriminate. This exception permits restrictions in the provision of goods and services, in membership and other activities provided certain statutory conditions are met. Sch. 23, Para 2

13.23

A religious or belief organisation is an organisation whose purpose is one of the following: Sch. 23, Para 2(1)

a) to practise or advance a religion or belief or to teach its practices or principles

Exceptions

- b) 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
- c) to foster or maintain good relations between persons of different religions or beliefs.

13.24

Sch.23,
Para 2(2) This exception does not apply to an organisation whose sole or main purpose is commercial.

Example:

A gay couple use a travel company to arrange accommodation in Scotland. 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.

13.25

Sch.23,
Para 2(6) In the case of religion or belief, none of the restrictions (see paragraph 13.27) are permitted unless it is imposed:

- because of the purpose of the organisation; or
- to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.

13.26

Sch.23,
Para 2(7) In the case of sexual orientation, none of the restrictions is permitted unless it is imposed:

- a) because it is necessary to comply with the doctrine of the organisation; or
- b) to avoid conflict with the strongly held religious convictions [or convictions relating to a belief] of a significant number of the religion's or belief's followers.

13.27

Sch. 23,
Para 2(3) Provided that one of the statutory conditions in paragraph 13.25 or 13.26 is met, it is not unlawful religion or belief or sexual orientation discrimination for a religious or belief organisation to restrict:

- a) Membership;
- b) participation in activities undertaken by or on behalf of the organisation or under its auspices;
- c) the provision of goods, facilities or services in the course of such activities; or
- d) the use or disposal of premises owned or controlled by the organisation.

Example:

An interfaith group bringing together Christians, Jews, Muslims, Sikhs and Hindus 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.

13.28

Similarly, it is not unlawful religion or belief or sexual orientation discrimination for a person to do any of the actions set out in paragraph 13.27 on behalf of or under the auspices of a religious or belief organisation provided that one of the statutory conditions in paragraph 13.25 or 13.26 is met.

13.29

Provided that one of the statutory conditions in paragraph 13.25 or 13.26 is met, it is not unlawful religion or belief or sexual orientation discrimination for a minister to restrict:

- a) participation in activities carried out in the performance of their functions as a minister connected with a religious organisation; or
- b) the provision of goods, facilities or services in the course of such activities.

For the purposes of this exception, the Act defines a minister as a minister of religion or other person who:

- a) performs functions in connection with the religion or belief of the organisation; and
- b) holds an office or appointment or is accredited, approved or recognised for the purposes of the organisation.

13.30

Sexual orientation discrimination remains unlawful where the religious or belief organisation has a contract with a public authority listed in Schedule 19 of the Act to provide a service or to carry out a public function on behalf of that authority.

Sch.23,
Para 2(5)

Sch.23,
Para 2(8)

Sch.23,
Para 2(10)

Example:

A local authority contracts out to a religious organisation the running of a parent and toddler group. The project includes building mutual support among the parents, involving open discussion at fortnightly meetings. A few parents say that they feel uncomfortable discussing personal matters with gay and lesbian parents. The organisation explains that as the council has contracted with them to provide this service they are not permitted to discriminate because of a parent's sexual orientation.

Charities**13.31**

s.193 & s.194

A charity will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charitable instrument that establishes or governs the 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.

13.32

s.194(2)

This exception does not apply if the group of people who are to receive benefits under the charitable instrument is defined by colour. If the charitable instrument enables benefits to be provided to a group of persons defined by colour then it has effect as if it enabled benefits to be provided:

- to other groups of persons if the group defined by colour is ignored; or
- to all persons generally, if the group of people to receive benefits is defined only by colour.

13.33

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 generally 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 be a charter, an Act of Parliament or other document or a combination of two or more documents.

13.34

Whether restricting the benefits of a charity to people who share a particular protected characteristic meets either of the Act's two tests in 13.31 is initially

a matter for the charity and its trustees to consider. Where the charity is challenged then this question will be decided by the courts.

13.35

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 on beneficiaries in the charitable instrument, and whether such restriction can be justified, in 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

13.36

What is required to show that a restriction is a proportionate means of achieving a legitimate aim is discussed in general terms at paragraphs 5.25 to 5.35. In the case of a charity with charitable status, the restriction would need to promote, or in any event not inhibit, the achievement of one of its stated aims. To be proportionate, the impact of the restriction in furthering the aim in question should be balanced against any adverse impact on the charity’s ability to fulfil its other aims and to meet the ‘public benefit’ test.

Preventing or compensating for disadvantage linked to the protected characteristic

13.37

To show that restricting its services or 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 5.10, disadvantage can include lack of opportunity, lack of choice, exclusion, rejection, 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:

If the selected group, for example, Gypsies and Travellers, is disadvantaged in terms of poor educational achievement, then depending on the provisions of its charitable instrument, the charity should be able to provide benefits to help overcome the disadvantage linked to their race. This might include financial resources for educational projects, supplementary educational facilities, training for teaching staff on the particular learning needs of this group, mentoring schemes, extra learning experiences outside of school hours or development work with parents and community leaders.

13.38

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 with the same 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 the selected group or groups.

13.39

Charities whose aims include provision of benefits only to persons who share a particular protected characteristic should keep their aims under review to ensure that the restrictions remain lawful under the Act.

Example:

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 come within either of the two tests under the Act, and if not they may need to apply to the charity regulator to amend their aims, for example, to replace 'sons' with 'children'.

13.40

s.193(5) & (6)

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. If a charity restricts access by members to a benefit, facility or service to those who make such a statement this is treated as imposing such a requirement.

Example:

The Scout Association, which is not a religious organisation, has always required children joining the Scouts to do their best to do their duty to God. This membership requirement, which excludes people with non-theist beliefs as well as those with no beliefs, is lawful under the Act.

Activity to support a charity

13.41

In relation to activities promoting or supporting a charity, the Act permits the restriction of participation in such an activity to persons of one sex, for example a women-only sponsored swim to raise money for a charity.

s.193(7)

Competitive sport

13.42

The Act includes two types of exceptions that may apply in relation to a competitive sport, game or other competitive activity.

s.195

Competitive sport – sex and gender reassignment

13.43

For sporting competitions where physical strength, stamina or physique are significant factors in determining success or failure, the Act permits separate events to be organised for men and for women.

s.195(1) – (4)

13.44

If the physical strength, stamina or physique of the average person of one sex would put them at a disadvantage compared to the average person of the other sex as competitors in a sport, game or other competitive activity, it is not unlawful for those arranging the event to restrict participation to persons of one sex.

13.45

The Act permits the organisers of such a sport, game or other competitive activity to restrict participation of a transsexual person in that activity but only if this is necessary in a particular case to secure fair competition or the safety of other competitors.

Exceptions

Example:

The organisers of a women's triathlon competition would need to consider whether a transsexual woman who wanted to participate would have an unfair competitive advantage or whether her participation would pose a risk to the safety of other competitors. Under the Act they would only be permitted to exclude her if they are satisfied that to do so is necessary to uphold fair competition or to ensure the safety of other competitors.

- 13.46
s.195(4) In considering whether separate events should be organised for boys and girls, the age and stage of development of the children competing in the activity should be taken into account.

Competitive sport – nationality, birthplace etc

- 13.47
s.195
(5) – (6) In selecting one or more persons to represent a country, place or area or a related association in a sport, game or other competitive activity, or in complying with eligibility rules for participation in that activity, it is lawful to do anything which is because of a person's nationality or place of birth or how long that person has lived in a particular area or place.

Services for particular groups

13.48
In a number of different situations it is lawful under the Act to restrict who may be provided with services on the basis of a protected characteristic.

13.49
As discussed in Chapter 10, under the Act's positive action provisions it may be lawful to provide separate services for people who share a protected characteristic, for a limited period where that is a proportionate means of encouraging or enabling them to overcome disadvantage, to increase their participation or to meet their particular needs.

13.50
In addition, the Act contains a number of specific exceptions discussed below which allow services to be provided separately for women and men, exclusively for women or exclusively for men, or only for persons who share a protected characteristic.

Separate services for women and men

13.51

The Act provides that it is not unlawful sex discrimination to provide separate services for each sex if:

- a) a joint service for persons of both sexes would be less effective; and
- b) the limited provision is a proportionate means of achieving a legitimate aim.

Example:

A charity sets up separate hostels for men and women experiencing domestic abuse. The hostels each provide the same level of service, but the charity believes a unisex hostel would be less effective.

Sch. 3,
Para 26(1)

13.52

The Act provides that it is not unlawful sex discrimination for a service provider to provide separate services for each sex in a different way, if:

- a) a joint service for persons of both sexes would be less effective;
- b) 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
- c) the limited provision is a proportionate means of achieving a legitimate aim.

Sch.3,
Para 26(2)

13.53

The prohibition of sex discrimination similarly does not apply when a person exercising public functions does anything in relation to the provision of separate services for women and men subject to the above conditions. This could include, for example, approving a planning application that would enable modification of premises to provide separate services for women and men.

Single-sex only services

13.54

The Act provides that the prohibition of sex discrimination does not apply where services are provided exclusively to one sex, as long as to do so is a proportionate means of achieving a legitimate aim, and at least one of the conditions set out below applies:

- a) Only people of that sex need the service.

Sch. 3,
Para 27

Exceptions

Example:

Post-natal exercise classes can be provided to women only, since only women need the service.

- b) Where the service is also provided jointly for both sexes, an additional service exclusively for one sex will be lawful if the joint provision would not be sufficiently effective.

Example:

A new fathers' support group is provided by a health authority as there is insufficient attendance by men at the new parents' support group.

Example:

If women of a particular religion or belief will not use the local swimming pool at the same time as men, women-only swimming sessions could be provided as well as mainly mixed sessions.

- c) If a service was provided for men and women jointly it would not be as effective and the level of need for the services makes it not reasonably practicable to provide separate services for each sex.

Example:

A women-only support unit for women who have experienced domestic or sexual violence can be set up, even if there is no parallel men-only unit because of insufficient demand.

- d) The service is provided at a hospital or other place where users need special care, supervision or attention.

Example:

Single-sex wards in hospitals and nursing homes and single-sex facilities in mental health facilities.

- e) 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).

Example:

Separate male and female changing rooms or any service involving intimate personal health or hygiene.

- f) The service is likely to involve physical contact between the service user and another person and that other person might reasonably object if the user is of the opposite sex.

Example:

Sports sessions involving a high degree of physical contact such as judo or self-defence classes.

13.55

The objections in (e) and (f) must be ‘reasonable’. So a low degree of physical contact is unlikely to justify separate provision in relation to (f), for instance. For example, the fact that in first aid training there may be some physical contact between women and men in the classes is unlikely to warrant the provision of single-sex sessions.

13.56

Similarly, where a person exercising public functions does anything in relation to the provision of single-sex services this will be lawful provided that one of the above conditions is met, and that such provision is a proportionate means of achieving a legitimate aim. This could include a local authority allocating funding for a single-sex service or a primary care trust contracting with a voluntary sector organisation to provide counselling for women who have had a mastectomy.

Gender reassignment discrimination and separate and single-sex services

13.57

If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate.

Sch. 3,
Para 28

13.58

The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex which are otherwise provided only to people of that sex. For example, a transsexual man may need access to breast screening or gynaecological services. In order to protect the privacy of all users, it is recommended that the service provider

Exceptions

should discuss with any transsexual service users the best way to enable them to have access to the service.

Example:

A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles.

13.59

Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.

13.60

As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances. A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available.

Communal accommodation**13.61**

Sch. 23,
Para 3 A service provider, a person exercising public functions or an association does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting persons to communal accommodation, or providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied.

13.62

‘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. It can also include shared sleeping accommodation for men and for women, ordinary sleeping accommodation and residential accommodation, all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

13.63

A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation.

13.64

This exception will not apply to admitting persons to communal accommodation unless the accommodation is managed in a way which is as fair as possible to both women and men.

13.65

In excluding a person because of sex or gender reassignment, the service provider must take account of:

- 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.

13.66

The Act permits a service provider to exclude a person who is proposing to undergo, is undergoing or who has undergone gender reassignment from communal accommodation. However, this will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim.

13.67

As discussed above in relation to separate services and single sex services, this must be considered on a case by case basis. In each case, the provider of communal accommodation must assess whether it is proportionate to exclude the transsexual person. The matters which a provider of communal accommodation should consider are similar to those set out in paragraphs

Exceptions

Separate or single-sex services relating to religion

13.68

Sch. 3,
Para 29 It is permissible for a minister of religion to provide separate or single-sex services if:

- the service is provided for the purposes of an organised religion;
- it is provided at a place which is (permanently or for the time being) used for those purposes; and
- the limited provision of the service is necessary in order to comply with the doctrines of the religion or for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.

13.69

Acts of worship do not themselves constitute 'services' within the meaning of the Act. 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, or is accredited, approved or recognised for the purposes of, a relevant organisation in relation to a religion.

Example:

A synagogue can have separate seating for men and women at a reception following a religious service.

Services restricted to persons with a shared protected characteristic

13.70

Sch. 3,
Para 30 If a service is generally provided only for people who have the same protected characteristic (such as gay men and lesbians or people of a particular ethnicity) a service provider who normally provides the service for members of that group does not breach the Act by continuing to provide the service in this way. The service provider also does not breach the Act by refusing to provide the service to people who are not members of that group but only if the service provider reasonably thinks that it is impracticable to do so.

13.71

This provision does not mean that where 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 that it is not unlawful

for a service provider who normally provides a service only for such people to continue to do so.

Pregnant women – health and safety

13.72

The Act provides that it is not unlawful to refuse a service to a pregnant woman, or to provide it only on certain conditions, if the service provider:

- a) reasonably believes that providing the service would create a risk to the woman's health or safety because she is pregnant; and
- b) would 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.

Sch. 3,
Para 14

Example:

The proprietor of a fairground ride displays a notice which states that the ride is unsuitable for people with back injuries. A refusal to allow a pregnant woman to go on the ride is likely to be permitted by this exception.

13.73

Similarly, an association may, in order to remove or reduce a risk to a pregnant woman's health or safety:

Sch. 16,
Para 2

- apply different terms for admission of a pregnant woman as a member or associate or to be invited as a guest;
- provide a pregnant member, associate or guest access to a benefit, facility or service in a different way;
- refuse to provide a pregnant woman with access to a benefit, facility or service; or
- vary the terms of membership of a pregnant member or vary the rights of a pregnant associate, (but they cannot refuse membership to a pregnant woman).

13.74

Such actions are only permitted if the association reasonably believes that the action is necessary to reduce, remove or avoid a risk to the pregnant woman's health and safety, and that association would take equivalent measures in relation to people with other physical conditions because of a reasonable belief that they are necessary for the health or safety of such persons.

Example:

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 restrict use of some equipment by pregnant members, associates or guests during the last three months of their pregnancy. Providing the club reasonably believes the restrictions are necessary to ensure the health or safety of members with the specified conditions and the health and safety of women who are over six months pregnant, the club's treatment of pregnant members and guests is likely to come within this exception.

Insurance**13.75**

Sch. 3
Part 5
Sch. 3,
Para 21 & 22

In some circumstances, the fact that a person is disabled, or of a particular sex, may be used as a factor in deciding whether to provide insurance services to that person and, if so, on what terms. Gender reassignment and pregnancy and maternity may also be treated as relevant considerations. The Act specifies the circumstances and prescribes the conditions that must be met if differential treatment in providing insurance services is permitted.

Disability**13.76**

Sch. 3,
Para 21

The prohibition against disability discrimination in the provision of services does not apply to anything which is done in connection with insurance business if:

- a) it is done by reference to information which is both relevant to the assessment of the risk to be insured and from a source on which it is reasonable to rely, and
- b) it is reasonable to do.

13.77

'Insurance business' means business consisting of effecting or carrying out contracts of insurance.⁶

⁶ Read with the s.22 and Schedule 2 Financial Services and Markets Act 2000 and any relevant order under that Act: 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.

This exception permits anyone involved in ‘insurance business’ to discriminate against a disabled person in any aspect of selling insurance or writing the terms on which a disabled person can be insured against certain risks, provided such treatment is reasonable and based on relevant, current information from a reliable source.

13.78

Information which might be relevant to the assessment of the risk to be insured includes actuarial or statistical data or a medical report. An insurer cannot rely on untested assumptions or stereotypes or generalisations in respect of a disabled person.

13.79

An insurer is prohibited from adopting a general policy or practice of refusing to insure disabled people or people with particular disabilities. It is also unlawful to have a policy or practice of only offering insurance to disabled people or people with particular disabilities on additional or adverse terms or conditions.

Example:

A disabled man with HIV+ applies to a motor insurer for comprehensive insurance on his motor car. In 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.

Sex, gender reassignment, pregnancy and maternity and insurance

13.80

The prohibition of sex discrimination, gender reassignment discrimination and pregnancy and maternity discrimination in the provision of services does not apply to anything done in relation to an annuity, life insurance or accident insurance policies or similar matter involving assessment of risk if:

- a) it is done by reference to information that is relevant to the assessment of the risk to be insured and from a source on which it is reasonable to rely, and
- b) it is reasonable to do.

13.81

For a contract of insurance, or a contract for related financial services entered into before 6 April 2008, this exception subject to the conditions

Sch. 3,
Para 22(1)

Sch. 3,
Para 22(2)

in paragraph 13.80 applies only to differences in premiums or benefits that would apply to the person under the contract.

13.82

While other factors such as age, health, occupation and recent history will also be taken into account depending on the type of insurance, this exception would permit differential premiums and benefits because of sex, gender reassignment and pregnancy and maternity provided these are reasonable and based on relevant, current actuarial or other data from a reliable source.

13.83

Sch. 3,
Para 22(3) For a contract of insurance or a contract for related financial services entered into on or after 6 April 2008, the exception in paragraph 13.80 is subject to additional and more rigorous conditions. In particular, the prohibition of sex, gender reassignment and pregnancy and maternity discrimination, in the provision of services will not apply to differences in premiums and benefits only if:

- a) the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data;
- b) the data are compiled, published (whether in full or in summary) and regularly updated in accordance with guidance issued by the Treasury;
- c) the differences are proportionate having regard to the data; and
- d) for any contract of insurance entered into, on or after 22 December 2008, the differences do not result from costs related to pregnancy or to a woman having given birth in the 26 weeks prior to the action in question.

Example:

A woman challenged an insurance company that required her to pay higher travel insurance premiums while pregnant. The insurance company has not published up-to-date reliable statistical or actuarial data based on Treasury guidance showing greater insurance risk because of pregnancy, so this higher premium is likely to be unlawful and not covered by the exception.

13.84

The exceptions in 13.80 and 13.83 do not permit sex discrimination, gender reassignment discrimination or pregnancy and maternity discrimination in the provision of other financial services not related to insurance, for example, banking services, loans from a bank or other body or mortgages. These services must be provided without any form of discrimination unless other exceptions apply to particular cases.

These exceptions permit differences only in insurance premiums and benefits. They do not permit sex discrimination, gender reassignment discrimination or pregnancy and maternity discrimination by those involved in advertising, selling, carrying out contracts of insurance or in the way they provide their services, for example, refusing to provide services or imposing different requirements including timing and form of payments (see paragraph 11.18).

s.29

13.85

For a contract of insurance or a contract for related financial services entered into on or after 6 April 2008, in relation to gender reassignment discrimination the Act permits differential premiums or benefits between a transsexual person and a non-transsexual person of the same sex. To rely on this exception, insurers must calculate premiums and benefits based on the sex of the person seeking the service.

Sch. 3,
Para 22(5)

13.86

The permitted discrimination in the case of a transsexual person who has a gender recognition certificate is between the transsexual person and another person who has their acquired sex. If a transsexual person does not have a gender recognition certificate their sex is their birth sex and the permitted discrimination is between the transsexual person and a person who has their birth sex.

Existing insurance policies

13.87

The Act also contains an exception for insurance policies which came into existence before Schedule 3 paragraph 22 came into force. This exception applies to:

Sch. 3,
Para 23

- disability discrimination;
- gender reassignment discrimination;
- pregnancy and maternity discrimination;
- race discrimination;
- religious or belief-related discrimination;
- sex discrimination, and
- sexual orientation discrimination.

13.88

It will not be unlawful discrimination under the Act to do anything in connection with insurance business in relation to an existing insurance policy.

Exceptions

13.89

Insurance policies in existence before Schedule 3 paragraph 23 came into force may continue without need for change until they are renewed or have their terms reviewed on or after that date when this exception will cease to apply, and any discrimination will only be lawful if the relevant conditions set out in paragraphs 13.75 to 13.86 above are met.

Financial services arranged by an employer

13.90

Sch. 3,
Para 20 The prohibition of discrimination in providing services does not apply where, pursuant to an arrangement with an employer, a service provider provides any of the following financial services to the employer's employees:

- a) insurance or a related financial service; or
- b) a service relating to membership of or benefits under a personal pension scheme.

Discrimination which occurs in the provision of such services arranged by the employer would remain the liability of the employer.

Immigration

13.91

Sch. 3,
Part 4 The Act includes exceptions that apply to:

- disability discrimination;
- race discrimination (relating to nationality and ethnic or national origins only); and
- religion or belief discrimination,

and which permit certain immigration decisions to be made and certain potentially discriminatory immigration functions to be carried out without breaching the discrimination provisions in the Act. These exceptions do not, however, permit harassment or victimisation contrary to the Act.

13.92

Different conditions apply for each of the types of discrimination.

Disability

13.93

Sch. 3,
Para 16 The prohibition of disability discrimination in the provision of services or the exercise of public functions does not apply to any of the following decisions

or anything done for the purpose of or in pursuance of any such decision, provided such decision is necessary for the public good:

- a) to refuse entry clearance;
- b) to refuse leave to enter or remain in the UK;
- c) to cancel leave to enter or remain in the UK;
- d) to vary leave to enter or remain in the UK; and
- e) to refuse an application to vary leave to enter or remain in the UK.

13.94

The prohibition of disability discrimination also does not apply to a decision or guidance by the Secretary of State or a decision taken in accordance with guidance by the Secretary of State where the decision or guidance is in connection with a decision in (a) to (e) above.

Example:

A man who entered the UK as a student from Australia suffers from severe paranoid schizophrenia. Following his violent assaults on several people involved in his care the Secretary of State decided to cancel his leave to enter or remain on the ground that this is necessary for the public good.

Nationality and ethnic or national origins

13.95

The prohibition of race discrimination (as it relates to nationality and ethnic or national origins only) in the provision of services and the exercise of public functions does not apply to anything done by:

- a Minister of the Crown acting personally; or
- a person acting in accordance with a relevant authorisation,

in the exercise of functions that are exercisable under a relevant enactment.

13.96

The 'relevant enactments' are:

- the Immigration Acts (excluding provisions⁷ which provide powers of arrest, entry and search etc);
- the Special Immigration Appeals Commission Act 1997;

Sch. 3,
Para 17

⁷ 'Sections 28A to 28K, Immigration Act 1971 and section 14, Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

- a provision in UK law made under s.2(2) European Communities Act 1972 giving effect to a provision of European Union law relating to immigration or asylum; and
- a provision of European Union law which relates to immigration or asylum.

13.97

A 'relevant authorisation' is a requirement imposed or an express authorisation given with respect to a particular case or class of case: (a) by a Minister of the Crown acting personally or (b) by a relevant enactment or an instrument made under or by virtue of a relevant enactment.

Example:

Immigration officers carrying out their functions in relation to the examination of passengers entering the UK would be acting lawfully under the Act if they had been authorised by a Minister to subject people of a particular nationality to more rigorous examination and they acted in accordance with this authorisation. A person who because of their nationality was singled out for such examination would not be able to bring a successful claim for race (nationality) discrimination.

Religion or belief

13.98

Sch. 3,
Para 18 The prohibition of religion or belief discrimination in the provision of services or exercise of public functions does not apply in relation to certain decisions relating to immigration control or anything done for the purpose of or in pursuance of such decisions.

13.99

This exception from protection against religion or belief discrimination applies to a decision, taken in accordance with the immigration rules, or anything done for the purpose of or in pursuance of a decision:

- a) 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, or
- b) 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.

13.100

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, where the decision is taken on grounds that:

- a) the person holds an office or post or provides a service in connection with a religion or belief;
- b) that one religion or belief is to be treated differently from others, or
- c) that 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.

13.101

This exception applies to a decision taken, or guidance given, by the Secretary of State in connection with either of the above decisions at paragraphs 13.99 and 13.100.

Care within the family**13.102**

The prohibition of discrimination under the Act does not apply where a person takes another person with any protected characteristic who needs particular care and attention into their home and treats that person as a member of their family. This exception applies whether the person providing care in their family, for example, fostering, is paid for doing so or not.

Sch. 3,
Para 15

Blood services**13.103**

Under the Act it is not unlawful 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. Discrimination in refusing blood donation (because of any of the protected characteristics covered by the services provisions) is permitted only where:

Sch. 3,
Para 13

- a) 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
- b) the refusal is reasonable.

Exceptions for certain transport services in relation to disability discrimination

13.104

Sch. 3 Part 9 The Act excludes from the prohibition of disability discrimination in the provision of services all services involving transport by air or transport by land except where designated types of vehicles are used for transport by land. The excluded transport services are set out in Chapter 11 (Services and Public Functions).

Exception for television, radio and online broadcasting and distribution

13.105

Sch. 3, Para 31(1) It is not unlawful under the Act to do anything in relation to the provision of a content service, as defined in s.32(7) of the Communications Act 2003.⁸ This includes editorial decisions on the content of a television programme or the distribution of online content. Such decisions could include which programmes to commission, scheduling of programmes or who should take part in a particular programme.

13.106

Sch.3, Para 31 (2) The above exception does not apply to the provision of an electronic communications network, electronic communications service or associated facility as defined in s.32 of the Communications Act 2003. This means that the prohibition of discrimination, harassment and victimisation under the Act applies to the sending of signals, and it is only the content of what is broadcast that is excluded.

Example:

If a broadcasting company 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 a protected characteristic or victimisation they could bring a claim against the broadcasting company. They could not, however, bring a claim of discrimination, harassment or victimisation against a broadcasting company because of a decision regarding who should appear in a particular programme or on which day that programme should be transmitted.

⁸ 'A content service' means so much of any service as consists in one or both of the following: (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network; (b) the exercise of editorial control over the contents of signals conveyed by means of such a network.

Exceptions for services provided by Information Society Service Providers

13.107

An information Society Services Provider (ISSP), is a service provider which provides services through a website. The Act applies to an ISSP which is established in Great Britain even if it provides services in another country in the European Economic Area (other than the United Kingdom) with the following exceptions:

Sch. 25

- Where the ISSP is a mere conduit, not initiating the transmission, selecting the recipient or selecting or modifying the information in the transmission and the information is not held by the conduit longer than is necessary.

Sch. 25,
Para 3

Example:

An ISSP, via its network, delivers e-mail traffic from a health club based in England to potential customers in Spain offering a discount for a spa weekend for couples. The offer only applies to mixed sex couples. The ISSP by delivering the e-mail will not be liable under the Act as long as the conditions above are met.

- Where the ISSP provides automatic, intermediate and temporary storage of information enabling future request for that information to be served faster ('caching'), not modifying the information and complying with any conditions of access to the information. This exception only applies if the ISSP expeditiously removes or disables the information as soon as the ISSP is aware that the information has been removed from the network at the initial source of the transmission, or that access to it has been disabled or a court or administrative authority has required it to be removed from the network the ISSP removes the information.
- Caching refers to the strategy of an ISSP of keeping a copy of a page or image an internet web user has already seen. The copy is then displayed for the web user rather than always downloading the entire file each time the web user subsequently refers to the same page or image. This speeds up the web user's next visit to the internet page.

Sch. 25,
Para 4

Example:

A restaurant based in Wales advertises services on the web for potential customers in Spain and the ISSP caches files for web users. The web page makes clear the restaurant will not take bookings from groups consisting of all males. The ISSP will be able to rely on this exception if all the conditions above are met.

- Sch. 25,
Para 5
- or where the ISSP stores information provided by a service recipient ('hosting'), and the ISSP had no actual knowledge when the information was provided that its provision amounted to a contravention of the Act, or when they actually knew the provision of the information was a contravention of the Act, the ISSP expeditiously removed the information or disabled access to it.
 - Hosting is a service provided by an ISSP which offers a physical location for the storage of web pages and files which can be viewed on the internet.

Example:

An ISSP offers subscribers free space for a small web site that is hosted by one of their computers. The web site advertises a hotel based in England which offers hotel accommodation services to potential customers in France. The hotel's web page provides it will not take bookings from gay couples. The ISSP will be able to rely on this exception as long as the conditions above are satisfied.

Exceptions relating to the scope of public functions under Part 3 of the Act

13.108

- Sch. 3,
Part 1
- The Act excludes certain activities, certain public authorities and certain types of functions from the prohibition of discrimination, harassment and victimisation in the exercise of public functions. These are set out in Chapter 11 Services and Public Functions.

Exceptions relating to gender reassignment and the solemnising of marriage

13.109

- Sch.3,
Part 6
- The Act contains specific exceptions which apply to those who have an obligation or are authorised to solemnise marriage enabling them to refuse to solemnise a marriage in which they reasonably believe that one of the people to be married has undergone gender reassignment.

13.110

These exceptions do not change the entitlement of a person with a full gender recognition certificate to be issued with a new birth certificate showing their acquired sex and to marry someone of the opposite sex to their acquired sex. The exceptions are intended to remove any obligation on those who solemnise marriages to act against their personal religious conviction.

13.111

In England and Wales:

- Clergy of the Church of England and the Church in Wales do not breach the Act by refusing to solemnise a marriage in which they reasonably believe that one of the people to be married has undergone gender reassignment, as provided in section 5B of the Marriage Act 1949.
- Another person authorised by the Marriages Act 1949 to solemnise religious marriages does not breach the Act if they refuse to solemnise a marriage in which they reasonably believe that one of the people to be married has undergone gender reassignment.

Sch. 3,
Para 24

13.112

In Scotland:

- A minister, clergyman, pastor, priest or any other person recognised by a religious body and entitled to solemnise a religious marriage does not breach the Act by refusing to solemnise a marriage in which they reasonably believe that one of the people to be married has undergone gender reassignment.

Sch.3,
Para 25

Chapter 14: Enforcement

Introduction

s.113-119 & s.136-144 **14.1** This chapter gives an overview of enforcement by the civil courts in England, Wales and Scotland of Part 3 of the Act (which applies to services and public functions) and Part 7 (which applies to associations).

14.2 This chapter is not intended to be a procedural guide to presenting a claim to the civil courts. In this chapter ‘civil courts’ means the county courts of England and Wales and the sheriff court in Scotland unless the contrary is indicated. The civil courts procedure is contained in the Civil Procedure Rules 1998 in England and Wales and in the Sheriff Court the Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules.

14.3 As explained in paragraph 1.23, the term ‘service provider’ and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Code.

14.4 In this chapter, a person who brings proceedings is known as the claimant in England and Wales and the pursuer in Scotland; a person against whom proceedings are brought is known as the defendant in England and Wales and the defender in Scotland

What unlawful acts can be remedied by the civil courts under the Act?

14.5

The unlawful acts that the civil courts can remedy include:

- Direct discrimination;
- Indirect discrimination;
- Discrimination arising from disability;
- Pregnancy and maternity discrimination;
- Failure to make reasonable adjustments for disabled persons;
- Harassment; and
- Victimisation.

14.6

These provisions are explained in Chapters 4, 5, 6, 7, 8 and 9. Also, claims brought against those who instruct, cause, induce or aid these unlawful acts may be brought in the civil courts. These terms are explained in Chapter 9. For brevity these will all be referred to as ‘unlawful acts’.

s. 114(1)

14.7

A person who believes that a service provider has done an unlawful act against them may bring civil proceedings. Those proceedings take place in the county court in England and Wales and the sheriff court in Scotland (‘the civil court’).

14.8

If a person thinks they may have a claim against a service provider, before they start proceedings it may be helpful to question the service provider (see obtaining information paragraph 14.27).

s.138

14.9

Before starting proceedings, a person should also ensure that the relevant provisions of the civil courts’ rules are observed.

Conciliation

14.10

Where a person thinks that a service provider has acted unlawfully towards them, before taking the complaint further it may be appropriate to see whether it can be resolved directly with the service provider, for example, by using a complaints procedure. However, if that does not succeed in dealing with the problem, then it may be sensible to see whether the dispute can be resolved without recourse to the courts.

14.11

Equality Act 2006 s.27 The Commission has power to make arrangements to assist with this process by providing conciliation services. The Commission does not have powers to organise other forms of alternative dispute resolution.

Civil courts

14.12

If a dispute cannot be resolved by conciliation or agreement, and the person brings proceedings, the matter will have to be decided by a court.

14.13

s.114(4)(b) The Act allows the civil courts to hear cases concerning unlawful acts in the provision of services; the exercise of public functions; the disposal and management of premises; and in relation to associations.

Assessors in cases under the Act

14.14

s.114(7) & (8) In cases about unlawful acts a judge or sheriff (in Scotland) will usually have to appoint an 'assessor' to assist him or her. 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.

14.15

It would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings.

A party to proceedings can object in writing to the court about the appointment of an assessor.

The remedies which the civil courts can grant are dealt with in paragraphs 14.50 to 14.59 below.

Time limits

14.16

Court action must be started within six months (minus a day) of the alleged unlawful act. s.118

14.17

If the proceedings are not brought within that period the court still has discretion to hear the proceedings, if it thinks it is just and equitable to do so.

14.18

Where the Commission uses its powers to make arrangements for conciliation of a dispute, the period within which the claim may be brought is nine months, or such longer period as the court or sheriff thinks is just and equitable. s.118(4)

When does the period for bringing the claim start?

14.19

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 or the date on which the claimant becomes aware that an unlawful act occurred. For example, the date when a person was refused entry to their shop on an unlawful basis.

14.20

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. In the absence of evidence to the contrary, a person is treated as deciding not to do a thing:

- a) when they do an act inconsistent with doing the thing;
 - b) if they do not carry out an inconsistent act, on the expiry of the period in which they might reasonably have been expected to do the thing.
- s.118(6) & (7)

s.118(6)(a) **14.21** In addition, the Act recognises 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 act of discrimination occurred.

14.22 If a service user has a policy, rule or practice, (whether formal or informal) in accordance with which decisions are taken from time to time, this might constitute an 'act extended over a period'. So if a service provider maintains an unlawful policy which results in a person being discriminated against on a continuing basis or on many occasions, the period for bringing a claim starts when the last act of discrimination occurred, or when the policy, rule or practice is removed.

14.23 For these purposes, a continuing state of affairs may constitute an act extended over a period. This means that even if the individual acts relied upon are done by different persons and are done at different places, they may be treated as a single act extending over a period. However, a single unlawful act which has continuing consequences will not extend the time period.

Example:

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 of these instances as part of a continuing state of affairs resulting in the gay man being treated less favourably than others. He may 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.

What happens if the claim is presented outside the correct time limit?

s.118(1)(b) **14.24** Where a claim is brought outside the time limits referred to above, the courts have discretion to hear the case if satisfied that it is just and equitable to do so.

14.25

In exercising their discretion, the courts will consider the prejudice which each party would suffer as a result of the decision to extend the time limit. This means the court will consider what impact hearing the case out of time would have on the defendant or defender and the claimant or pursuer.

14.26

When a court considers whether to exercise its 'just and equitable' discretion, it will have regard to all the circumstances of the case including in particular:

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected;
- the extent to which the defendant or defender had cooperated with any requests for information;
- the promptness with which the claimant or pursuer acted once they knew of the facts giving rise to the claim; and
- the steps taken by that person to obtain appropriate legal advice once they knew of the possibility of taking action.

The procedure for obtaining information

14.27

Before starting proceedings, it may be helpful to the person considering bringing proceedings to obtain information from the service provider, to help them decide if they have a valid claim or not. Any person who thinks that they were the subject of an unlawful act may request information from the person they think is responsible. This is known as the procedure for obtaining information and it is additional to other means of obtaining information under the courts' rules.

s.138

14.28

There are standard forms for asking and answering questions, as well as guidance which explains how the process works. However the standard forms do not have to be used to present questions or answers.

14.29

The questions procedure is a way for service users to obtain information when they believe they have been subjected to conduct which is unlawful under the Act but do not have sufficient evidence to be sure. It could also assist the service user in their decision about how to proceed with the complaint.

Example:

An atheist man suspects that he was not accepted as a member of a lawyers' association because of his belief. Using the questions form, he could request information from the association about their decision, which could support or dispel his suspicion.

14.30

s.138(3) The questions and answers are admissible in evidence in court proceedings.

14.31

s.138(4) The recipient of the questions is not obliged to answer the questions.

s.138(5) However, if they fail to answer within eight weeks (starting on the day the questions are received), or if they give equivocal or evasive replies, then the court may draw an inference from that, which could be an inference of discrimination. A court cannot however draw an inference from a failure to answer questions if the answers might prejudice a criminal matter or in other circumstances specified in legislation.

Burden of proof**14.32**

s.136 A claimant or pursuer alleging they have experienced an unlawful act must prove facts from which a court could decide or draw an inference that such an act has occurred.

14.33

A court will hear all of the evidence from the claimant (or pursuer) and the defendant (or defender) before deciding whether the burden of proof has shifted to the defendant.

14.34

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. 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's explanation is inadequate or unsatisfactory, the court must find that the act was unlawful.

Example:

A person who is of Irish Traveller ethnicity seeks to hire a hall for a function. The owner is at first willing, but on learning of their ethnicity becomes unwilling to hire. The person can show that the owner was willing to hire to another person who is of a different ethnicity. The owner of the hall must provide an explanation of the refusal to hire the hall to the person which shows that race did not form any part of the decision, if the owner is to avoid a finding of direct race discrimination.

14.35

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.

14.36

The above rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence

Settling complaints without recourse to the court

14.37

Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the civil courts. An agreement of this nature can include any terms the parties agree to and can cover compensation, future actions by the defendant or defender, costs and other lawful matters.

Use of judicial review

14.38

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.

14.39

A claim for judicial review will be appropriate where the person bringing it wants to quash (remove) an administrative decision of a public authority.

14.40

In England and Wales a person who brings a claim for judicial review must obtain permission from the High Court. 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. The court will expect any appeal mechanisms against the decision to have been exhausted before granting permission for judicial review, which is a remedy of last resort.

14.41

In Scotland the person bringing a judicial review petition does not need to seek permission. While there is no formal time limit, the petition must be raised without undue delay.

Immigration cases**14.42**

Complaints about unlawful acts relating to certain decisions under the relevant immigration provisions by the Secretary of State, or by an immigration officer or an official responsible for granting entry clearance (referred to as ‘immigration authorities’) are heard by the First-tier Tribunal dealing with appeals against immigration decisions.

s.115
The Special
Immigration
appeals
Commission
Act 1997/Part
5 Nationality
Immigration
& Asylum Act
2002

14.43

The First-tier Tribunal can determine whether an unlawful act under the Act has taken place but they do not have jurisdiction to award compensation. If they find 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.

14.44

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.

14.45

There are special time limits for claims about discrimination in the context of immigration decisions in the civil courts. During the period that an appeal against the immigration decision is possible, it is not possible in the First-tier Tribunal to bring a claim for discrimination before 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 before the civil courts.

s.118(5)

National security**14.46**

The Act includes the possibility of special rules being applied to proceedings for the purpose of safeguarding national security (see paragraph 13.17).

s.117

14.47

The rules of the courts may allow the courts to exclude from all or part of the proceedings the claimant or pursuer, where the court considers it expedient in the interests of national security. Their representative may be excluded, and the court may also exclude the assessor in the case.

14.48

The claimant, pursuer or representative who has been excluded may make a statement to the court before the exclusive part of the proceedings starts. The court may take steps to keep secret all or part of the reasons for its decision.

14.49

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 these proceedings. However, that representative is not responsible to the person whose interests they are appointed to represent.

Remedies**14.50**

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 or in a claim for judicial review.

s.119(2)

s.119(3) **14.51** Likewise, 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 on a petition for judicial review.

These remedies include:

- a declaration of the rights and responsibilities of the parties to the claim;
- an injunction or interdict to prevent the person defending the claim from repeating any unlawful act in the future;
- quashing orders by which the court can set aside an administrative decision or action of a public authority;
- damages to compensate for any loss suffered by the person bringing the claim;
- interest on damages; and
- costs.

14.52

Special rules apply where it is alleged that an injunction might prejudice a criminal case (see paragraph 14.59).

Damages

14.53

s.119(4) Damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

14.54

An award of damages can include any loss the claimant or pursuer has suffered. In England and Wales the award can include aggravated damages which may be awarded when the person committing the unlawful act has behaved in a high-handed, malicious, insulting or oppressive manner in doing so. These damages are additional compensation for injured feelings.

14.55

In England and Wales where a public authority acts unlawfully under the Act, the courts may, very occasionally, award 'exemplary' damages. At the court's discretion, these may be awarded for oppressive, arbitrary or unconstitutional action by servants of the government.

14.56

'Exemplary damages' may also be awarded where the defendant's conduct has been calculated by them to make a profit for themselves. Exemplary damages may well exceed the compensation to the claimant. However these damages are not available in Scotland.

Damages for complaints of indirect discrimination**14.57**

Where the 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, it must not award damages unless it first considers whether to dispose of the case by providing another remedy, such as a declaration or injunction. If the court considers that another remedy is not appropriate in the circumstances, it may make an award of damages.

s.119(5) & (6)

14.58

Indirect discrimination will be intentional where the defendant (or defender) 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**14.59**

The court must not grant an interim injunction or interdict unless satisfied that no criminal matter would be prejudiced by doing so.

The Commission**14.60**

In addition to the rights given to the individual under the Act, the Commission has a power to apply to the court if it thinks that a person is likely to commit an unlawful act for an injunction (interdict in Scotland) to prohibit them from committing that act.

Equality Act
2006 s.24

14.61

Equality Act 2006 s. 24A The Commission has power to take action even if no identifiable individual has been (or may be) affected by the unlawful act. It can take action in respect of arrangements which would, if they were ever applied to an individual, amount to an unlawful act, for example, to deal with the publication of an advertisement which suggests that a service provider would discriminate. This power could also be used to challenge a provision, criterion or practice that indirectly discriminates, even if it has not yet put any particular person at a disadvantage.

14.62

Equality Act 2006, s 34, s.20, 21, 22 s. 2 If the Commission suspects that a service provider has committed an unlawful act, it can conduct an investigation. If it finds that the service provider has done so, it can serve a notice requiring them to prepare an action plan to avoid repetition or continuation of that act or recommend that they take action for that purpose.

14.63

Equality Act 2006 s. 23 The Commission may also, if it suspects that a service provider is committing an unlawful act, enter into a binding agreement with the service provider to avoid such contraventions.

14.64

Equality Act 2006 s. 28, The Commission also has a power to assist a service user who is taking enforcement action against a provider.

Appendix

The meaning of disability

1.

This Appendix is included to aid understanding about who is covered by the Act. Government Guidance is also available [reference].

When is a person disabled?

2.

A person has a disability if he has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

However, special rules apply to people with some conditions such as progressive conditions (see paragraph 15) and some people are automatically deemed disabled for the purposes of the Act (see paragraph 14).

What about people who have recovered from a disability?

3.

People who have had a disability within the definition are protected from discrimination 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).

What does 'impairment' cover?

4.

It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

5.

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

What if a person has no medical diagnosis?

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.

What is a 'substantial' adverse effect?

7.

s.212 A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

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.

What is a 'long-term' effect?

8.

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.

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.

What if the effects come and go over a period of time?

9.

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

What are 'normal day-to-day activities'?

10.

They are activities which are carried out by most men or most women on a fairly regular and frequent basis. 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, or performing a skilled or specialised task at work. However, someone who is affected in such a specialized way but is also affected in normal day-to-day activities would be covered by this part of the definition.

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 one's self. Normal day to day activities also encompass the activities which are relevant to working life.

What about treatment?

11.

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).

Does this include people who wear spectacles?

12.

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

13.

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.

Are there any other people who are automatically treated as disabled under the Act?

14.

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act.

What about people who know their condition is going to get worse over time?

15.

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition.

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Contacts

England

Equality and Human Rights Commission Helpline
FREEPOST RRLG-GHUX-CTR
Arndale House, Arndale Centre, Manchester M4 3AQ

Main number 0845 604 6610

Textphone 0845 604 6620

Fax 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline
FREEPOST RSAB-YJEJ-EXUJ
The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Main number 0845 604 5510

Textphone 0845 604 5520

Fax 0845 604 5530

Wales

Equality and Human Rights Commission Helpline
FREEPOST RRLR-UEYB-UYZL
3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Main number 0845 604 8810

Textphone 0845 604 8820

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