

Please note: this is draft for consultation and should not be taken as final text

The Equality and Human Rights Commission

Services, public functions and associations

Statutory Code of Practice

Draft for Consultation

This draft code is based on the Equality Bill as printed on 3 December 2009 (introduced into the House of Lords on 4th December 2009).

Please note: this is draft for consultation and should not be taken as final text

Foreword

The new Equality Bill is the most significant piece of equality legislation for a generation. It will simplify, streamline and strengthen the law. It will give individuals greater protection from unfair discrimination. It will make it easier for employers and companies to understand their responsibilities. And it will set a new standard for public services to treat everyone, no matter what their background or personal circumstances, with dignity and respect.

As I write, the Bill is before parliament. We in the Equality and Human Rights Commission hope to see it on the statute book in a matter of months. Our biggest priority, in the short term, is to do what we can to help make that happen.

The point of legislation, however, is not to put ink on vellum. If the Bill is to fulfil its potential, it needs to be translated into practical change in the way companies act, the way public authorities plan and deliver services, the opportunities each of us enjoys in our everyday life.

As the statutory champion for fairness, the Equality and Human Rights Commission monitors compliance with the law, enforcing and litigating where necessary. But our role is not limited to picking up the pieces when things go wrong. First and foremost we aim to provide information, support and encouragement so that organisations can get things right.

The Commission places great importance on illuminating the Equality Bill. It is our job to help individuals understand and assert their rights, and to help organisations (both public and private) understand what legislative change means for them. With some elements of the law possibly coming into force as early as October 2010, there is no time to lose. That is why we are planning to publish two significant documents before the legislation comes into effect.

The first is a set of statutory codes, setting out clearly and precisely what the legislation means. They will draw on precedent and case law. They will explain the implications of every clause in technical terms. The statutory codes will be the authoritative source of guidance for anyone who wants a rigorous analysis of the legislation's detail. For lawyers, advocates and human resources experts in particular, they will be invaluable.

The second document will be non-statutory guidance. Our goal is to make equality and diversity part of everyday business for everyone, not just the experts. Indeed, we will have failed if what we produce speaks only to a small circle of people. That's why the non-statutory guidance is designed to be down-to-earth, practical, and accessible.

As we draft these documents we are acutely aware that they should reflect the needs, expectations and language of the people who are going to use them. Many individuals and organisations have already been kind enough to share their thoughts on what good guidance looks like, and what they expect to see in our documents. We are grateful for their input.

Please note: this is draft for consultation and should not be taken as final text

This document is the draft statutory code on the services, public functions and associations provision of the Equality Bill. This publication starts a formal period of consultation. (The draft of non-statutory guidance, and formal consultation on it, follow shortly.)

We look forward to hearing reactions and comments, and responses to a number of specific questions in this text. Clear and authoritative codes will be vital to enable new equality law to fulfil its promise: this is your chance to help us get them right.

A handwritten signature in black ink, appearing to read 'N Kinghan', with a long horizontal flourish extending to the right.

Neil Kinghan

Interim Director General of the Equality and Human Rights
Commission

Chapter 1

Introduction

Purpose of the Equality Act

The Equality Act 2010 (the Act) brings together discrimination law introduced over four decades through legislation and regulations. It replaces most of the previous discrimination legislation, which is now repealed. 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’.

An important purpose of the Act is to create a single approach to discrimination against people with different protected characteristics, where this is appropriate. However, there are some important differences in the way that discrimination is defined, particularly for disability. There are also some circumstances that would amount to discrimination against people with some protected characteristics, but not with other characteristics. People using the Act therefore need to be familiar with the differences that relate to people with different characteristics.

The Act has also brought in provisions to strengthen the law by making discrimination unlawful in circumstances not covered under previous discrimination law. Broadly speaking, discrimination in most areas of activity, against

Please note: this is draft for consultation and should not be taken as final text

people with protected characteristics described in the Act, is now unlawful. These areas of activity include, for example, employment, education, housing, the provision of services and the exercise of public functions. An organisation may have duties under more than one area of the Act because, for example, it employs people and provides services to customers.

These 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 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.

Scope of the Code

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.

Part 3 is based on the principle that people with the protected characteristics defined 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 the exactly the same way; in some circumstances a service provider will need to provide services in a different way to meet the needs of 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.

Public authorities carrying out public functions which do not involve the provision of a service 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 sector, are also covered by the public functions provisions of the Act when they carry out such functions. 'Public functions' are defined as in the Human Rights Act, and are often carried out under a statutory power or duty, such as policing, licensing or determining the framework for benefit entitlement.

Membership associations are also covered in this Code as these organisations generally provide services or other benefits to their members. The provisions relating to associations are found in Part 7 of the Act. Under the Act, associations include private clubs, where they have membership criteria, and political parties. Only associations with at least 25 members have obligations under this part of the Act.

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

Age as a protected characteristic

The Act provides that age, specifically age 18 and above, is a protected characteristic under the areas covered by this Code (Parts 3 and 7 of the Act). However, the provisions relating to age in these areas 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

The Act does not provide protection against discrimination because of marriage or 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 marriage or civil partnership in the provision of services, the exercise of public functions or by associations.

Purpose of the Code

The main purpose of this Code is to provide a detailed explanation of the Act and to apply legal concepts in the Act to everyday situations where services are provided. This will assist courts when interpreting the law and help lawyers, advisers and others who need to apply the law.

Because the Act is long and complex, this Code is detailed and some parts may be difficult to understand for someone with no knowledge of discrimination law. 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. The practical guidance explains what services providers should do in a range of situations and explains what rights members of the public have when using services. It can be obtained from the Commission, or downloaded from the Commission's website. The practical guidance has been designed to relate closely to the Code and will help people to use the Code and the Act.

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

- help service providers, those exercising public functions and associations to

Please note: this is draft for consultation and should not be taken as final text

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
- give courts clear guidance on equality law and on good practice in the provision of services, in the exercise of public functions and as it relates to membership of an association

Status of the Code

The Commission has prepared and issued this Code under the Act on the basis of a request by the Secretary of State. 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. It is not 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 to avoid an adverse decision by a court in such proceedings.

Role of the Equality and Human Rights Commission

The Equality and Human Rights Commission

Please note: this is draft for consultation and should not be taken as final text

was set up under the Equality Act 2006 to encourage and support the development of a society in which:

- people's ability to achieve their potential is not limited by prejudice or discrimination
- there is respect for and protection of each individual's human rights
- there is respect for the dignity and worth of each individual
- each individual has an equal opportunity to participate in society, and
- there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The Commission has duties to promote human rights and equality and to provide advice about the law so that discrimination is avoided. It also has powers to enforce discrimination law in some circumstances. The Commission can bring proceedings where a service provider has issued an instruction to discriminate, or where that service provider has caused or induced another person to discriminate. It can also issue enforceable non-discrimination notices.

Where the Commission has information to suggest that an organisation with duties under the Act has committed an unlawful act, it can carry out an investigation under Section 20 of the Equality Act 2006. Where the Commission has information to suggest that there is a pattern of discrimination generally, for example in a particular sector or against a group of people with particular protected characteristics, it can carry out an Inquiry under Section 16 of the Equality Act 2006. As part of an investigation or Inquiry the Commission, acting under Schedule 2 of the Equality Act 2006, can require

Please note: this is draft for consultation and should not be taken as final text

organisations such as service providers or public authorities to provide information about their policies or practices. An organisation cannot unreasonably refuse to provide such information. The Commission will use these powers of investigation and Inquiry strategically to promote equality and human rights, and to tackle entrenched discrimination.

These provisions of the Equality Act 2006 have not been repealed by the Equality Act 2010.

Human Rights

Public authorities have a duty under the Human Rights Act 1998 (HRA) to act compatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). It is unlawful for public authorities to breach Convention rights in any area of their activity, including service provision or employment and work-related activities. Organisations not in the public sector have a duty to act compatibly with Convention rights only in relation to functions of a public nature that they may carry out. The public functions covered by this Code are functions of a public nature under the Human Rights Act 1998 (HRA).

By following this Code, public authorities and other organisations carrying out public functions will find it easier to ensure compliance with the HRA and the Convention.

Courts and tribunals also have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a claim is made by an individual against a private organisation or a

Please note: this is draft for consultation and should not be taken as final text

public authority. So in any discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention, where it can.

Human rights issues can arise in relation to the exercise of any public function or the provision of any public service where a person's dignity, personal freedom or other Convention right is at stake. If a public authority or any other body discriminates when carrying out a function of a public nature, this can amount to a breach of the HRA because discrimination in the enjoyment of Convention rights is a breach of the Convention (under Article 14). Where such discrimination is based on a characteristic protected under the Equality Act it is likely also to be a breach of the Equality Act.

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. This will help to ensure that all members of the public are treated with equal respect and dignity and that discrimination and human rights violations are avoided. It is advisable for all employees to have training in these policies.

Recognising different needs of people with different protected characteristics

The principle of equality that underpins the Equality Act 2010 is intended to promote and protect the dignity of all persons in society. This involves, where appropriate, dealing with the specific needs of persons with particular protected characteristics. In some cases this may involve balancing different needs associated with different characteristics.

Under the Act a person is not entitled to treat another person less favourably simply because the first person has a protected characteristic.

Please note: this is draft for consultation and should not be taken as final text

Where a service provider perceives that the needs of an employee and certain service users or the needs of two different service users could conflict, they must ensure:

- first that both are treated with dignity and respect by the service provider; and
- second that each treats the other with dignity and respect.

This will involve ensuring that neither person unlawfully harasses the other while permitting responsible freedom of expression.

Service providers will be assisted by having a clear complaints procedure which sets out the requirement for (and right to) dignity and respect to which employees and service users alike may have recourse.

Large and small service providers

It is inevitable that service providers and those exercising public functions will have different ways of complying with the Act, depending on the size of the organisation. While all service providers have the same legal duties under the 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. This Code should be read with awareness that large and small service providers may carry out their duties in different ways, but that no service provider is exempt from duties under Part 3 because of size. Smaller organisations or businesses are less likely to have a separate department or legal team to provide advice, so may need to take advice on compliance with the Act from an external organisation (such as the Equality and Human Rights Commission) or to

Please note: this is draft for consultation and should not be taken as final text

use the Commission's other practical guidance.

Small associations, with less than 25 members, are exempt from the provisions of the Act (under Part 7) that apply to associations

How to use the Code

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, 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 provides an overview of the Act's provisions in relation to services, the exercise of public functions and to associations. It also describes what actions service providers can take to avoid unlawful behaviour.

Chapter 5 explains direct discrimination, including segregation (in relation to race) and combined discrimination (discrimination against a person because of a combination of two characteristics).

Chapter 6 explains indirect discrimination.

Chapter 7 explains discrimination arising from disability, a type of discrimination that was not defined in previous discrimination legislation.

Chapter 8 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 9 explains the three types of harassment, including sexual harassment

Chapter 10 explains other unlawful acts, namely victimisation and instructing, causing, inducing or aiding discrimination.

Chapter 11 examines the provisions of Part 3 as they relate to services only (rather than to public functions or associations). It explains what is meant by a service and what discrimination (or other prohibited conduct) by a service provider looks like in practice. It also sets out a number of exceptions which relate to the provision of services.

Chapter 12 examines the provisions of Part 3 as they relate to public functions. It explains what is meant by a 'public function' and what discrimination (or other prohibited conduct) by a body exercising a public function looks like in practice.

Chapter 13 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 14 explains the positive action provisions as they relate to Part 3 and Part 7 of the Act. These provisions are of a voluntary nature. This chapter explains the measures that organisations can take to address disadvantage and discrimination; and distinguishes between 'positive action' and 'positive discrimination'

Chapter 15 explains exceptions which permit discrimination in some, limited, circumstances.

Chapter 16 deals with enforcement by the civil courts of Part 3 and Part 7.

Please note: this is draft for consultation and should not be taken as final text

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

Examples in the Code

Examples of good practice and how the Act is likely to work are given 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 should not be treated as complete or authoritative statements of the law.

While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in similar circumstances. They can also be used to test how the law might apply to someone with different protected characteristics, but only to the extent that those provisions actually apply to the different protected characteristics. (So, for instance, in the context of this Code an example that describes discrimination because of a person's sex, could not be applied to discrimination because of a person's age, or status or being married or civil partnered.) The examples attempt to use as many different protected characteristics as possible and as many situations as possible relating to services, public functions and associations, in order to demonstrate the breadth and scope of the Act. Examples relating to women or men are given for realism but could, in almost all cases, refer to people of either sex.

Use of the terms 'service provider', 'service' and 'service user'

As explained above, the Act imposes duties on service providers and those exercising public functions (under Part 3) and on associations

Please note: this is draft for consultation and should not be taken as final text

(under Part 7). The term 'service provider' is used in this Code to refer to all legal persons with duties under these parts of the Act. The term 'service' refers to all relevant activities carried out by 'service providers'. Similarly, the term 'service user' refers to people who are users of these 'services': customers of services, people who benefit from or are subject to public functions; and people who or 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

In this Code, 'the Act' means the Equality Act 2010. References to particular clauses and Schedules of the Act are shown in the margins. Occasionally other legislation or regulations are also referred to in the margins.

Changes to the legislation

This Code refers to the law as it is expected to be at the time the Equality Act 2010 comes into force. There are expected to be changes to the Act, in particular to the protected characteristic of age, in relation to the areas covered by this Code. There may also be changes to other legislation which may have an effect on the duties explained in the Code. Readers of this Code will need to keep up to date with any developments that affect the Act's provisions and be aware that further Codes may be issued by the Equality and Human Rights Commission. Further information can be obtained from the Commission. See below for contact details.

Please note: this is draft for consultation and should not be taken as final text

Further information

[To be provided in published version]

How to get hold of the Act

How to get hold of the Code

Contact details for The Equality and Human Rights Commission (the Commission)

Equality and Human Rights Commission
England
Arndale House
Arndale Centre
Manchester
M4 3EQ

Telephone 0845 604 6610

Equality and Human Rights Commission
Scotland
The Optima Building
58 Robertson Street
Glasgow
G2 8DU

Telephone 0845 604 5510

Equality and Human Rights Commission Wales
1st Floor
3 Callaghan Square
Cardiff
CF10 5BT

Telephone 0845 604 8810

Chapter 2

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

Protected characteristics

2.1 This chapter outlines the characteristics which are protected under the Act and which are relevant to the areas covered by this Code.

The protected characteristics with which this Code is concerned are:

- disability
- gender reassignment
- race
- religion or belief
- sex, and
- sexual orientation.

A person may receive unlawful treatment under the Act as a result of having a protected characteristic, but also because (wrongly) they are perceived to have that characteristic or because they are associated with another person who has the protected characteristic or is perceived to have it. These concepts are dealt with in more detail in Chapter 5 (Duty not to discriminate directly).

Please note: this is draft for consultation and should not be taken as final text

- 2.2 The Act provides that the protected characteristic of age, specifically age 18 and above, 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. Orders under 192 c
- 2.3 The Act says that the protection against discrimination in the areas covered by this Code does not extend to Marriage and Civil Partnership. C27
- 2.4 As explained at page 17 in Chapter 1, 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.

Disability

- 2.5 What does the Act say?
- A person who has a disability has the protected characteristic of disability. Where people have the same disability, they share the protected characteristic of disability.
- 2.6 A person will have the protected characteristic of disability if they have had a disability, even if they no longer have the disability (except in relation to Part 12 (transport) and Section 188 (improvements to let dwelling houses)). Clause 6(4)
- 2.7 A person has a disability if they have a physical or mental impairment which has a
- long-term and
 - substantial

Please note: this is draft for consultation and should not be taken as final text

adverse effect on their ability to carry out normal day-to-day activities.

Physical or mental impairment includes sensory impairments.

2.8 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. So long as the effect is long term, it will be covered by the Act.

2.9 Long term means that it has lasted or is likely to last for at least a year or for the rest of the affected person's life. Substantial means more than minor or trivial. Sch. 1 Paragraph 2

2.10 Where a person is taking measures to treat or correct an impairment, and, but for those measures, the impairment would 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.

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

Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act. Sch. 1 paragraph 6

Progressive and recurring conditions will amount to disabilities in certain circumstances. Sch. 1 paragraph 8 and 2(2)

2.12 Only people who have a disability, who have had a disability or who are perceived to have a disability, or are associated with a disabled person, are protected against discrimination on this ground. The status of being non-disabled is not protected. This asymmetrical protection originates in the need to prohibit the historic discrimination against disabled people.

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

Gender reassignment

2.13 What does the Act say? 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. 7(1)

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

2.14 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 *medicalised* process.

Thus it may be proposed but never gone through; the person may be in the process; or the process may have happened previously. It may include undergoing the medical procedures involved, or may simply include choosing to

dress in a different way as part of a person's desire to live in the opposite gender. .

2.15 A person can show that they have reached a definitive position and are 'proposing' to undergo gender reassignment. Once they are proposing to undergo reassignment they are protected.

There are lots of ways in which some one may show that they have reached a definitive position point:

- Making their intention known to someone (even if they do not take any further step).
- Starting to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex.

(Somebody who was driven by their gender identity to cross dress would also be in the process of gender reassignment, however intermittently it manifested itself.)

- Although undergoing a medical process is not required, where someone has decided to attend counselling sessions related to that process, this would signal that they are proposing to undergo gender reassignment and are therefore protected.

This is a non-exhaustive list and the characteristic should be given a broad interpretation because it seeks to encompass the personal process involved.

Because the provision does not follow a medical model of gender reassignment it is capable of providing wide protection. This is particularly important for gender variant children: although some children do transition whilst at school, there are others who are too young to make such a decision. Nevertheless they may have begun a personal journey and are moving their gender identity away from their birth sex. Manifestations of that personal journey, such as mode of dress, indicate that a process is in place and they will

Please note: this is draft for consultation and should not be taken as final text

be protected. Protection is provided from the moment when someone proposes to move along the pathway away from their birth sex. The Act does not however require that person to have reached a *decision* that they will do it and never turn back. As soon as there is a manifestation the duty not to discriminate is applicable.

Example: A person born physically female decides to spend the rest of her 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 undergone gender reassignment.

2.16 Someone may show that they are proposing to undergo gender reassignment by attending counselling sessions relating to the commencement of a gender reassignment.

2.17 Also, people who have started a gender reassignment process but have withdrawn still have the characteristic because they have undergone part of a process of gender reassignment. So for example a woman born physically male may start the process and decide to go no further. She will still have the characteristic.

Example: A person born physically male lets her friends know that she intends to reassign. She attends counselling sessions to start the process. However she decides to go no further. Although she no longer intends or proposes to undergo reassignment, she will remain protected against discrimination based on her gender reassignment characteristic because she has undergone part of a process to change attributes of sex.

2.18 Further, where someone is discriminated against because they are *perceived* to be proposing, undergoing or having undergone the personal process of gender reassignment, protection is provided from direct discrimination and harassment, *even if* they are not in fact proposing to undergo gender reassignment etc. The effect of these provisions is to provide protection against any direct discrimination and harassment *connected with* the protected characteristic of gender reassignment.

Thus, where someone is a transvestite, but is not driven by their gender identity to cross dress, they will be protected from direct discrimination and harassment if they are *perceived* to be proposing to undergo gender reassignment etc.

Similarly, if someone were directly discriminated against because they were *associated* with someone proposing to undergo gender reassignment etc, such as family and friends, they too would be protected.

Race

2.19 What does the Act say? 9

The Act defines 'race' as including colour, nationality and ethnic or national origin. Nationality includes citizenship. The definition is not an exhaustive one.

2.20 **Ethnic origin**

Being of a particular ethnic origin will depend on whether a person belongs to an ethnic group. An ethnic group is one which regards itself or is regarded by others as a distinct and separate community by virtue of certain characteristics. These characteristics usually distinguish the group from the surrounding community.

An ethnic group must have two essential characteristics: a long shared history and a cultural tradition of its own. Other relevant characteristics of an ethnic group may include a common language, common literature, religion or a common geographical origin or a sense of being a minority or oppressed group.

The term 'ethnic' can be interpreted relatively widely, in a broad and cultural/historic sense. To date the courts have confirmed that the following are ethnic groups for the purpose of equality laws: Sikhs, Jews, Romany Gypsies, and Irish Travellers.

There can be a relationship between ethnic origins and religion. As demonstrated by the examples above, a religious group with a common ethnic origin will be covered by this part of the Act. Religious groups may include a variety of ethnic groups. While religion is protected by the Act, religious groups are not protected as ethnic groups unless they satisfy the above test for ethnic origin.

2.21 **National origin**

A national group must have identifiable elements, both historical and geographical, 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 (for example, the Basques or Kurds).

National origin is distinct from nationality but often these will be the same, for example, people of Chinese national origin may be citizens of China but may also be citizens of the UK, Canada, Taiwan, Malaysia or Singapore.

An ethnic group or national group could include members new to the group (for example, a person who marries into the group).

2.22 **Meaning of 'racial group'**

A racial group can be a group of people who have or share a colour, or ethnic or national origin or a group with the same nationality.

For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act.

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

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

Please note: this is draft for consultation and should not be taken as final text

British citizens. Another racial group could be 'Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans.

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

Religion or belief

2.23 What does the Act say? 10 (1) and (2)

Religion or belief is a protected characteristic. 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.

Therefore, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, whether they have another religion, another belief or no religion or belief. 10 (1) and (2)

The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights.

2.24 **Meaning of religion**

'Religion' means any religion and includes a lack of religion. The term religion includes the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for tribunals to determine what constitutes a religion. A religion need not be mainstream or well known to gain protection as a religion. It must, though, be identifiable and 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. Cults and new religious movements, may also be religions. 10 (1)

2.25 Meaning of belief

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

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

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

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.

2.26

For a belief to be protected under the Act:

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

Example: A person believes in a philosophy of racial superiority for a particular racial group. It is a belief around which they centre the important decisions in their life, such as where they live. 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.

2.27 **Manifestations of religion or beliefs**

The Act protects people of a particular religion or belief; there is not always a clear line between a religion or a belief and the manifestation of that religion or that belief. Manifestations of a religion or a belief could include treating certain days as days for worship or for rest, following a certain dress code, following a particular diet, carrying out or avoiding certain practices. Direct or indirect religion or belief discrimination may be based on manifestation of a religion or a belief.

Sex

2.28 What does the Act say?

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 or women. 11(a) and (b) and 201(1)

A comparator for the purposes of showing unlawful sex discrimination will be a person of the opposite sex. Where treatment of a woman is because of her pregnancy or maternity, no comparator is required [see chapter 5 paragraph 5.51 to 5.54]. 17& 18
13(7) (a) and 13(8)

Direct sex discrimination in non-work cases explicitly covers less favourable treatment of a woman because she is breastfeeding [see Chapter 5 paragraph 5.51 to 5.54].

Sexual orientation

2.30 What does the Act say? Clause
12(1)

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

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

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. That may include someone's appearance, the places they visit or the people they associate with.

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

2.31 When the Act refers to the protected characteristic of sexual orientation: Clause
12(2)

(a) 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

(b) a reference to people who share a protected characteristic is a reference to people who are of the same sexual orientation.

2.32 Gender reassignment is a separate characteristic and unrelated to sexual orientation, despite a common misunderstanding that the two characteristics are related.

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 the provisions of the Act which are covered by the Code and of those which are not covered. Part 3 of the Act applies to services and public functions. Part 7 applies to associations.

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 provisions relating to services, as well as public functions. This also applies to those who are generally outside the scope of Parts 3 and 7 (such as schools) if they provide services to the public, as explained below.

Part 3 provisions covered by the Code: Services to the public

- 3.2 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. More detail is provided on services to the public in Chapter 11. Clause 29

Public functions

- 3.3 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. 31(4)
- More detail is provided on public functions in Chapter 12.

Associations

- 3.4 The Act imposes obligations on associations. An association is 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 100/101
 - it is not a trade organisation (for

Please note: this is draft for consultation and should not be taken as final text

information on trade organisations, referenced should be made to the employment code).

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 13.

Exceptions that apply to all or some service providers, persons exercising public functions and associations are described in Chapter 15.

What is not covered by the Code?

Education

3.5	Part 6 of the Act prohibits discrimination by schools and institutions providing further and higher education, by general qualifications bodies and by local authorities and education authorities in providing recreation and leisure facilities for children and young people. Where a Part 6 duty applies, Part 3 will not apply. These provisions are covered in the education code [title].	Clause 84 - 94
-----	--	-------------------

There will be some educational or training services, however, which do fall within Part 3 and to which this code will apply. These include youth clubs run by voluntary organisations, as well as private training courses.

In addition, non-educational services provided by schools are likely to be subject to the services provisions of Part 3 (for example, services to parents such as facilities for parent-

Please note: this is draft for consultation and should not be taken as final text

teacher association meetings), as well as services provided by colleges or universities which are not wholly or mainly for students.

Premises

		Clause
3.6	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 –these provisions are covered in the premises code [title].	32 - 38

There will be some situations however where the circumstances will fall within Part 3 and where this Code will apply – for example, where premises are provided solely for the purpose of exercising a public function, such as cells in a police station; or where an estate agent is providing general information about property, when it will be providing a service to the public.

Transport

3.7	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 but in a separate code [Code of Practice [title]	Clause Sch.3 Part 7
-----	--	------------------------

Part 12 of the Act makes provision for regulations setting access standards for vehicles; and also relating to the carriage of

Please note: this is draft for consultation and should not be taken as final text

assistance dogs in taxis. These provisions are also covered in the Code of Practice [transport]

Ships and hovercrafts

- 3.8 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. Clause 30

Employment services

- 3.9 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 and occupation] code. Clause 55-56

Liability

- 3.10 Under the Act, in their capacity as employers or principals, service providers, those exercising public functions, and associations are legally responsible for the actions of their employees in the course of their employment. They are also responsible for the actions of their agents. Employees who discriminate (or subject someone to harassment or victimisation) will usually be regarded as acting in the course of their employment, even if the service provider has issued express instructions not to discriminate. Clause 108
- 3.11 In legal proceedings based on the actions of an employee, it is a defence for the service provider, person exercising public functions or association to show that they took all

Please note: this is draft for consultation and should not be taken as final text

reasonable steps to prevent such actions. Chapter 4 provides details of what such reasonable steps might be. Clause108(4)

3.12 An employee or agent may be found to have discriminated in their own right, where the employer would also be liable (or would be but for the defence of having taken all reasonable steps to prevent the employee from discriminating). It is not necessary to show that the employee or agent knew that the act was unlawful. Clause 109

3.13 An employee or agent will not be liable if they have reasonably relied upon a statement by the employer or principal that their action is not unlawful. Clause109(3)

It is an offence, punishable by fine, to make a false or misleading statement to try to get an employee or agent to carry out an unlawful act.

For more details on the liability of employers and principals and employees and agents refer to the Employment Code

Other prohibited conduct

Aiding unlawful acts

3.14 It is unlawful for a person to help someone carry out an act which they know is unlawful under the Act. It is not unlawful if the person helping has been told that the act is lawful and they reasonably believe this to be true. Clause 111

It is an offence, punishable by fine, to make a false statement in order to try to get another person's help to carry out an unlawful act.

Instructing, causing or inducing discrimination

- 3.15 It is unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so. This only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited. Clause 107

Both the recipient of the instruction, and the intended victim, may bring action for a breach of this provision, whether or not the instruction is carried out, provided the recipient or intended victim suffers detriment as a result.

Example: A GP instructs his receptionist not to register any Gypsies or Travellers. If the instruction is complied with then the patient who is rejected may have a claim against the GP and the receptionist.

A potential patient, who discovers the instruction has been given and is deterred from applying to register, may also have a claim against the GP and the receptionist..

If the receptionist refuses to comply with this instruction, they may have a claim against the GP if subjected to a detriment for refusing. The receptionist's claim against the GP would be brought in the employment tribunal as it relates to employment, while the potential patient's claims would be brought in the county court as they relate to services.

Victimisation

- 3.16 Any treatment which amounts to victimisation will be covered by the provisions on victimisation. See Chapter 10.

Relationships that have come to an end

- 3.17 It is unlawful to discriminate against or harass someone after a relationship covered by the Act has come to an end, where the adverse 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. Clause 107

Example: a department store credit agency had provided credit to a woman. After she had paid off the credit, she approached another credit agency which asked for a reference from the department store. The store replied that the new agency should only grant credit to her husband and not to her, commenting that given her age she might become pregnant and would not be able to repay the loan.

- 3.18 Reasonable adjustments must be made for disabled people even after a relationship has ended if they continue to be 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 local community centre. When the man initially registered for the course he made the community centre aware that he required any information to be sent to him by email.

Six months later the community centre 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 is likely to amount to a failure by the centre to make a reasonable adjustment, even though the man is no longer undertaking a course at the centre.

Contracts

- 3.19 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 acts which are unlawful under the Act. Clause 141-143

Unenforceable contracts

- 3.20 The Act says that a term of a contract is unenforceable against a person in so far as it Clause 141-143

- constitutes
- promotes, or
- provides for:

treatment of that or another person that is unlawful in relation to the provision of goods facilities or services or in relation to public functions or the activities of associations.

This will include any act of discrimination,

Please note: this is draft for consultation and should not be taken as final text

victimisation, harassment or other act made unlawful (see Chapter 10).

The Act says that a term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit the anti-discrimination legislation.

However it is possible to reach agreements which have the effect of settling a claim made to the county courts or to the sheriff court.

Removal or modification of terms

- 3.21 If a person who has an interest in a contract or agreement which is unenforceable makes an application to it, the county court or the sheriff may make an order for the term to be 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

- 3.22 The Act does not limit the scope of the services and functions provisions to activities which take place in the UK – whether or not something takes place outside the UK, is covered by the Act's provisions will be determined by the courts. The exception to this is services by an information society service provider (ISSP), where the ISSP must be based in the UK and the service user be based in the EEA for a claim to be brought in the UK. See Chapter x for further details on ISSPs.

- 3.23 The provisions do not apply, however in Northern Ireland.

There are a number of specific cases where the

Please note: this is draft for consultation and should not be taken as final text

3.24 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. EN26, 27, 31, 32
Clause 113, 29(9)

The provisions relating to associations apply only to activities within the UK.

Chapter 4

What is unlawful and how to avoid it

Introduction

- 4.1 This chapter provides a brief overview of the Act's provisions in relation to services, the exercise of public functions and to associations. It also describes what actions service providers can take to avoid unlawful behaviour.

As explained at page 17 in Chapter 1, 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. In certain respects the Act's provisions differ for services, public functions and associations. Chapters 11, 12 and 13 respectively describe in more detail how the requirements of the Act apply to these three different areas of activity.

What is unlawful?

- 4.2 The Act prohibits
- direct discrimination
 - indirect discrimination, and
 - harassment

by a service provider where these are because of, or for reasons related, to the relevant protected characteristics.

Chapter x sets out what is meant by protected characteristics

In short these are:

- disability

Please note: this is draft for consultation and should not be taken as final text

- gender reassignment
- pregnancy and maternity
- race
- religion and belief
- sex, and
- sexual orientation.

The prohibition on harassment does not apply where it is related to the protected characteristics of religion or belief and sexual orientation.

Additional definitions of discrimination apply to pregnancy and maternity, and to disability.

The Act also prohibits victimisation.

Direct discrimination

- 4.3 The direct discrimination provisions primarily aim to prohibit actions based on prejudice or stereotypes, whether consciously held or otherwise. Where a service provider treats a person less favourably because of a protected characteristic this will generally constitute direct discrimination.

As explained in Chapter 5, the Act also prohibits discrimination where it is because of the combination of two characteristics such as being both black and gay, or being a woman from a particular religious or ethnic group.

Chapter 5 provides a more detailed explanation of direct discrimination and combined discrimination.

Indirect discrimination

- 4.4 The indirect discrimination provisions primarily aim to address forms of discrimination which, while they do not explicitly entail or propose different treatment, in practice disadvantage people with

Please note: this is draft for consultation and should not be taken as final text

particular protected characteristics.

Indirect discrimination occurs where:

- a) a service provider applies to everyone a provision criterion or practice which disadvantages (or would disadvantage) a person with a particular protected characteristic
- b) a provision criterion or practice generally disadvantages (or would disadvantage) those who share that protected characteristic, and
- c) the service provider cannot justify the provision criterion or practice.

It also occurs where a provision, criterion or practice deters (or would deter) a person from doing something such as using a service because it would be applied to them.

Chapter 6 provides a more detailed explanation of indirect discrimination.

Harassment

4.5

The Act prohibits three different types of harassment:

- a) harassment related to a protected characteristic
- b) sexual harassment, and
- c) less favourable treatment because of a submission to or a rejection of sexual harassment and harassment related to sex or gender reassignment.

Chapter 9 provides a more detailed explanation of harassment.

Victimisation

4.6 Victimisation occurs where service providers subject anyone to a detriment because of:

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

Chapter 10 provides a more detailed explanation of victimisation.

Discrimination arising from disability

4.7 The Act prohibits service providers from treating disabled people less favourably than other people for a reason arising from their disability. In contrast to direct discrimination, which occurs when the reason for the treatment is the disability, in the case of discrimination arising from disability, the reason for the treatment does not matter. The question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability. A broader category of treatment is thus potentially unlawful: any form of unfavourable treatment which because of anything which is the result, effect or outcome of their disability. Unlike direct discrimination, discrimination arising from a disability can be justified.

Chapter 7 provides a more detailed explanation of discrimination arising from disability.

Pregnancy and maternity discrimination

- 4.8 The Act specifically prohibits unfavourable treatment because of pregnancy or maternity, including unfavourable treatment of a woman because she is breast feeding.

Chapter 5 provides a more detailed explanation of pregnancy or maternity discrimination.

Reasonable adjustments

- 4.9 Complying with the reasonable adjustment duty requires service providers to undertake reasonable measures to avoid disabled people being substantially disadvantaged in accessing services (functions or associations). Failing to do this constitutes discrimination. This duty is described in Chapter 8.

Avoiding discrimination and improving services

- 4.10 Service providers need to consider taking active steps to ensure that discrimination is not occurring.

As explained in paragraphs 3.10 in Chapter 3, a service provider will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts. Reasonable steps are not defined in the Act.

- 4.11 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 in 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.

4.12 In relation to the duty to make reasonable adjustments for disabled people the following actions will help service providers comply with the Act's requirement:

- 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 acting on the findings of those

Please note: this is draft for consultation and should not be taken as final text reviews.

4.13 Small businesses and small organisations providing 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.

In addition, service providers may wish to consider adopting positive action measures to seek to ensure that all sections of the community are able to benefit from appropriate services. Chapter 14 explains in more detail what sorts of action may be taken and in what circumstances.

Good record-keeping regarding these activities and initiatives will be helpful.

Chapter 5

The Duty not to discriminate directly in provision of services, exercise of public functions and associations

Introduction

- 5.1 This chapter explains what the Act says about direct discrimination and combined 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 special provisions making it unlawful to treat a woman unfavourably because of her pregnancy or maternity.

Note: As explained at page 17 in Chapter 1, 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.

Direct discrimination

- 5.2 *What the Act says* 13 (1)

Direct discrimination occurs when a person is treated less favourably than others are or would be treated, and the treatment is because of a protected characteristic.

Example: A shop requires women but not men to provide a guarantor for a credit facility.

Example: A hospital does not allow a very ill gay patient to be visited by his civil partner while it does allow a similarly ill patient in the same ward to be visited by his wife.

Example: A car hire firm charges higher fees to Asian customers.

- 5.3 Apart from the specific exceptions referred to in Chapter 15, and more favourable treatment of disabled people (see paragraph 5.56 below), direct discrimination in the provision of services, exercise of public functions and associations is always unlawful and can never be justified.

The motive or intention behind the treatment is generally irrelevant.

Example: At the request of their regular female users, who complain that they feel uncomfortable in the company of a male to female transsexual, a health spa tells the transsexual woman that they are sorry but she will not be able to use the spa services again.

- 5.4 The law recognises that discrimination can be conscious or unconscious; for example, people may have prejudices that they do not even admit to themselves or they may act out of good intentions (see paragraph 5.17 below).

Example: A restaurant manager asks a group of Africans to leave because she finds their music and laughter too noisy but she allows an equally noisy group of white customers to remain.

Example: A political party decides not to put forward as a candidate a long serving party member who has severe facial disfigurement because they believe voters would be put off by his appearance and would not vote for him.

5.5

A service provider cannot base their decision on another criterion that is itself discriminatory.

Example: A travel company is aware that the local university charges non-EC foreign students higher fees than it charges UK or other EC students. The travel company decides to adopt this same approach and offers a special student package holiday priced at £200 for UK and other EC students and £275 for non-EC students. The university is acting under statutory authority when it charges higher fees to non-EC foreign students. The education regulations permitting higher fees for most non-EC students apply to further and higher educational institutions and make no provision whatsoever for private providers of commercial services. While the practice of the university is permitted in law, it is not possible for the travel company to mirror this difference of treatment lawfully. Thus its differential pricing policy is likely to be unlawful direct discrimination because of nationality (non-EC nationality).

What is 'less favourable' treatment?

5.6

A person (B) is treated 'less favourably' if he or she is put at a disadvantage compared with others. If the disadvantage is obvious, it will be clear that the treatment has been less favourable: for example, B may have been denied a service or given a poorer service. Being denied a choice or excluded from an opportunity is likely to be less favourable treatment.

Example: A pub allows a family with a child who has cerebral palsy to drink in their beer garden but not in their family room; the family with a disabled child are denied the choice that other families can enjoy.

5.7

However B does not have to experience adverse consequences (economic or otherwise) for the treatment to be less favourable; it is enough that B can reasonably say that they would have preferred not to be treated differently from the way A treated – or would have treated – another person.

5.8

It is not possible for A to balance or eliminate less favourable treatment by offsetting it with more favourable treatment.

17 (2) -
(3)

Example: A council sports centre, aiming to secure a better balance of male and female users, decides to restrict the number of men who can use the gym at popular times. This is likely to be direct discrimination because of sex. The fact that the council offers male users vouchers for special training events in the gym does not alter the fact of the discrimination.

- 5.9 For direct discrimination on grounds of pregnancy or maternity, the test is whether the treatment is *unfavourable* (without the need for a comparator) rather than less favourable. (See paragraph 5.52 below.) 17 (2) - (3)

Segregation

- 5.10 When the protected characteristic is race, deliberately segregating a person or group of persons from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because segregation on race grounds is always an act of unlawful direct discrimination. The segregation will only be unlawful if it is a deliberate act or policy rather than a situation that has occurred inadvertently; congregation, that is where individuals choose to group together, is not segregation. 13 (5)

Example: Intending to limit racial conflict, a youth club decides to open on Tuesdays and Thursdays for black young people only and on Wednesdays and Fridays for white young people only. This is likely to be unlawful direct discrimination by racial segregation. ('separate but equal' is unlawful).

- 5.11 At another youth club where all young people are welcome at every session, if black boys choose to separate themselves from white boys, playing different sports or simply standing 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.

- 5.12 Segregation linked to other protected characteristics *may* be unlawful direct discrimination. However, it is necessary to show that it amounts to less favourable treatment.

‘Because of a protected characteristic’

- 5.13 ‘Because of’ a protected characteristic is intended to have the same meaning as the phrase ‘on grounds of’ in previous equality legislation.

- 5.14 Because of a protected characteristic means that the protected characteristic is an effective cause of the less favourable treatment – but it need not be the only or even the main cause.

Example: After an incident on the wing involving Muslim and non-Muslim prisoners in which prison property was damaged a privately run prison limits the time the Muslim prisoners involved in the incident can be out of their cells but does not impose a similar restriction on the non-Muslim prisoners. It is likely that religion is one of the causes of the treatment of this group of prisoners, although their recent conduct may be another cause.

- 5.15 In some instances, the discriminatory basis of the treatment will be obvious from the treatment itself, for example a Gypsy couple turned away from a pub which displayed a ‘No Gypsies or Travellers’ notice. In cases such as this, what was going on in the mind of the discriminator will be irrelevant. In other cases, it will be necessary to look at why they acted in the way that they did.

- 5.16 A person experiencing less favourable treatment ‘because of a protected characteristic’ may but does not have to, possess the characteristic themselves. Rightly or wrongly, the person might be perceived as having the characteristic (‘discrimination by perception’); or might be associated with someone who has – or is believed to have – the characteristic (‘discrimination by association’). These concepts are explained in more detail below.
- 5.17 It does not matter what the service provider’s intentions are or whether the service provider’s less favourable treatment of the person is conscious or unconscious. The service provider may even think that they are doing the person a favour, or simply be unaware that they are treating the person differently because of a protected characteristic.

Example: An amateur dramatics association that also organises theatre trips for its members turns down an application for membership from a woman with hearing impairment as they believe she would not get the same benefits as other members.

- 5.18 Unintentional less favourable treatment is more likely to occur within a culture or atmosphere where certain behaviour or conduct which is considered as normal has the effect of treating a person less favourably.

Example: Following a series of stories in the local press linking an increase in the number of thefts in the area with black boys, several shopkeepers have refused to allow black boys into their shops.

- 5.19 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: Relying on a current stereotype that people from a certain south-east Asian country are dishonest, a bank refuses to allow overdraft facilities for anyone of that national origin. This is an example of less favourable treatment based on a false stereotype.

A general stereotype about men and women is that in terms of physique, most men are stronger than most women. Nevertheless it is likely to be unlawful sex discrimination for a gym to test every woman's strength but not every man's before allowing them access to weight lifting facilities.

Discrimination by association

- 5.20 It is direct discrimination if the service provider treats a person less favourably because of that person's association with another person who has a protected characteristic. Discrimination by association can occur in various ways – for example, where the person has a relationship of parent, child, partner, lover, primary carer or friend of someone with a protected characteristic. The association with the person does not need to 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 likely to be unlawful direct discrimination by association because of sexual orientation.

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 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 group were not admitted because the three Poles 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.

- 5.21 Direct discrimination because of a protected characteristic could also occur if a person experiences less favourable treatment because of campaigning to help someone with a protected characteristic or refusing to act in a way that would disadvantage a person or people who have (or whom A believes has) the protected characteristic.

Example: When officers of an established tennis club see Mary on television speaking on behalf of an organisation campaigning for fairer treatment of transsexuals they convene an emergency meeting. They decide that to maintain the club's reputation they must remove Mary as captain of their women's team.

Discrimination by perception

5.22 It is also direct discrimination where the person treated less favourably because they are thought to have a protected characteristic, even though in fact they do not. If a service provider treats a person less favourably because the service provider thinks that that person has a protected characteristic, then that will be direct discrimination even though the service provider is mistaken about this.

Example: A Sikh man with a beard enters a butcher's shop in his local area. The butcher immediately informs him that he will not be able to serve him. The shop does not sell Halal meat and the butcher has mistakenly perceived the Sikh as being Muslim.

Example: A woman with a medical condition that makes her appear 'masculine' is perceived to be undergoing gender re-assignment and excluded by her club from their women's gymnastics team.

Advertising an intention to discriminate

- 5.23 If a service provider advertises that in providing services they will treat persons less favourably because of a protected characteristic, this amounts to direct discrimination. 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. It would include a notice or announcement banning people sharing a protected characteristic from entering a particular place, most commonly 'No Gypsy or Traveller' signs. Other examples include: EN75

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.

Example: A notice in a police station says that information regarding a person who is currently detained at that station will only be given to a person who can show that they are the detained person's parent or their husband or wife, advertising discrimination because of sexual orientation.

Who will be an appropriate comparator?

- 5.24 Other than in cases of racial segregation or pregnancy or maternity discrimination, to establish direct discrimination, a claimant must show that the service provider treats or has treated them less favourably because of a protected characteristic than the service provider treats, has treated or would treat a person to whom that protected characteristic does not apply. This person is referred to as a 'comparator'.

5.25 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 person. It is not necessary for the circumstances of the two people to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the claimant are the same or nearly the same for the claimant and the comparator.

Example: A man brings a claim of direct sex discrimination when he is not accepted as a member of a prestigious cycling club and a woman who applied at the same time is accepted. The man has recently bought his first bicycle; 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 is unlikely to have his claim upheld.

Example: A group of deaf students travelling together on a train are having animated conversations using British Sign Language. An official of the train company warns them that unless they 'calm down' they will be asked to leave the train as their behaviour is disturbing other passengers. The group notice that a similar warning has not been given to a far livelier group of non-deaf teenagers moving about at the other end of the same carriage. Individuals in this other group, whose circumstances relevant to the treatment at issue appear to be the same or not materially different, could be an actual comparator for individuals in the group of deaf students.

Example: A woman and her husband often play pool 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 can refer to her husband as a comparator in a claim of direct discrimination because of sex.

- 5.26 The relevant circumstances must not themselves be discriminatory, for example where the treatment in question is based on a decision to follow a discriminatory external rule.
- Please see the example in paragraph 5.5
- 5.27 In practice it is rarely 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.
- 5.28 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.
- 5.29 Referring to the above example of the deaf students: If the group of 'far livelier teenagers' turned out to be a group of young people with ADHD who were supervised by two teachers, the fact of their supervision would be a significant difference in their circumstances compared to those of the deaf students so that individuals in that group would not be actual comparators. However the fact of the difference in treatment of the two groups could help to define a hypothetical comparator group that might be treated more favourably than the deaf students.

5.30 To compare the treatment of a hypothetical comparator will involve considering the treatment of persons whose circumstances are not the same as the claimant's but whose treatment sheds light on the reason why the claimant was treated as they were. In some cases it may be necessary to make an inference from the behaviour of the service provider towards other people in similar circumstances or in different circumstances which are analogous but materially different in certain respects.

5.31 Who could serve as a hypothetical comparator may also depend on the reason why the service provider treated the person as they did. In many cases it may be more straightforward to establish the reason for the service provider's treatment. This could include a consideration of the treatment by the service provider of persons whose circumstances are not the same as those of the person making the claim but whose treatment illuminates the reason why that person was treated in the way they were. If the reason is because of a protected characteristic, then hypothetical comparator(s) can be identified.

Example: A small council housing block has been renovated and made available to three Somali refugee families. After moving in the families try to register with a GP at the nearby health centre but none is accepted. They were told that the health centre did not have suitable staff for their health needs. The three Somali families bring a claim of direct discrimination because of race against the health centre. As no other families were trying to register at the same time, they do not have an actual comparator. They have learned from 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. As they build up evidence that the reason for their treatment is race, and more specifically Somali national origin, they will be able to define a hypothetical comparator who would have been treated more favourably.

The facts in a case may suggest that the reason for the less favourable treatment is a prejudice, stereotype or assumption relating to the particular characteristic

5.32 Where the alleged less favourable treatment is because of disability the Act states that relevant circumstances include a person's abilities. A comparator will be a person who does not have the disabled person's disability, and should have the same abilities or skills as the disabled person as long as those abilities are relevant. If a suitable comparator can be identified with the same skills or abilities, this makes the match a closer one and makes the comparison more useful in determining whether the treatment was less favourable treatment because of disability

Example: A disabled man with a chronic heart condition is a member of a golf club. He is told that he will not be selected for the club's team because his game is not good enough. A comparator is a member of the golf club with the same golf handicap who does not have this disability.

5.33 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.

Example: Henry, who is gay, complains that he was refused membership of a squash club because of sexual orientation; Frank, his non-gay regular squash opponent was accepted into the squash club. The fact that Frank is married and Henry is a civil partner will not be a material difference in their circumstances, so Henry would be able to refer to Frank as a comparator in this case.

Combined discrimination

5.34 What does the Act say?

Combined discrimination occurs when, because of a combination of two relevant protected characteristics, a person is treated less favourably than others are or would be treated. 14 (1)

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

5.35 For combined discrimination, disability is treated as a single characteristic, which may be combined with any other relevant protected characteristic, for example visual impairment combined with sexual orientation, or HIV combined with race. Even where a person has more than one disability, disability can only be one characteristic within the combination of characteristics. Hansard House of Lords 19.10.09 Column WA 39

- Less favourable treatment because of two different disabilities, for example visual impairment and HIV, will not be combined discrimination under the Act. A person who is treated less favourably because of two disabilities would be able to bring claims for direct discrimination because of each disability separately.
- It may be combined discrimination if a person experiences less favourable treatment because of the combination of more than one disability and a different protected characteristic, for example a woman with a learning disability and hearing

Please note: this is draft for consultation and should not be taken as final text

impairment who is treated less favourably by health service providers because of the combination of her sex and her disabilities could bring a claim of combined discrimination because of sex and disability.

5.36 For combined discrimination, pregnancy and maternity is not a relevant protected characteristic. However, where less favourable treatment is because of a combination of pregnancy or maternity and another characteristic, that treatment may constitute combined discrimination because of sex and that other characteristic.

5.37 What is a combination of characteristics?

Treatment will only be combined discrimination where the reason for the treatment is the combination of two characteristics.

14(1) and

Example: A business association advertises for new members. A Jewish man's application is rejected. As the association has accepted other men as members, rejection of the Jewish man is not direct discrimination because of sex, and as the association has accepted a Jewish woman as a member, this is not direct discrimination because of Jewish religion or ethnicity. It is because he is a Jewish man; that is, because of the combination of sex and religion or ethnicity, that he is treated less favourably.

5.38 Combined discrimination is often based on specific stereotypes, assumptions or prejudices about people who have the particular combination of characteristics.

Example: A group of black boys are stopped by the police almost daily, and this does not happen to white boys or black girls. The black boys believe this is because of police assumptions about the behaviour of black boys.

Example: An Asian man wearing a rucksack is not permitted to travel on a London bus. He watches the driver allow Asian women with rucksacks as well as non-Asian men with rucksacks to board the bus. He believes his treatment is because of the stereotype of Asian men with rucksacks as terrorists.

- 5.39 To complain about combined discrimination, the person does not need to show that each characteristic was individually an effective cause of the less favourable treatment. They need only show that the combination of characteristics was an effective cause of the treatment. 14 (5)

Example: The only black woman member of a skiing club sees other women and black men included in the club's plans for special trips which she is not invited to join. She believes that it is not her race on its own or her sex on its own that is the cause of her exclusion but the fact that she is both black and female.

5.40 Where a person is treated less favourably because of two separate protected characteristics and the person can show that this amounted to direct discrimination because of each characteristic separately, the treatment will not be combined discrimination. For example, where a disabled lesbian can show less favourable treatment because of sexual orientation and can also show less favourable treatment because of disability, she can claim direct discrimination relating to each of these grounds separately. Since it is not the combination of characteristics, but each characteristic separately, which caused the treatment, she cannot claim combined discrimination.

Meaning of ‘because of’ for combined discrimination

5.41 A service provider’s treatment of a person could be because a person has both characteristics, for example, because they are black and a wheelchair user or Thai and a transsexual. It could also be ‘because of a combination of protected characteristics’ where a service user does not possess that combination of characteristics themselves. As with direct discrimination, the person might be perceived as having the combination of characteristics (‘discrimination by perception’); or might be associated with someone who has – or is believed to have – the combination of characteristics (‘discrimination by association’). These concepts are explained in paragraphs 5.20 to above.

Example: A woman receives less favourable treatment based on her association as the full-time carer of a woman who has a mental illness.

Example: A man receives less favourable treatment because he is perceived to be a gay Christian as he is a leading spokesperson for the Gay Christian movement.

Are there any restrictions on claiming combined discrimination?

5.42

Less favourable treatment because of a combination of two characteristics is not combined discrimination if direct discrimination is permitted under the Act or any other law in relation to either or both of the characteristics within the combination, for example because an exception applies in relation to one of the characteristics. (See Chapter 15 for exceptions).

14(4)

Example: A gay man would not be able to complain of combined sex and sexual orientation discrimination in the provision of certain services where the Act permits services of that type to be provided to women only.

Example: A blind student who is an atheist who is refused membership of a Christian students' association would not be able to complain of combined religion and disability discrimination since the Act permits associations to restrict their membership to people of a particular religion.

Comparator for combined discrimination

- 5.43 As for direct discrimination, to establish combined discrimination a claimant must show that the service provider treats or has treated them less favourably than the service provider treats, has treated or would treat a comparator (see paragraphs 5.6 and 5.24). For combined discrimination the comparator is a person who has neither of the protected characteristics in the combination. For example, the comparator for a black woman who has experienced discrimination because of a combination of sex and race is a white man. The comparator for a Muslim man who has experienced discrimination because of a combination of religion and sex is a non-Muslim woman.
- 5.44 In most cases a claimant will not be able to identify an actual person without the claimant's combination of characteristics whose relevant circumstances are otherwise the same as or not materially different from the claimant's, and so the comparison will need to be made with a hypothetical comparator.
- 5.45 For combined discrimination as for direct discrimination, in constructing a hypothetical comparator, it may be necessary to make an inference from the behaviour of the service provider towards people in similar circumstances to the claimant or in different circumstances which are analogous but materially different in certain respects. For combined discrimination, evidence as to the way the service provider treats persons to whom only one of the protected characteristics apply may enable an inference to be drawn as to how a hypothetical comparator who has neither protected characteristic would be treated.

- 5.46 If a black woman finds that a service provider treats both black men and white women more favourably than they treat her, an inference could be made that the service provider only treats black female service users less favourably and therefore that a hypothetical comparator, a white man, would have been treated more favourably. This would also show that it was neither race alone nor sex alone that was the reason for her less favourable treatment, but the combination of the two.
- 5.47 As for direct discrimination, the facts in a case may suggest that the reason for the less favourable treatment is a prejudice, stereotype or assumption relating to the particular combination of characteristics. When it is clear from the facts that the reason for the treatment is the combination of characteristics, it will follow that a hypothetical comparator without both characteristics would have been treated more favourably.
- 5.48 When a Muslim man tried to enter a leisure centre, the manager stopped him and said: 'With the current threat of Muslim terrorism in this city, if I let you in other users will be put in fear.' The facts indicate that the reason for the treatment was the combination of sex and religion. The comparison that must be carried out would be with a hypothetical non-Muslim woman comparator whose relevant circumstances are otherwise not materially different.

Characteristics of the discriminator

5.49 In a claim of less favourable treatment because of a protected characteristic, it does not matter whether the service provider has that protected characteristic. Where the alleged less favourable treatment is because of a combination of two protected characteristics, it does not matter if the service provider has one or both, or neither, of the characteristics in the combination.

5.50 After a number of incidents, the proprietor of a café refuses to serve black young men after 7pm on Friday or Saturday. In determining whether this amounts to unlawful direct discrimination or unlawful combined discrimination it is irrelevant whether the proprietor is black or white or male or female.

Provisions relating to sex, pregnancy and childbirth

13 (7)

5.51 The Act clarifies how direct discrimination applies in relation to sex, pregnancy and childbirth.

- Treating a woman unfavourably because she is breastfeeding a baby who is more than six months old is an act of direct sex discrimination. For unfavourable treatment of a woman who is breastfeeding a baby up to six months old, see paragraph 5.52 on pregnancy and maternity discrimination. 13(7)(a)
13(9) and 17(6)(b)
- 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. 13(8)
13(7)(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.

- Treating a woman unfavourably because of her pregnancy or because she has given birth is covered separately under Section 17 of the Act (see below). The protected characteristic of sex would not apply in this situation.

Pregnancy and maternity discrimination

5.52 What does the Act say?

The [Act] protects women from discrimination because of their pregnancy or maternity in provision of services, exercise of public functions and associations. It is discrimination to treat a woman unfavourably because:

- of either her current or a previous pregnancy 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 17(3)
 - she is breastfeeding, and the unfavourable treatment occurs within a period of 26 weeks beginning with the day on which she gave birth. 17(4)
- 17(5)
17(6) and
13(7)

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

Outside of the 26-week period, she may be protected by the sex discrimination provisions. See paragraph 2.28x Chapter 2 on the protected characteristic of sex.

When is discrimination under this section likely to occur?

5.53 The unfavourable treatment will be pregnancy and maternity discrimination if the woman would not have received the treatment but for the fact she is or has been pregnant, has given birth within the previous 26 weeks, or is breastfeeding a baby who is 26 weeks old or less. The woman's pregnancy or maternity does not have to be the only reason for the unfavourable treatment but it does have to be an effective cause.

It is not necessary to show that the treatment was unfavourable compared with the treatment of a man, or anyone else in similar circumstances.

Pregnancy of hers

5.54 The unfavourable treatment must be experienced by the woman herself who is or has been pregnant, and does not extend to association. However, someone who is unfavourably treated because of their association with a pregnant woman may be protected by the sex discrimination provisions.

17(2)

17(6)

Example: A cafe owner must not ask a woman to leave his cafe because she is breastfeeding her baby.

A shopkeeper must not refuse to sell cigarettes to a woman because she is pregnant.

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 and when she asks why she is told by the loans manager that they were concerned that she may not be able to maintain repayments. Although the refusal is because of her income being assessed as deficient, the effective cause of that assessment is her pregnancy and it would therefore be unlawful pregnancy discrimination.

Exceptions

- 5.55 See Chapter 15 for the limited circumstances where it may be lawful on health and safety grounds to refuse a service to a woman because of pregnancy or maternity, or to offer/provide it conditionally.

More favourable treatment for disabled people

- 5.56 A service provider does not discriminate against a non-disabled person if they treat or would treat disabled people more favourably. Thus it is always lawful for a service provider to treat a disabled person more favourably than they treat a non-disabled person. 13(3)

Example: A club puts on a cabaret evening for members and their guests at a small charge. Several club members are disabled. The club offers free entry to personal support workers accompanying disabled members. This allows disabled club members to enjoy the cabaret without having to pay two entrance fees. This more favourable treatment of disabled people is within the Act.

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.

Chapter 6

The duty not to discriminate indirectly in provision of services, exercise of public functions and associations

Introduction

- 6.1 Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity (although in pregnancy and maternity cases, indirect sex discrimination may apply). As explained in at page 17 in Chapter 1, 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. 19(3)

What does the Act say?

- 6.2 Indirect discrimination occurs when a service provider applies to a person a provision, criterion or practice, which on the face of it has nothing to do with that person’s protected characteristic, and applies (or would apply) that provision, criterion or practice equally to everyone, but it: 19(1),19(2)
- puts, or would put, people who share the person’s protected characteristic at a particular disadvantage when compared with people who do not have that characteristic; and
 - puts, or would put, the person at that disadvantage, and

Please note: this is draft for consultation and should not be taken as final text

- cannot be justified by the service provider as a 'proportionate means of achieving a legitimate aim'. (This is sometimes called 'objective justification').

What constitutes a provision, criterion or practice?

6.3 In establishing whether there is indirect discrimination, the first stage is to ask whether there is a provision, criterion or practice, and if so what it is. The phrase 'provision, criterion or practice' is not defined by the Act. The three terms frequently overlap and it is not always sensible to treat them as separate concepts. However, they should be construed widely so as to include, for example, any (formal or informal) policies, rules, practices, arrangements, criteria, prerequisites, qualifications or provisions. 19(1)

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 is likely to be unlawful.

- 6.4 The Act covers proposals (such as a proposed policy or criterion) and 'one-off' or discretionary decisions. The Act also allows provisions, criteria or practices which have not yet been applied to persons but which would have a discriminatory effect to be challenged.

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. A woman points out that this plan will make it more difficult for women, including herself, using a pushchair to get in and out of the block. Although the work has not yet started, if the council cannot justify its one-off decision it will be unlawful.

Is the provision, criterion or practice a neutral one?

- 6.5 On the face of it, the provision, criterion or practice has to be neutral and apply to everybody, whether or not they have the protected characteristic in question. If the provision, criterion or practice expressly applies to people with a specified protected characteristic then it may amount to *direct* discrimination. 19(2)(a)

Example: GP practice decides that it will not see migrant workers 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. A migrant worker attempts to open an account. The bank notes that the migrant worker has no permanent residence and refuses the application. The requirement for a permanent residence is a neutral one; in its application in this case it would be unlawful unless it could be justified.

- 6.6 There is no need to demonstrate a causal link between the disadvantage and the protected characteristic, although often the disadvantage will be clearly linked to something connected with the protected characteristic.

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 the 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.

- 6.7 It is not enough that the provision, criterion or practice puts, or would put, at a particular disadvantage a group of people with a protected characteristic. It must also have or be capable of having that effect on the individual concerned. So for a person merely to establish that they are a member of that particular group will not be enough.

The comparative approach

- 6.8 The next stage is to make a comparison between people with the protected characteristic and those without. Comparing the situation of the two groups will make it clear whether the provision, criterion or practice puts – or would put – the group with a protected characteristic at a particular disadvantage when compared with others who do not share the characteristic. The circumstances of the two groups must be sufficiently similar for a comparison to be made – there must be no material differences in circumstances. 19(2)(b), 23(1)
- 6.9 It is important to be clear which protected characteristic is relevant. In the case of disability, this is unlikely to be disabled people as a whole but could be people with a particular disability – for example, a specific visual impairment. For race, it could be all ethnic minorities generally but could also be Africans or Somalis or non-UK citizens.

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 correct ethnic groups and those who are not, the racial consequences of the rule will become apparent and the nursing home will have to justify the rule.

- 6.10 Sometimes, a provision, criterion or practice is *intrinsically liable* to disadvantage a group with a particular protected characteristic. So a dress code policy which prohibits headwear would obviously disadvantage Sikhs.

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: A local authority requires applicants for some of its services to demonstrate that they have paid Council Tax in the area for the previous two years. Such a rule is intrinsically liable to disadvantage non-UK nationals, for example those moving from other EU countries to work on a temporary basis.

- 6.11 There will also be cases where the disadvantage is *common knowledge*. For example, it is common knowledge that a much larger proportion of women than men are restricted by childcare responsibilities in being able to work full time. So women will generally be disadvantaged by a requirement to work full time. In such cases, it is not necessary to demonstrate that a substantially higher proportion of this group will be affected – it will be a matter of common sense about the normal behaviour of the group.

Example: A service provider makes it a qualifying criterion for provision of a service that a person must be on the electoral register. This is likely to disadvantage Gypsies and Travellers.

- 6.12 There will be many situations where the disadvantage is less obvious. If such cases go to court, the use of statistics may be helpful in showing the effect of the provision, criterion or practice on the group with the protected characteristic compared to the effect on the other group. 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 statistically significant comparison. In these cases, it may be helpful to have evidence from an expert to help the court understand the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about principle 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 are in prison and have a medical condition requiring medication. They claim that the prison doctor is indirectly discriminating against them by prescribing tablets which contain pork gelatine. The Court would be assisted by evidence of the place of this belief in the person's religion in order to establish that that it amounted to a disadvantage.

Choosing the 'pool'

- 6.13 The people used in the comparative exercise are usually referred to as the 'pool'. It is important to choose the right pool for comparison, but this may not be easy. In general, the pool should consist of the group whom the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding people who are not affected either way. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. 19(2)(b)

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 they cannot access these services and 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.

Making the comparison

- 6.14 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. Apart from the protected characteristic, the circumstances of the two groups of people within the pool must be similar enough to allow comparison.
- 6.15 How the comparison is carried out will depend on the circumstances, including the protected characteristic involved. Once the person has proved there is a 'particular disadvantage' to the group of which they are a member, they must then show that they have also suffered (or would suffer) that disadvantage as an individual. 19(2)(c)

Information on pools

- 6.16 If the court is asked to decide an indirect discrimination claim, it will generally ask itself these questions:
- What proportion of the pool has the particular protected characteristic under consideration?
 - Within the pool, how does the provision, criterion or practice affect people without the protected characteristic?
 - How many of them are (or would be) put at a disadvantage by it?
 - Within the pool, how does the provision, criterion or practice affect people with the protected characteristic?
 - How many of these are (or would be) put at a disadvantage by it?

Finally, the court would compare (a) the proportion of people with the protected characteristic who are, or would be, disadvantaged by the provision, criterion or practice, with (b) the proportion of disadvantaged people without the characteristic.

It can then address the question of 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.

Example: A local authority makes a hall available for residents meetings for people living in the local authority ward in which the hall is situated. It is only made available on Friday evenings. Making the hall available on a Friday night is a neutral practice

- a) The local authority looks at the information it holds on the religious make-up of the 'pool' (which is the 5,000 people 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 local authority knows that non-Jewish residents are unlikely to be prevented from using the hall by their religious beliefs.
- c) It estimates that none of the 4,000 non-Jewish residents will be disadvantaged by this practice.
- d) However at least 500 Jewish residents, those holding Orthodox beliefs, will be prevented by their religion from using the hall and
- e) Therefore, 50 per cent of Jewish residents will be disadvantaged by the practice.
- f) The local authority then compares the proportion of Jewish people who are disadvantaged by the practice (half of them) with the proportion of those who are disadvantaged by the rule but are not Jewish (none). From this comparison, the local authority concludes that the group with the protected characteristic (Jewish religion) experiences a particular

disadvantage, and recognises that it must justify the practice (see below) or change it to avoid acting unlawfully. It chooses to make the hall available on another evening instead of Friday.

Intention

6.17

Indirect discrimination is unlawful whether it is intentional or not and whatever A's motivation. Even if it never occurred to the person applying the provision, criterion or practice that someone with a protected characteristic could be particularly disadvantaged by it, the indirect discrimination will be unlawful unless it can be justified. However, a service provider which unintentionally commits an act of indirect discrimination may avoid having to pay damages in certain circumstances (see Chapter 16, paragraph 58).

118(5),(6)

Example: A provider of legal services introduces a website to enable the public to access its services more easily. However, the website embedding all of its text within graphics. Although it did not intend to discriminate indirectly against those with a visual impairment, this practice places those with a visual impairment at a particular disadvantage because they cannot change the font size or apply text to speech recognition software. Hence they cannot access the website. As well as giving rise to an obligation to make a reasonable adjustment to their website, their practice will be unlawful (unless they can justify it).

When is indirect discrimination justified?

- 6.18 Indirect discrimination is not unlawful where the person applying the provision, criterion or practice can show that it is ‘a proportionate means of achieving a legitimate aim’. This test is also known as ‘objective justification’. It is for the service provider to justify indirect discrimination. So it is up to the service provider to produce evidence to support their assertion that it is justified, and not rely on mere generalisations. 19(2)(d)

What is a legitimate aim?

- 6.19 The notion of ‘legitimate aim’ is not defined by the Act. The aim must be legal, must not be discriminatory in itself, and it must represent a real, objective consideration.

- 6.20 Although business needs and economic efficiency may be legitimate aims, a service provider simply aiming to reduce costs or improve competitiveness cannot expect to satisfy the test.

- 6.21 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
- 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.

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

What is proportionate?

6.23 The term 'proportionate' is not defined in the Act. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. Applying a provision, criterion or practice may be 'necessary' in this context without being the only possible way of achieving the legitimate aim; it is sufficient that less discriminatory measures could not achieve the same aim. A balance must be struck between the discriminatory effect of the practice and the service provider's reasons for applying it, taking into account all the relevant facts. In court, a service provider will need to produce evidence supporting the use of the provision, criterion or practice.

6.24 The financial cost of using a less discriminatory approach cannot, by itself, provide a justification for using a particular provision, criterion or practice. A service provider cannot argue that to discriminate is cheaper than avoiding discrimination. But cost can be taken into account as part of the service provider's justification if there are other good reasons for adopting the chosen practice, such as seeking to eliminate discrimination.

6.25 A court will conduct a detailed scrutiny of, and a critical evaluation of, the reasons advanced by the person defending the case by way of justification. It will also give detailed consideration to the alternative means available to achieve the service provider's aims.

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 restricting strenuous exercise could be admitted to undertake parts of the course which do not create a safety risk, and because some conditions which doctors may refer to when refusing to certify 'good health' do not, in practice, impede the ability to undertake strenuous exercise safely.

6.26 In a case involving disability discrimination if the service provider has not made relevant reasonable adjustments, it will be difficult for the service provider to show that the treatment was proportionate.

6.27 The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be. Indirect discrimination should be seen as forming a continuum with direct discrimination [see paragraph 2 of Code]; the closer the practice comes to direct discrimination, the more difficult it will be for the service provider to justify using it.

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 have at least one parent or grandparent born in the UK. This constitutes indirect discrimination on grounds of national and/or ethnic origins as it is not objectively justified and proportionate. The criteria although indirectly discriminatory are very close to direct discrimination.

- 6.28 A significant factor in determining whether a public authority is able to justify what appears to be indirect discrimination is the extent to which the authority has complied with their equality duties under the Act to have due regard to the need to eliminate unlawful discrimination and to advance equality of opportunity.

Example: In the example above, the government department would need to pay due regard to the positive duty to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good race relations. This makes it more difficult for it to justify the indirect discrimination.

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

- 6.29 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 8). These two duties frequently overlap and it is sensible to consider them together.
- 6.30 When planning its service, a service provider will need to consider whether its practices indirectly discriminate against disabled persons (and so cannot be justified). If a practice indirectly discriminates against disabled persons, then the service provider will not be able to continue the practice and must cease to apply it to anyone.
- 6.31 However, if the service provider plans to provide 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.

6.32 In many cases when the service provider considers the question of whether a practice is justifiable despite its impact on disabled persons, this will reveal adjustments that would enable the service provider to achieve its business aim but to provide the service in a way that means its service is accessible for disabled persons.

Chapter 7

Discrimination arising from disability

Introduction

- 7.1 This chapter addresses the duty of providers of services to the public, those carrying out public functions, and private clubs and associations to ensure that disabled people are not treated less favourably than other people when using their services for a reason relating to their disability. This type of discrimination is known as ‘discrimination arising from disability’ and it is a type of discrimination which is only applicable to disabled people. 15

The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 11, 12 and 13.

As explained in paragraph xx in chapter XX, 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 discrimination arising from disability?

7.2 What does the Act say?

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.

Example: An association – in the form of a private members' club – rejects applicants for membership who do not satisfy its 'image' in one respect or another. A woman with a severe facial disfigurement is refused membership of the club. Even though the club also does not allow entrance to many non-disabled people, for example, because it does not consider them to be attractive enough, the woman with the severe disfigurement has been treated in a detrimental way because of her disability.

How does it differ from direct discrimination?

- 7.3 Discrimination arising from disability is different from direct discrimination. Direct discrimination occurs because of the protected characteristic of disability. By contrast, in the case of discrimination arising from disability, the reason for the treatment does not matter. 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 Hirschprung'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 experiencing detrimental treatment as a consequence of his disability

How does it differ from indirect discrimination?

- 7.4 Discrimination arising from disability is also different from indirect discrimination. Indirect discrimination occurs when a disabled person is disadvantaged by a provision criterion or practice which:
- is (or would be) also applied to everyone, and
 - puts (or would put) people who have the disabled person's disability at a disadvantage when compared with people who do not have that disability.

7.5 In the case of discrimination arising from disability, there is no need to show that a provision criterion or practice has been (or would be) applied to other people. Nor is there any need to show group disadvantage – that it puts (or would put) other people with the person’s disability at a disadvantage when compared with people who do not have the disabled person’s disability. The only question is whether the unfavourable treatment the particular disabled person experiences is because of something arising in consequence of their disability.

Is a comparator required?

7.6 No. There is no need to show that a non-disabled person or someone with a different disability would not have been treated unfavourably in the same circumstances. Both direct and indirect discrimination require a comparison to be made but there is no need for a comparison when considering whether there has been discrimination arising from disability. It is only necessary to demonstrate unfavourable treatment is because of something arising in consequence of their disability.

Example: A disabled person is refused access to a nightclub because they are slurring their words, as a result of having cerebral palsy. In these circumstances, the disabled person has been treated unfavourably because of something arising as a consequence of their disability. This will amount to discrimination arising from disability which is unlawful, unless it can be justified.

What is unfavourable treatment?

7.7 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. If the disadvantage is obvious, 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. 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.

7.8 What does 'something arising in consequence of their disability' mean?

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 upon 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; or an inability to maintain paid employment and so keep up with financial obligations.

The unfavourable treatment must be because of *something that arises* in consequence of the disability. For example, a visually impaired person may not be able to navigate without a guide dog. A refusal of entry to a restaurant because the restaurant does not permit dogs to be inside would be unfavourable treatment because of something that arises in consequence of the disability.

Example: A member of staff at Jobcentre Plus refuses to interview a member of the public, who wishes to complete an application for job seekers 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.

Knowledge

7.9 If the service provider can show that they

- 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.

However, it is not enough for the service provider to show that they did not know that the disabled person had the disability in question. They must both show that they did not know about the disability itself and also 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 justified.

7.10 A service provider must do all they can reasonably be expected to do to find out if a person has a disability. The action that it is appropriate to take to find out about a person's disability may vary depending on the circumstances.

7.11 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 will be expected to 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.

Example: A woman with Post Traumatic Stress Disorder joins a private club for ex services personnel without disclosing her condition. From time to time, symptoms of her impairment include aggressive behaviour and poor short-term memory. She becomes involved in a loud argument at the club. As a result, she is called to a meeting to explain her actions before the club committee. Before the meeting, she is asked if she

would like to submit any considerations to the committee in relation to her behaviour and she is advised that any information will be kept confidential. This gives her an opportunity to provide information about her condition.

- 7.12 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 has any problems in going to the counter. 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.

- 7.13 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?

- 7.14 The Act does not prohibit positive action in favour of disabled people (unless this would be unlawful under other legislation). Therefore service providers may provide services on more favourable terms to a disabled person.

Relevance of reasonable adjustments

- 7.15 A service provider can still subject a disabled person to discrimination arising from their disability despite the fact that they have complied with a duty to make reasonable adjustments in relation to the disabled person.

This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

Failing to comply with the duty to make adjustments will not automatically mean that a service provider has subjected a disabled person to discrimination arising from disability. But if it has failed to make a reasonable adjustment which would have had made a difference to the treatment experienced by the disabled person, it will be very difficult for them to show that the treatment was a proportionate means of achieving a legitimate aim.

Chapter 8

Disabled persons: reasonable adjustments

Introduction

- 8.1 This chapter is concerned with the principles of 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 in respect of these three areas of activity are detailed in Chapters 11, 12 and 13. These chapters also provide more detail of the specific wording of the reasonable adjustment duty in relation to these three areas of activity.
- 8.2 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 at page 17 in Chapter 1, 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.

Please note: this is draft for consultation and should not be taken as final text

- 8.3 The duty to make reasonable adjustments is a cornerstone of the Act and 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.
- 8.4 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. Accordingly, 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.

What does the act say?

- 8.5 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.

Clause
21 2

What is the duty to make reasonable adjustments?

8.6 The duty to make reasonable adjustments comprises three sets of requirements.

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

- To take reasonable steps to avoid the substantial disadvantage where a provision, criterion or practice puts disabled persons at a substantial disadvantage in relation to the provision of a service or exercise of a function.
- To take reasonable steps to avoid the substantial disadvantage, or to adopt a reasonable alternative method of providing the service or exercising the function, where a physical feature puts disabled persons at a substantial disadvantage in relation to the provision of a service or exercise of a function.
- To take reasonable steps to provide an auxiliary aid where disabled persons would, but for the provision of such an auxiliary aid, be put at a substantial disadvantage in relation to the provision of a service or exercise of a function.

Clause
20

Sch 2

8.8 For associations, these requirements are:

- To take reasonable steps to avoid substantial disadvantage where a provision, criterion or practice puts relevant disabled persons at a substantial disadvantage in relation to being admitted to membership or being invited as a guest; or having access to a benefit, facility or service; or members and associates retaining their rights or avoiding having them varied.

Clause
20 Sch
15

Please note: this is draft for consultation and should not be taken as final text

- To take reasonable steps to avoid substantial disadvantage where a physical feature puts relevant disabled persons at a substantial disadvantage in relation to being admitted to membership or invited as a guest; or having access to a benefit, facility or service.
- To take reasonable steps to provide an auxiliary aid where relevant disabled persons would, but for the provision of such an auxiliary aid, be put at a substantial disadvantage in relation to being admitted to membership or invited as a guest; or having access to a benefit, facility or service; or members and associates retaining their rights or avoiding having them varied.

8.9 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.

What these reasonable adjustment duties require in practice is described in paragraphs 8.30 to 8.39 below.

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

8.10 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 separate restrictions on the duty in relation to service providers, those exercising public functions and associations.

Please note: this is draft for consultation and should not be taken as final text

- 8.11 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 (7)
- 8.12 Those exercising public functions will not be required to take any steps which are *ultra vires* – outside their powers. Sch 2 (8)
- 8.13 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 (6)
- 8.14 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. Associations may still need to seek the occupier's permission to make any necessary changes, including temporary ones – such as the provision of a portable induction loop. Or the association may have to arrange a change of venue to ensure that disabled members have access to association benefits. Sch 15 (7)

To whom is the duty to make reasonable adjustments owed?

- 8.15 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 persons 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.

At what point does the duty to make reasonable adjustments arise?

- 8.16 In relation to all three areas of activity 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 join an association, use the service, avail themselves of a function, etc.
- 8.17 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 be thinking now about the accessibility of their services to disabled people. Service providers should be planning continually for the reasonable adjustments they need to make, whether or not they already have disabled customers. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. In many cases, it is appropriate to ask customers to identify whether they have any particular requirements and, if so, what adjustments may need to be made. Failure to anticipate the need for an adjustment may render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defense to a claim that it was reasonable to have provided one.

8.19 Disabled people are a diverse group with different requirements that service providers need to consider. No single aspect of the way in which a service is delivered will obstruct access to the service for all disabled people, or, in most cases, for disabled people generally. A practice, or a feature of the premises, which obstructs access to a service for persons with a particular type of disability may present no difficulties for others with a different disability. Indeed there may also be certain features which present barriers for only some people with a particular impairment – 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.

Does the duty of reasonable adjustment apply even if the service provider does not know that the person is disabled?

8.20 Because, as explained in paragraph 8.15 above, 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.

8.21 For this reason, employees should be made aware that they may be discriminating unlawfully even if they do not know that a customer is disabled, and they should be reminded that not all impairments are visible. The duty of reasonable adjustment is best met by the service provider trying to anticipate the types of problems which could arise, and by training its employees to enquire rather than act on assumptions. The aim should be that, when disabled customers request services, the service provider has already taken all reasonable steps to ensure that they can be served.

Must service providers anticipate every barrier?

- 8.22 Service providers cannot be 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 features that may impede persons with particular kinds of disability – for example, people with visual impairments or mobility impairments.
- 8.23 When considering the provision of a reasonable adjustment, a service provider should be flexible in its approach. However, there may be situations where it is not reasonable for a service provider to anticipate a particular requirement.
- 8.24 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.

How long does the duty continue?

- 8.25 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 and 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.

- 8.26 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 the replacement computers. This is likely to be a reasonable step for the library to have to take at this time.

What disadvantage gives right to the duty?

- 8.27 As explained in paragraph 8.16 above, the duty to make reasonable adjustments arises where a provision, criterion or practice, any physical feature of premises or the absence of an auxiliary aid or services puts disabled persons at a substantial disadvantage compared with people who are not disabled. Substantial disadvantages are those which are not minor or trivial. Whether or not such a disadvantage exists is a question of fact.
- 8.28 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. Clause
23
- 8.29 The object of the duty to make reasonable adjustments is, so far as is possible by reasonable means, to avoid the disadvantage which a disabled person experiences because of their disability.

What is meant by 'reasonable' steps?

8.30 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.

8.31 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 difficulty 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 TV licence. 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 TV licence. Thus, the post office's queuing policy makes it unreasonably difficult for the disabled person to use the service. 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.

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. Depending on the size of the post office, these might be reasonable steps to have to take to adjust the queuing policy. However, it is not likely to be a reasonable step for the post office to send a member of staff to the disabled customer's home in order to sell him the TV licence. The time and expense involved would probably be an unreasonable use of the post office's resources, particularly in proportion to the degree of benefit to the disabled customer.

8.32 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.

8.33 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.

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

Please note: this is draft for consultation and should not be taken as final text

8.35 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.

8.36 The purpose of taking the steps is to ensure that disabled people are not placed at a substantial disadvantage 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 result in the service being accessible.

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 impairments or visual disabilities to access the conference, nor does it help 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.

8.37 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. The way in which an auxiliary aid or service is provided may be just as important as the auxiliary aid or service itself.

Once a service provider has decided to put a reasonable adjustment in place, it is important to draw its existence to the attention of disabled people. This might be done by a simple sign or notice at the entrance to the service provider's premises or at a service point.

Example: 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.

8.38 Alternatively, the availability of a reasonable adjustment might be highlighted in forms or documents used by the service provider, such as publicity materials, application forms, local newspapers, websites, information sent to disability groups. In all cases, it is important to use a means of communication which is itself accessible to disabled people. Failing to make people aware of the adjustment, if it is not obvious, may be tantamount to not making the adjustment at all.

8.39 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.

Example: An airport provides transfer by electric buggy between check-in and gates for passengers with mobility impairments. Prominent signs at the entrance to the arrival and departure halls and at check-in desks assist disabled passengers in accessing that auxiliary service.

Example: A hospital has its forms and explanatory literature in accessible alternative formats such as large print, audio tape and Braille. A prominent note to that effect on the literature sent to patients, or a specific mention of this by reception staff when a patient first visits the hospital, assists disabled patients to access the service.

Costs of providing reasonable adjustments

8.40 Justification of a charge for reasonable adjustments

There is nothing in the Act which prevents service providers from recouping the cost of providing reasonable adjustments by increasing their charges to customers in general. However, if a service provider charged a disabled person for providing or making a reasonable adjustment, this would amount to discrimination in providing a service on different terms (discrimination meaning discrimination arising from disability) unless it can be justified. This form of discrimination is explained further in Chapter 7. It is extremely unlikely that a service provider will be able to justify such treatment, because it would not be appropriate to charge for an adjustment: if it is too costly to make an adjustment, then it would not be a 'reasonable step' for the service provider to have to take.

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

8.41 Where a service provider does not comply with the duty to make reasonable adjustments in the circumstances outlined in Chapters 11, 12 and 13, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 17 for more detail about claims).

Reasonable adjustments in practice

General approach to making reasonable adjustments

- 8.42 It is important that service providers do not assume that the only way to make services accessible to disabled people is to make a physical alteration to their premises (such as installing a ramp or widening a doorway). Often, minor measures such as allowing more time to serve a disabled customer will help disabled people to use a service. Disability awareness training for staff is also likely to be appropriate. However, adjustments in the form of physical alterations may be the only answer if other measures are not sufficient to overcome barriers to access.
- 8.43 A service provider should be able to identify the more obvious physical barriers or other impediments for disabled people in accessing its services. Regularly reviewing the way in which it provides services to the public, for example, via periodic access audits, might help a service provider identify any less obvious or unintentional barriers to access for disabled people. Obtaining the views of disabled customers and disabled employees will also assist a service provider.
- 8.44 Disabled people know best what hurdles they face in trying to use the services provided. They can identify difficulties in accessing services and might also suggest solutions involving the provision of reasonable adjustments. In addition, local and national disability groups or organisations of disabled people have extensive experience upon which service providers can draw. Listening carefully and responding to what disabled people really want helps service providers find the best way of meeting disabled people's requirements and expectations.

8.45 Employee training is also an important factor in providing reasonable adjustments. Employees should be generally aware of the requirements of disabled customers and potential customers and should appreciate how to respond appropriately to requests for a reasonable adjustment. They should know how to provide an auxiliary service and how to use any auxiliary aids that the service provider offers. Employees could also be encouraged to acquire additional skills in serving disabled people, for example, communicating with hearing-impaired people and those with speech impairments. Providing such training may help to avoid a finding of unlawful discrimination.

What do the requirements to make adjustments mean in practice?

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

8.46 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 circumstance described in paragraphs 8.7 and 8.8 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 all together. 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?

8.47 There is no definitive list of what is a provision, criterion or practice. However, in general, provisions, criteria and practices relate to the ways in which a service is delivered.

8.48 When a service provider is providing services to the public, they will have established a particular way of doing this. Their practices (including policies and procedures) may be set out formally, or may have become established informally or through custom. The phrase ‘provision, criterion or practice’ includes the full breadth of informal and formal policies, practices and procedures used by the service provider. The three terms frequently overlap and it is not always sensible to treat them as separate concepts in the context of service provision. Broadly speaking the phrase includes

- the statements or rules about how a service provider plans to go about providing the service (provisions)
- the factors a service provider uses to make decisions relating to service provision (criteria), and
- what a service provider actually does (practice).

8.49 Clearly ‘practice’ will include all aspects of the manner in which a service is provided: any informal policies (what a service provider intends to do), rules, arrangements, as well as one off discretionary decisions.

8.50 ‘Criterion’ will include prerequisites, conditions or qualification requirements; ‘provision’ will include formal policies, rules, and contract terms.

What is the duty to provide auxiliary aids or services?

- 8.51 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 8.7 and 8.8 above to remove the disadvantage experienced by disabled persons.

Example: A solicitors' firm lends an audio tape 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. The client would be expected to return the recorder after use.

Example: Health workers at a blood donation centre provide a pager to an individual whose impairment means that she is unable to speak so that she can alert the staff members if she needs to attract their attention. The blood donor would be expected to return the pager after use.

What is an auxiliary aid or service?

- 8.52 An auxiliary aid or service is anything which provides additional support or assistance to a disabled person. This might be the provision of a special piece of equipment, the provision of information on audio format and the provision of a sign language interpreter, or simply extra staff assistance to disabled people.

Please note: this is draft for consultation and should not be taken as final text

- 8.53 Service providers should ensure that any auxiliary aids they provide are carefully chosen and properly maintained. It would also be advisable to have in place contingency arrangements in case of an unexpected failure of an auxiliary aid.
- 8.54 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.
- 8.55 The duty to provide auxiliary aids or services requires the service provider to take such steps as it is reasonable for it to have to take, in all the circumstances of the case, to avoid disabled people being put to a substantial disadvantage in accessing services. What might be reasonable for a large service provider (or one with substantial resources) might not be reasonable for a smaller service provider. The size of the service provider, the resources available to it, and the cost of the auxiliary service are relevant factors.

The reasonableness of the service provider's response to disabled people's requirements will inevitably vary with the circumstances. The kinds of factors which may be relevant are described in paragraphs 8.30 to 8.39 above.

A service provider will have to consider what steps it can reasonably take to meet the individual requirements of disabled people. How effectively the service provider is able to do so will depend largely on how far it has anticipated the requirements of its disabled customers. Many things that seem impossible at the time they are confronted might have been accommodated relatively easily if prior thought had been given to the question.

8.56 The Act leaves open what particular auxiliary aids or services might be provided in specific circumstances. Disabled people may be able to help the service provider to identify where they would be at a substantial disadvantage in accessing the service and what kind of auxiliary aid or service will overcome them. It is good practice to include disabled customers in the process of considering what reasonable adjustments should be made. However, the duty remains on the service provider to determine what steps they need to take.

Physical features

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

8.57 In the circumstance described in paragraphs 8.7 and 8.8 above, where a physical feature puts disabled persons at a substantial disadvantage, a service provider must take such steps as it is reasonable for them to take:

- to avoid the substantial disadvantage, or
- to adopt a reasonable alternative method of providing the service or exercising the function.

Please note: this is draft for consultation and should not be taken as final text

8.58 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.

8.59 The Act does not require a service provider to adopt one way of meeting their obligations over another. The focus of the Act is on results. 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.

8.60 For example, a service provider may decide to provide a service through the option of an alternative method. If a disabled person were to bring a claim against the service provider for a failure to make reasonable adjustments, the court determining the claim will be able to consider the other options which the service provider could have adopted in making the service accessible. 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.

Adopting this approach is in any event good practice, achieves an inclusive solution and resolves the problem permanently.

Clause
20 (7)

Please note: this is draft for consultation and should not be taken as final text

8.61 It is, in particular, recognised good practice for a service provider to consider first whether a physical feature that creates a barrier for disabled people can be removed or altered. This is because removing or altering the barriers created by a physical feature is an ‘inclusive’ approach to adjustments. It makes the services available to everyone in the same way. In contrast, an alternative method of service offers disabled people a different form of service than is provided for non-disabled people.

8.62 Removing or altering the barriers created by a physical feature is also preferable to any alternative arrangements from the standpoint of the dignity of disabled people. In addition, it is likely to be in the long-term interests of the service provider, since it will avoid the ongoing costs of providing services by alternative means and may expand the customer base.

Sch 2 2 6
Sch 15 2
5

What is a ‘physical feature’?

8.63 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 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.

Please note: this is draft for consultation and should not be taken as final text

- 8.64 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 an airport). This is not an exhaustive list.
- 8.65 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. Sch. 21
As is rest of this section
- 8.66 A physical feature includes features brought by or on behalf of the service provider onto premises other than those occupied by the service provider.
- How can service providers identify possible adjustments?**
- 8.67 Service providers are more likely to be able to comply with their duty to make adjustments in relation to physical features if they arrange for an access audit of their premises to be conducted by a suitably qualified person and draft an access plan or strategy. Acting on the results of such an evaluation may reduce the likelihood of legal claims against the service provider.
- 8.68 In carrying out an audit, it is recommended that service providers seek the views of people with different disabilities, or those representing them to assist in identifying barriers and developing effective solutions. Service providers can also draw on the extensive experience of local and national disability groups or organisations of

Please note: this is draft for consultation and should not be taken as final text

disabled people.

Leases, binding obligations and reasonable adjustments

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

- 8.69 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.
- 8.70 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.

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

- 8.71 Special provisions apply where a service provider occupies premises under a lease, the terms of which prevent it from making an alteration to the premises. These same provisions apply where the service provider is a tenant of a property which includes common parts, and is the responsible person in relation to those common parts.
- 8.72 In such circumstances, if the alteration is one which the service provider proposes to make in order to comply with a duty of reasonable adjustment, the Act overrides the terms of the lease so as:
- a) to entitle the service provider to make the alteration with the consent of its landlord
 - b) for the service provider to make a written application for that consent
 - c) for the landlord not to withhold the consent unreasonably, and

d) for the landlord to be able to give consent subject to reasonable conditions.

- 8.73 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.
- 8.74 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).
- 8.75 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.
- 8.76 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

Please note: this is draft for consultation and should not be taken as final text

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).

- 8.77 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.
- 8.78 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.
- 8.79 If the court finds that the refusal or condition as unreasonable it can:
- make an appropriate declaration,
 - make an order authorising the service provider to make a specified alteration (subject to any conditions), or
 - order the landlord to pay compensation to the disabled person.
- 8.80 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?

- 8.81 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.
- 8.82 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.
- 8.83 Where consent has been refused, there is likely to be a means of appeal. Whether or not the service provider's duty to take such steps as it is reasonable to take includes pursuing an appeal will depend on the circumstances of the case.
- 8.84 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

- 8.85 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). A separate Code will provide further information regarding these specific provisions, and other elements of the Act as they relate to transport.

Chapter 9

Harassment

What does the Act say?

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

- | | |
|--|---------------|
| a) harassment related to a protected characteristic | Clause 26 (1) |
| b) sexual harassment, and | Clause 26(2) |
| c) less favourable treatment of an service user because they submits to or reject sexual harassment or harassment related to sex or gender reassignment. | Clause 26 (3) |

Note: As explained at page 17 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 who are protected in the areas covered by this Code.

9.2 Harassment related to a protected characteristic occurs when a service provider

- engages in unwanted conduct which is related to a protected characteristic, and
 - which has the **purpose** or the **effect** of
- a) violating the dignity of another person, or
- b) creating for that person an intimidating, hostile, degrading, humiliating or offensive environment.

Clause
26(1_(a) & (b)

Example: A female wheelchair user goes into an electrical goods shop to buy a fridge; while showing her a range of fridges, the staff talk to her at great length about the Paralympics for no particular reason. While she may find this patronising and stereotypical, it is unlikely to amount to harassment under the Act.

9.3 Unwanted conduct can include any kind 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.

Example: A white man and Thai woman are having a short break in a hotel. Two of the serving staff make it obvious they disapprove of the man's relationship with the woman by banging down their dinner plates, standing over them while they eat, interrupting their meal with unnecessary questions and attending to the requests of other guests before those of the couple. The couple feel humiliated and find the environment a hostile one. This conduct related to race could amount to harassment under the Act.

- 9.4 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' although in some situations this may be necessary.
- 9.5 Whether a single act of harassment or sexual harassment (see below) is sufficient to found a complaint is a matter of fact and degree. One incident which is sufficiently serious may amount to harassment or sexual harassment.

Example: When she was leaving a large store, a woman was subjected to a search by store security staff that involved unnecessary touching of her body. As they were putting their hands in her pockets they made jokes of a sexual nature. She was shocked and horrified by their conduct which, due to a childhood experience of sexual abuse, made her ill. She began proceedings stating that this single incident was sufficiently serious to be sexual harassment under the Act.

'Related to'

- 9.6 'Related to' a protected characteristic has a broad meaning: conduct will be related to a protected characteristic if the person has the protected characteristic or if, in its application to the person, there is any connection with the protected characteristic.
- 9.7 This could include gender-specific conduct which is not pursued, because of the sex of the claimant, but which is clearly related to her sex. So, for example, where bar staff regularly and audibly refer to women as 'slags', an individual woman may be able to establish that she has been subjected to unwanted conduct related to sex.
- 9.8 Harassment occurs even if the person harassed does not have the characteristic: a person might be perceived wrongly to have the characteristic or be harassed because of their association with someone who has the characteristic such as a family member, friend or lover.

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 and other diners. The support workers bring a claim of harassment related to disability.

Example: A woman goes to a bar to meet a friend. While waiting to be served, she hears the staff making insulting comments about her appearance, inferring that she is a male to female transsexual. Despite the fact this is not true, she feels intimidated and upset by their remarks and leaves before her friend arrives. While the remarks were not made directly to her, she is confident the staff were aware that she could hear what they were saying.

- 9.10 Protection under the Act also applies where someone is subjected to harassment related to a protected characteristic even when the service provider knows that they do not have 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 Sri Lanka, 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.

- 9.11 The conduct does not have to be directed at the complainant - it will be prohibited by the Act if, as stated above, it is related to a protected characteristic and has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

9.12 For example:

- At a meeting of a club where the club manager makes comments and jokes about women to a mixed audience, this may amount to harassment where it creates a humiliating or offensive environment for a woman in the audience.
- Racist jokes among hospital staff while on duty may violate the dignity or create a hostile, degrading or humiliating environment for a hospital patient or visitor to the hospital notwithstanding the fact that this conduct was not *directed* at the patient or visitor.
- A prisoner who observes prison officers regularly mimicking and taunting another prisoner who has learning difficulties could have a claim of harassment if this conduct causes an offensive environment for him.

Sexual harassment

9.13 The second type of harassment, often referred to as sexual harassment, occurs when a person engages in any unwanted conduct of a sexual nature which has the purpose or effect of:

Clause 26(2)(a)
& (b)

- violating a person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

9.14 Conduct 'of a sexual nature' can include unwelcome sexual advances, touching, forms of sexual assault, sexual jokes or comments, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

9.15 For example, pornographic photographs of women on a members-only section of the website of an association that recently agreed to accept women members.

Example: A woman attends her local A & E Department following a bicycle accident. A male member of hospital staff treats her wounds and during this treatment makes personal remarks about his sex life and questions the woman about hers. When she asks him to stop he ignores her and continues.

Meaning of 'purpose or effect'

9.16 If the person engaged in the unwanted conduct with the intention that it should have the effect of

- a) violating the dignity of the other person,
or
- b) creating for them an intimidating, hostile, degrading, humiliating or offensive environment,

then it amounts to harassment irrespective of its actual effect on the person.

Please note: this is draft for consultation and should not be taken as final text

- 9.17 Even where the person does not intend either to violate another person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for another person, conduct will amount to harassment if the conduct has this effect.
- 9.18 In some cases, conduct which is intended to be helpful or friendly could amount to harassment.

Example: A boy with multiple sclerosis feels that he is being harassed by his Scout Leader, who constantly asks him if he is feeling all right, despite the fact that he and his parents have asked him not to do so in front of the other boys. Even though the Scout Leader might think that he is being kind, and has no intention of violating the boy's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, his conduct could amount to harassment if it has that effect.

Example: An offer by a male sports centre trainer to stay late to give a woman user of the centre extra instruction is unlikely to amount to harassment on its own unless it is persisted in or is accompanied by remarks about her body.

- 9.19 In deciding whether conduct had that effect the court must take the following three matters into account: Clause 26(4)
- a) The perception of the complainant. This part of the test is subjective, and is concerned with how the particular complainant perceives the conduct in question. Clause 26(4)(a)
 - b) The other circumstances of the case. Clause 26(4)(b)
 - c) Whether it is reasonable for the conduct to have that effect. This is an objective test. Clause 26(4)(c)
- 9.20 Circumstances that may be relevant and therefore need to be taken into account can include:
- 9.21
- Circumstances of the person experiencing the conduct. For example, the person's health including mental health, mental capacity, cultural norms, previous experience of harassment.
- 9.22
- Where the conduct took place. For example, was it 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? Or was it where the relationship may be casual, one-off and brief; for example, in a café or shop?

- 9.23
- The relationship between the service provider and the person experiencing the conduct; for example, doctor and patient; police officer and criminal suspect; club manager and club member; bus conductor and passenger. The greater the power relationship between the parties, the more it should be reasonable that the conduct should have the effect.

Example: A police officer uses insulting racist language when she tells a group of teenagers of different ethnicities to move away from a shopping precinct. The teenagers feel that her offensive words make the situation a hostile one. They are aware from previous experience with the police that if they complain they risk being arrested, so they do nothing at the time but complain with the support of a youth worker the following day.

- 9.24
- Differences in age, status, fluency in English or other relevant language.

Example: One of the security staff at a UK airport makes a series of racist comments to an Ethiopian student as he is searching his bags. The student, travelling alone for the first time and with very limited knowledge of English, finds these comments particularly intimidating and offensive. He fears he will be detained if he complains or asks the security officer to stop, making the experience even more distressing for him.

- 9.25
- The impact of the conduct; to what extent was the person inhibited in making relevant choices.

Example: A woman with a speech impairment is made fun of by staff at her local cinema as she buys a ticket. She leaves without watching the film because she is so humiliated and offended by their conduct.

Example: Elder care staff in a residential home make racist remarks on a regular basis in the presence of a resident of Indian origin. He makes a complaint but no action is taken. He finds it intolerable to have to endure remarks of this sort, and as a result he is now considering leaving the home.

- 9.26
- Whether the perpetrator of the alleged harassment was exercising any of her or his rights under the Human Rights Act 1998.

Example: A couple, one of whom is a wheelchair user, are waiting in their GPs surgery. The two receptionists are discussing in loud voices a programme about adoption that had been on the television the previous night. They both express strong views that a disabled person, even in a couple with a non-disabled person, should never be allowed to adopt a child. The couple are very upset by their remarks and make a complaint. As the harassment provisions are not intended to inhibit public discussion on matters of general interest, it is unlikely that the receptionists' conduct would be found to be harassment under the Act.

Less favourable treatment for rejecting or submitting to unwanted conduct

9.27 The third type of harassment occurs when

(a) unwanted conduct related to sex or gender reassignment or unwanted conduct of a sexual nature has the purpose or effect of

- violating a person's dignity, or
- creating for that person an intimidating, hostile, degrading, humiliating or offensive environment

and

(b) because of the person's rejection of or submission to the conduct, a service provider treats the person less favourably than they would if the person had not rejected or had not submitted to the conduct.

The less favourable treatment under this type of harassment may be perpetrated by the same person who carried out the initial unwanted conduct, or by another person.

Example: After a female prisoner rejects sexual advances and unwanted touching by a male prison officer, the assistant governor decides to reduce the hours of paid work she had previously been allowed to do.

Example: A female patient in a hospital complains about a male member of staff who makes comments of a sexual nature while he reads sexually explicit magazine during his nightshift. She is disturbed by his words and is unable to sleep. After the complaint the nursing staff fail to respond when she rings the call bell and do not provide her with the same level of care she had previously received.

Sexual orientation or religion or belief harassment - unwanted conduct

- 9.28 The express prohibition of harassment as described above where the protected characteristic is sexual orientation or religion or belief does not apply to the provision of services, the exercise of public functions and the acts of associations.
- 9.29 However, unwanted conduct related to sexual orientation or religion or belief which might otherwise come within the specific definition of harassment may be direct discrimination where the claimant is able to show that they have been treated less favourably because of one of these protected characteristics. Direct Discrimination is considered in Chapter 5. Clauses 29 (8)
103 (2)
- 9.30 The Act does not explicitly prohibit harassment where the unwanted conduct is related to a combination of protected characteristics; for example, harassment of a black woman where the unwanted conduct is related to the combination of race and sex. In such cases, the woman may be able to show that the unwanted conduct amounts to combined discrimination; that is, that it is less favourable treatment because of her sex. The black woman would need to show that because of this combination she was treated less favourably than another is or would be treated in the same or similar circumstances. Combined discrimination is discussed in Chapter 5.

Statutory defence

- 9.31 Service providers may avoid liability for harassment of a service user carried out by one or more of their employees where they can demonstrate that they took all reasonable steps to prevent the harassment. Clause 108(4)

Chapter 10

Other unlawful acts

Introduction

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

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

As explained at page 17 in Chapter 1, 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

10.2 What the Act says

27

The Act prohibits victimisation. Victimisation arises when a service provider subjects a person to a detriment because they have done a protected act or because the service provider believes that they have done or may do a protected act in the future. Victimisation cannot be justified.

Example: An association of older people has arranged a members' meeting with a speaker to discuss euthanasia. One of the members who comes to the meeting is a member of a religious faith of which an important tenet is that euthanasia is a sin. After a number of outbursts – shouting 'sin, sin, you will be damned' - which totally disrupt the meeting, this member is asked to leave the room. Believing that he will complain of discrimination because of his religion or belief, the association suspends his membership. Such a complaint would be a protected act, and the association has subjected him to a detriment.

Example: Piotrek, a gay man, sues a publican for harassment for persistently remarking to other customers about his sexuality in a derogatory way. Because of this, the publican bars him from the pub all together. This would be victimisation.

- 10.3 Only individuals are protected against victimisation. 27(4)
- 10.4 An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act. But victimisation is only unlawful if it is linked to a protected act.
- 10.5 In the above example, the pub owner has behaved in this way towards many gay customers and not just Piotrek. Sidney witnessed a previous occasion and complains to the owner that what he is doing is unfair discrimination against Piotrek just because he is gay. Sidney is also barred. This would also be victimisation and it does not matter what Sidney's sexual orientation may be.

What is a protected act?

27(2)

10.6 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 for the purposes of or in connection with the Act
- making an allegation that another person has done something in breach of the Act.

10.7 Making an allegation or doing something ‘for the purposes of or in connection’ with the Act does not have to involve an explicit reference to the legislation. 27(2)(c),(d)

Example: The mother of a two-year-old disabled child complained first to the staff, then to her Councillor and finally to the Director of Children’s Services that her child was not receiving the same care and attention as other children at a Council-run nursery. She said that her daughter’s physical and social needs were not being properly met. The nursery staff invited her to a meeting, following which the care of her daughter improved. The following summer she applied for a place on any one of four trips to the seaside for parents with their disabled children organised by the Children’s Services Department. She was turned down for all of these trips. She believes that she was victimised because of her complaint about the way the Council nursery treated her daughter. Although she did not refer explicitly to the Act, she asserted that her daughter had been treated less favourably and referred to 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.

- 10.8 Detrimental treatment amounts to victimisation if a 'protected act' is an effective cause of the treatment. The protected act need not be the only reason for the treatment.

What is a detriment?

- 10.9 'Detriment' in the context of victimisation is not defined by the Act and could take many forms.

Any denial of a reasonably valued choice can be a detriment.

So, in the above case, the mother was subjected to the detriment of being denied the opportunity for a trip to the seaside with her daughter.

- 10.10 Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. 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: Mary brought a claim that she had been discriminated against because of her sex when her political party would not put her forward to stand as a councillor although it had invited all members to indicate if they wished to stand. The real reason for refusal is that she had council rent arrears at the time for selection which excluded her under the party's rules. She lost her claim for sex discrimination because the party's explanation was accepted. At a later meeting when she refers to her non-selection, claiming that it was discrimination, several people point out that she lost her claim for discrimination and the matter is over. However strong her sense of grievance at this remark her grievance could not constitute a detriment since a reasonable person would not have felt themselves to be disadvantaged in these circumstances.

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

- 10.11 Victimisation does not require a comparator. The person need only show that they have been subjected to a detriment because they have done a protected act or because the person subjecting them to the detriment believes (rightly or wrongly) that they have done a protected act or intend to carry out one.

- 10.12 Victimization is not limited by time: it can occur at anytime after an individual has done a protected act.

Example: Three years ago Brian, a customer of a bank, gave information which Heinrich used in his gender reassignment employment discrimination claim against the local branch of that bank. Last week Brian was refused an overdraft facility by the local bank manager who says that he will never forget that tribunal claim. Brian can claim victimisation despite the fact that his protected act took place a long time ago.

- 10.13 An individual cannot claim victimisation linked to an act of bad faith such as maliciously giving false evidence or information or making a false allegation. Such actions would not amount to a protected act. 27 (3)

Example: Jenny assaulted the landlord in a pub in an unprovoked attack while drunk. In the magistrates court, she falsely claimed that the landlord was trying to bar her from the pub for her behaviour although he would not have done so if she had been a man. She is convicted and, in passing sentence, the magistrate remarked that she was an unreliable witness who had deliberately fabricated an allegation of discrimination by the landlord to try to avoid conviction. After the court case she visits the pub but is told by the landlord that she is banned for life. As Jenny's allegations were made in bad faith, she will not be able to bring a claim of victimisation under the Act.

- 10.14 However, an individual will still be protected from victimisation if they give evidence or provide information in good faith even if this is factually wrong or is given in relation to proceedings which are unsuccessful.

Example: Pablo is a person with a hearing impairment who benefits from using induction loop technology. He complained that a set of conference rooms were not made available to him because the owners did not make a mobile induction loop immediately available on request. He brings a court case, claiming that the conference centre discriminated against him by failing to make reasonable adjustments, which he loses. The court concludes that the conference centre took all reasonable steps to provide the loop, but Pablo misunderstood how long they would take and left the conference centre prematurely. Pablo's good faith in bringing the claim is accepted by everyone. A few weeks later, Pablo and a business associate visit the centre again and try to book a room but they are told that there are no rooms available. As they leave, they notice another booking being made. Clearly rooms are available. Pablo believes that he was victimised because of his complaint of disability discrimination. Although he lost his case in the county court he would be able to bring a claim of victimisation.

110

Instructing, causing or inducing discrimination

- 10.15 What does the Act say?

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.

110(1)

Example: The organising committee of a local association of business people instructs its members not to serve a person who has successfully brought a claim for race discrimination against a member who owns a club. The organising committee's members will be liable for an unlawful act even if no act of victimisation is carried out by any of the members of the organisation against that person.

Even if the person sues the member who carried out the victimisation, the association's organising committee could be sued for issuing the instruction in the first place.

- 10.16 The Act also makes it unlawful to cause or induce, or to attempt to cause or induce, someone to discriminate against, harass or victimise a third person because of a protected characteristic. 110(2)(3) and (8)

Example: A play group is insured via 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.

- 10.17 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. 110 (4)

Relationships which have ended

10.18 It is unlawful for a person to instruct, cause or induce a person to commit discrimination or harassment in the context of relationships which have come to an end. 107, 110 and 111

10.19 Does the person who is instructed, caused or induced actually have to commit the discrimination?

110(6)

No. Instructing, causing or inducing discrimination (or attempting to do so) is in itself unlawful. The person who is instructed, caused or induced to discriminate does not have to go on to commit the discrimination. However if they do, both the person instructing, causing or inducing and the person carrying out the unlawful act may be liable.

Example: The new manager of a sports club is buying equipment for the junior football team at a local shop. The shopkeeper advises the manager that he will give him a concession if he can keep out 'those asylum seekers who have just moved into the area'. The manager is tempted by the concession and so adopts as a requirement for joining the team that players must have lived in the area for at least four years. This is a requirement which disadvantages young people with non-British nationality whose parents may be asylum seekers, refugees and migrant workers.

The manager is likely to be liable for indirect discrimination related to nationality and the shopkeeper is likely to be liable for inducing the unlawful act.

10.20 When does this provision of the Act apply? 110(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, or other relationships governed by the Act.

Example: A local authority runs childcare services in its area. It instructs its independent social workers that they must not recommend to the fostering panel any fundamentalist Christian family as suitable to foster. The local authority contracts with the social workers and their relationship is one in which discrimination is prohibited.

Who is protected

10.21 The Act provides a remedy for:

(i) the person to whom the causing, instruction or inducement is addressed; and

(ii) the person who is subjected to the discrimination or harassment or victimisation if it is carried out

provided that they suffer a detriment as a result.

- 10.22 Therefore in the above example in which the social workers are instructed to discriminate by the local authority, both the social workers and families affected by this instruction may have a remedy against the local authority for giving the instruction. If the social workers are subjected to a detriment as a result of this instruction (including a detriment as a result of 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 complying with this instruction may bring claims against the local authority as well as against the social workers.
- 10.23 In addition, the Equality and Human Rights Commission has the power to bring proceedings regardless of whether anyone has actually suffered a detriment. 110(5)(c)
- Aiding contraventions**
- 10.24 The Act makes it unlawful to knowingly 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. It is unlawful to help a person to discriminate against or harass another person where the discrimination or harassment arises from and is closely connected with a relationship covered by the Act, even where the relationship has ended. 111
- 10.25 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 surgery practice manager complies with the request and when disabled patients make enquiries about the practice they are told that the practice is full and to try elsewhere.

- 10.26 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?

- 10.27 'Help' should be given its ordinary meaning. It is distinct from procuring, inducing or causing 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?

- 10.28 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 discrimination, harassment or victimisation should result from the help.

Reasonable reliance on another's statement 110(2)(3)
and (4).

10.29 Help is not unlawful if the helper was told that they were helping a lawful act and it was reasonable for them to rely on this statement. It is a criminal offence to knowingly or recklessly make a false or misleading statement in this way.

10.30 '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 they have or ought to have.

Chapter 11

Services

Introduction

- 11.1 This chapter looks at what is a service for purposes of the Act. It explains in depth what is unlawful under the Act in relation to the provision of services, including the duty to make reasonable adjustments.
- 11.2 **Who is a provider of services to the public?**
A provider of services is anyone who is concerned with the provision of services to the public, or to a section of the public, for payment or not. ‘Services’ includes the provision of goods and facilities. The services, goods or facilities may be provided outside the UK. 29(1)
31(2)
- 11.3 A wide range of services is covered by the Act, including 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 by local councils, government departments and agencies, the emergency services, charities, voluntary organisations, hotels, restaurants, toilet facilities, pubs, post offices, banks, building societies, solicitors, accountants, telecommunications and broadcasting organisations, public utilities (such as gas, electricity and water suppliers), buses, trains, railway stations, airports, public parks, sports stadia, leisure centres, advice agencies, theatres, cinemas, hairdressers, shops, market stalls, petrol stations, telesales businesses, places of worship, courts, hospitals, and clinics. This list is for illustration only and does not cover all the services falling under the Act.
- 11.4 Services are covered regardless of whether they are provided by a private or a public body. Thus

Please note: this is draft for consultation and should not be taken as final text

the provision of day care, the running of residential homes and leisure centre facilities will be subject to these provisions whether provided by a public body or local authority. The distinction between services provided by a public authority and public functions is explained in Chapter 12.

11.5 Public authorities and those delivering services on their behalf will also be subject to the public sector equality duties under the Act. These duties are described in a separate Code of Practice.

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.

Example: If a health food shop provides its services from temporary or mobile premises during a two-week tennis tournament, those services are still covered by the Act.

Example: A bank branch provides a cash withdrawal service over the counter from Monday to Friday during opening hours. It also provides a 24-hour cash withdrawal facility all through the week from cash machines (ATMs). To the extent that the ATM service is available when the counter service is not, the bank is likely to be providing an additional service which is subject to the duties in the Act.

Example: A television company invites members of the public to participate in a game show by telephoning its national call centre. This is the provision of a service to the public and is subject to the Act.

Relation to other Parts of the Act

- 11.7 As explained in Chapter 3, employment, education and the disposal and management of premises are addressed by other Parts of the Act (Parts 5, 6 and 4 respectively) and will be described in other statutory Codes. However, where those Parts do not apply to related activities these may constitute services. For example, an estate agent is providing services to the public when advertising and selling property but Part 4 will apply where they are letting or managing a flat or shop on behalf of the owner.
- 11.8 Part 6 of the Act prohibits discrimination in relation to education provided by specified 'responsible bodies'. Those bodies are, broadly, schools and state-funded institutions of further and higher education. Part 6 also prohibits discrimination by general qualifications bodies and in the provision of recreational and training facilities for children and young people. Discrimination within Part 6 is dealt with in the Education code. There are certain activities of education bodies, however, that will fall within the services provisions – such as the provision of information to parents or providing school premises for use by outside organisations.

Example: A parent-teacher association holds a fundraising event which is open to the public, in a school hall. This is a provision of a service which is likely to be subject to this part of the Act.

Example: A school hires out their sports hall to local sports clubs for regular events and club activities. This is likely to be subject to this part of the Act.

Example: A privately run ‘business college’ that offers typing courses is providing a service which is likely to be subject to this part of the Act.

Example: A university puts on a conference that is aimed at both students and the general public. Even if the majority of people who attend are students, the conference is still likely to be subject to the Act.

- 11.9 Where Part 5 of the Act, which is concerned with work, applies, the services provisions will not. 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 sole exception to this applies where an employer makes provision for financial services to their employees as a consequence of their employment. (See Chapter 15.) Sch.3.20
- However, the employer is not to be regarded as a service provider in relation to facilitating access to the service. Instead, their conduct in this regard would be governed by the provisions in Part 5 of the Act and covered in the Employment Code.

Example: An employer arranges for a trainer to run a course for employees. During this course, an offensive remark is made by a trainer to a disabled member of staff. This would potentially be direct discrimination or harassment 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)

Website services

- 11.10 Under the Act, a service provider includes an Information Society Services Provider (ISSP), that is, a person who provides services through a website the Act applies to any ISSP who is established in the UK, and an action may be brought in the UK courts against the provider whether or not the individual affected is in the UK, so long as they are in an European Economic Area state. Clause 198 & Sch 25
- 11.11 The Act does not apply to anything done by an ISSP who is established outside the UK including anything done in Great Britain. Chapter 15 – Exceptions includes specific exceptions that apply to ISSPs.

Services provided to the public by more than one provider

- 11.12 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 the provision of 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 under the Act, and any obligations under the Act 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 provides a cash machine facility inside a supermarket. Although the facility 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. The training company is responsible for any duties that may arise under the Act in respect of the conduct of the conference and the choice of an accessible venue. However, the hotel may provide some services that are part of the conference facilities, such as toilets, for which it is responsible under the Act. In addition, services provided by the hotel that are ancillary to the conference (for example, accommodation the night before the conference) are also those for which the hotel is likely to be liable under the Act.

Example: An airport grants a franchise to a crèche to provide its services in a part of the airport. Although the crèche is located on the airport's premises, the service is being provided by the franchisee. The franchisee is likely to be responsible for any duties that may arise under the Act in respect of the crèche. However, access through the airport to the crèche is the responsibility of the airport.

What is unlawful discrimination in relation to services?

- 11.13 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. 29(1) 31(6) and (7)

In this context, reference to a service provider not providing a service includes:

- 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 the service provider usually provides 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, the service provider usually provides to the public (or the section of the public that includes that person).

- 11.14 It is also unlawful for a service provider to discriminate against a person by:

- the terms on which service is provided to that person 29(2)
- terminating the service to that person, or
- subjecting that person to any other detriment.

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.

Please note: this is draft for consultation and should not be taken as final text

- 11.15 Discriminating in the terms of service would include charging more for services or imposing extra conditions for using a service.
- 11.16 Detriment is not defined by the Act and is a very broad term, taking many forms. The detriment need not be physical or economic but the fact that a person has an unjustified sense of grievance alone would not be enough.
- 11.17 It means some disadvantage, and can include denial of an opportunity or choice, or anything which a reasonable person would consider altered their position for the worse. For example, a bed and breakfast owner insisting that a lesbian couple have a twin bedded room when they had booked a double room, and such a room is available.

There is a degree of overlap in these provisions. So in the previous example this 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 baby to feed the baby 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 is unlawful discrimination 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 not to accept calls from customers through a third party. This could amount to indirect discrimination against a deaf person who uses a registered interpreter to call the company.

Example: A mobile phone company asks a Jamaican man (who does not have British nationality) to pay a higher fee for a mobile phone contract. They state that this is because he is more likely to leave the country without paying his phone bill. This could amount to unlawful race discrimination.

Example: A man and two female friends plan a night out at a local night club. At the entrance the man is charged £10 entry but the women are charged £5. The owner explains that the club is trying to attract more women and has decided to charge them half the entrance fee. This would be unlawful sex discrimination.

11.18 Even if a service provider thinks that they are acting in the best interests of a person, that may still amount to a detriment.

Example: An assistant in a small shop refuses to serve a disabled person, arguing that a nearby larger shop can offer a better service to disabled people. 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.

Example: A waiter refuses to serve a glass of wine to a pregnant woman at a bar, on the grounds that it would not be good for her unborn baby's health. This is unlawful discrimination, despite the fact that his intention is to act in her best interests.

Please note: this is draft for consultation and should not be taken as final text

11.19 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.

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.

11.20 It is lawful to provide services or sell goods which by their nature are likely to be used or purchased by people who share a protected characteristic (for example, a Kosher butcher whose customers will mostly be Jewish), provided that they do not refuse to provide the service, to persons who do not share that characteristic. It would constitute discrimination if the Kosher butcher refused to sell their Kosher meat to non-Jews.

What does discrimination mean in this context?

11.21 In this context discrimination means:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- pregnancy, maternity and breastfeeding discrimination, and
- failure to provide a reasonable adjustment in the relevant circumstances.

These provisions are explained in Chapters 5, 6 7 and 8.

11.22 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.

29

Example: A restaurant dress code states that strictly no headwear can be worn by customers. Although the rule applies to everyone, it would have a disproportionate effect on many Muslim women and Sikh men due to their respective religious practices of wearing headscarves and turbans. If the restaurant cannot objectively justify this rule it is likely to be indirect discrimination in provision of a service.

Failure to make a reasonable adjustment

- | | | |
|-------|--|-------------|
| 11.23 | A service provider will be acting unlawfully if they fail to comply with a duty to make reasonable adjustments. This duty is explained in more detail in Chapter 8x. | 29(7) Sch 2 |
| 11.24 | 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 2.2(7) |

Example: A town hall 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 town hall will not modify its procedures (with the agreement of the local fire authority) to allow visitors with mobility impairments or sensory disabilities to be evacuated safely, this is likely to be a failure to undertake a reasonable adjustment.

Example: A woman with a severe speech impairment needs to re-negotiate her mortgage with her bank. She writes to them with all the necessary information and asks them to reply in writing due to the difficulties she faces in communicating by telephone. The bank leaves a

phone message at her house saying that they can't correspond with her by letter, that all mortgage matters must be dealt with by phone. When she writes to them again explaining her situation, they leave another message asking her to call them. This is likely to be a failure to make a reasonable adjustment.

Example: Disabled customers with a learning disability may need more time to explain to post office staff what their service requirements are. If the cashier asks disabled customers to go to the back of the queue so as not to delay other customers waiting to be served, this is a refusal to make a reasonable adjustment.

Other unlawful conduct in relation to services

11.25 Harassment 29(3)

A service provider must not harass a person requiring the service, or a person to whom they are providing services.

In relation to the provision of services this prohibition does not apply to harassment relating to sexual orientation, religion or belief. However, in some cases, unwanted conduct related to these protected characteristics may constitute direct discrimination, and therefore be unlawful. 29(8)

Example: A black man goes into a pub to watch a football match. While watching the football match the bartender and a number of customers make racist remarks about some of the footballers on the pitch. When the man makes a complaint, he is called a number of derogatory names. The black man could complain of harassment; he could also complain of direct discrimination as the pub is providing a worse service to him than it is to other customers.

Victimisation

11.25 Service providers are prohibited from subjecting anyone to a detriment because of: 29(4) and (5)

(a) bringing proceedings under the Act

(b) giving evidence or information in connection with proceedings brought under the Act

(c) doing anything which is related to the provisions of the Act, and

(d) making an allegation that another person has done something in breach of the Act (whether or not the allegation is later dropped).

11.26 The Act defines such actions as victimisation, which is discussed more fully in Chapter 10. A service provider must not victimise a person requiring the service 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 lifeguard at a private gym 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 when a friend of hers was offered it the same day. This situation is a direct result of the complaint she made as the membership staff at the gym are friends with the lifeguard.

Other prohibited conduct

- 11.27 Chapter 3 sets out other prohibited conduct which applies to those providing services as well as other persons covered by this Code.

Avoiding discrimination and improving services

- 11.28 As set out above, the Act prohibits certain forms of behaviour. In some situations, the Act also requires active steps to be taken. Complying with the reasonable adjustment duty requires service providers to undertake measures to meet disabled customers' needs to avoid substantial disadvantage. More generally, service providers need to consider taking active steps to ensure that discrimination is not occurring in their services. Some actions for avoiding discrimination are set out in Chapter 4.
- 11.29 In addition, service providers may wish to consider adopting positive action measures, to seek to ensure that all sections of the community are able to benefit from appropriate services. Chapter 14 explains what sorts of action may be taken and in what circumstances.

13(3)

It is important to note that it is not unlawful to positively discriminate in relation to disability. This is because a non-disabled person cannot bring a claim of disability discrimination based on more favourable treatment of a disabled person. This means that a service provider can, if they wish, restrict services to disabled people only, and this will be perfectly lawful.

Exclusion of certain transport services

11.30 In relation to disability, the Act exempts certain transport services from the Part 3 duties relating to services and public functions prohibiting direct and indirect discrimination, as well as discrimination arising from disability and failure to make reasonable adjustments. This means that these duties and the duty to make reasonable adjustments will not apply to:

Sch 3
Part 7

- Transporting people by air or providing a service on an aircraft transporting people by air.
- Anything governed by EC Regulations¹; 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 30 (1).

The exceptions include, and Part 3 therefore applies to, hire vehicles of certain types, taxis, licensed private hire cars, public service vehicles, trains, trams and certain guided transport systems.

Example: An airline is required to make reasonable adjustments to its booking and boarding services to ensure that they are accessible to disabled people. An airline is not required to make adjustments to the cabin environment inside an aircraft but 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.

¹ Regulation (EC) No.1107/2006 of the European Parliament and of the Council of 5 July 2006

Exceptions to the services provisions

- 11.31 There are a number of specific exceptions which relate to the provision of services. Some exceptions permit discrimination to enable a service provider to provide a more suitable service to people who share a protected characteristic; for example, single-sex services. Chapter 15 explains these exceptions in more detail and sets out other exceptions which apply to the Act as a whole. Sch 3

Services for particular groups

- 11.32 There are a variety of situations in which it is lawful to provide services only for particular groups, based on a shared protected characteristic.

Separate services for men and women

- 11.33 Separate services, including services delivered in a different fashion, are lawful in the circumstance set out in the Act, such as where a joint service would be less effective and where they are a proportionate means of achieving a legitimate aim.

Single-sex services

- 11.34 Single-sex services are lawful where they are a proportionate means of achieving a legitimate aim and one of the conditions set out in the Act applies. For example, conditions relating to the level of need for the service among men and women, and the relative effectiveness of providing a single-sex as opposed to a joint service. Sch. 3 25

Gender reassignment

- 11.35 The prohibition on gender reassignment discrimination does not apply in relation to the provision of separate- and single-sex services, provided that the treatment is a proportionate means of achieving a legitimate aim. Sch 3 26

Please note: this is draft for consultation and should not be taken as final text

Services relating to religion

- 11.36 It is lawful for a minister to provide separate and single-sex services in the circumstances set out in the Act. Sch 3 27

Services restricted to persons with a shared protected characteristic

- 11.37 If a service is generally provided only for persons of a shared protected characteristic (such as people of a particular religion or ethnic group) then it will not be a breach of the Act for a service provider to continue to provide a limited service or to refuse to provide the service to someone who does not share that protected characteristic if they reasonably think it would be impracticable to do so. Sch. 3 28

Health and safety

- 11.38 The prohibitions regarding discrimination do not apply where a service provider refuses to provide a service to a pregnant woman, or imposes conditions to the service, because they reasonably believe that it would create a risk to her health or safety, and they would take similar measures in respect of persons with other physical conditions. Sch 3 14

Blood service

- 11.39 The Act provides that in certain circumstances it is not unlawful for a person operating a blood service to refuse to accept a person's donation of blood. Sch 3 13

Care within the family

- 11.40 The Act provides that the prohibitions regarding discrimination do not apply to foster carers, or others providing similar forms of care in their own home. Sch 3 15

Insurance

- 11.41 In some circumstances, the fact that a person is disabled, or of a particular sex, may be a relevant factor in deciding whether to provide insurance services to that person and, if so on what terms. Sch3.20-23

Please note: this is draft for consultation and should not be taken as final text

Equally gender reassignment, maternity or pregnancy may be relevant considerations. The Act sets out special rules to deal with these circumstances.

Charities

- | | | |
|-------|---|------------|
| 11.42 | There are specific exceptions permitting charities in some circumstances to restrict benefits to persons who share a particular protected characteristic (other than the protected characteristic of colour). | Clause 191 |
|-------|---|------------|

Security services

- | | | |
|-------|---|--------------------------|
| 11.43 | The prohibition of discrimination in provision of services does not apply to the security services. | <u>Schedule 3 para 5</u> |
|-------|---|--------------------------|

Chapter 12

Public functions

Introduction

12.1 The way public authorities and other bodies exercise public functions can have a major impact on large numbers of people; therefore ensuring that those who exercise public functions do so lawfully will have wide benefit. 29 (6)

This chapter looks at what a public function is and whether the public function provisions apply. It explains in depth what is unlawful under the Act, including the duty to make reasonable adjustments.

12.2 The Act prohibits a person from doing anything that constitutes discrimination, harassment or victimisation when exercising a public function. Although in principle the term ‘function’ may cover a variety of activities, the provisions of the Act relating to public functions will not apply in the following circumstances:

- Where a service is being provided, and so the services provisions apply.
- Where the circumstances are covered by the premises provisions (or would apply but for an exemption) which specifically exclude providing accommodation solely for the purpose of exercising a public function (for example, in police cells). Clause 28(2) 32(3)

- Where the circumstances are covered by the work provisions or the education provisions (or would be but for an exemption). Clause 28 (2)

The public function provisions are therefore residual; that is, they only apply where other provisions of the Act do not.

What is a public function?

12.3

For purposes of the public functions provisions as discussed in this Code, 'public function' is the term used to describe activities carried out by public authorities or other organisations which are not similar in kind to services that can be performed by private persons. An example of such an activity would be law enforcement. Often, in the case of a public authority, the authority will be acting under a statutory power or duty when performing such a function. The term may cover a wide variety of actions, such as the setting of budgets, determining frameworks for entitlement to benefits or services, the collection of taxes, receiving someone into a prison or immigration detention facility, planning control or licensing. This list is illustrative only and does not cover all functions covered under this Part of the Act.

31(4)

The public functions covered by this Code are functions of a public nature under the Human Rights Act 1998 (HRA).

12.4

In principle, everything that a public authority such as a government department, or an NHS Trust, does is a function. However, for the purposes of this part of the Act, it is only those areas that are not services, or covered by another provision of the Act, that are covered by the public function provisions. 28(2) and 29(6)

Public functions are not only carried out by public

- 12.5 authorities – they may also be carried out by private organisations – for example, a private company which manages a prison. Managing a prison would be covered by the public function provisions. However, the other activities of the private organisation – such as providing security services for a supermarket – will not be covered by the public function provisions (though this may be part of the way in which the supermarket provides its services).

Interaction with the services provisions

- 12.6 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 – the provision of library or leisure services, or access to information provided by the authority. In those circumstances, the activities will be subject to the sections of the Act relating to the provision of a service to the public (see Chapter 11). 31(3)

Example: A police officer is organising a community safety meeting and prepares literature to hand out about crime prevention. In providing information to the community on crime prevention, the police are likely to be providing a service and therefore subject to the provisions relating to the provision of services to the public rather than the public function provisions.

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 so are covered by the public function provisions.

12.7 In practice, the duties under the Act imposed on persons exercising public functions and those providing a service are essentially the same.

Interaction with the education provisions

12.8 Part 6 of the Act prohibits discrimination in relation to education provided by specified 'responsible bodies'. Those bodies are, broadly, schools and state-funded further and higher education. Discrimination by a responsible body is dealt with in the Education code.

12.9 There are certain functions of a local authority² in England and Wales or an education authority³ in Scotland, however, that will fall within the function provisions (including policy decisions such as whether schools are to be merged or a new school established).

Example: A parent wishes to complain about a school's policy that girls must wear skirts to school. As this relates to education, it is covered by the education provisions.

Example: A parent-governor of a school is banned from attending school governor meetings at a school because she was breastfeeding her young child. This situation is likely to be covered by the public function provisions.

² Within the meaning of s. 162 Education and Inspections Act 2006

³ S.135(1) Education (Scotland) Act 1980

Interaction with the premises provisions

- 12.10 Where premises are provided for the purposes of exercising a public function – for example, the provision of accommodation in a prison – then it will be covered by the public function provisions.
- 12.11 Otherwise, anything relating to the sale or management of premises (other than estate agents when they are providing a service such as advertising a property) will fall under the premises provisions, which are dealt with in [code ref]

Exceptions relating to the scope of public functions

- 12.12 The Act excludes certain activities, certain public authorities and certain types of functions from the scope of public functions for the purpose of the prohibition of discrimination, harassment and victimisation in the exercise of public functions. Sch 3 Part 1

Parliament and the legislative process

- 12.13 The Act excludes from the scope of public functions a function of Parliament or exercisable in connection with official business of Parliament.
- 12.14 The Act excludes from the scope of public functions any steps within the legislative process in Parliament, the Scottish Parliament or the National Assembly for Wales, including:
- preparing, making or considering an Act or a Bill for an Act,
 - preparing, making, confirming, approving or considering an instrument made under an Act by a Minister of the Crown, the Scottish Minister or a member of the Scottish Executive, the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, and

Please note: this is draft for consultation and should not be taken as final text

- preparing, making, confirming, approving or considering an instrument by the General Synod, Her Majesty in Council or the Privy Council.

Judicial functions

12.15 The Act excludes from the scope of public functions:

28 (9)

- a judicial function and anything done on behalf of or on the instructions of a person exercising a judicial function, and
- a decision not to commence or continue criminal proceedings, and anything done for the purpose of reaching, or in pursuance of, that decision.

‘Judicial function’ includes judicial functions exercised by a person other than a court or tribunal.

Armed forces

12.16 The Act excludes from the scope of public functions in relation to disability discrimination, gender reassignment discrimination and sex discrimination anything done for the purpose of ensuring the combat effectiveness of the armed forces.

Security services

12.17 The Act excludes the security services from the scope of public functions. Section 29 does not apply to:

- The Security Service.
- The Secret Intelligence Service.
- GCHQ.
- A part of the armed forces which is assisting GCHQ under requirement of the Secretary of State.

Other exceptions

- 12.18 A person exercising public functions does not breach the Act in relation to disability, religion or belief, sex or sexual orientation if they do anything they must do under a requirement of another law. It is only where an obligation in another law or a requirement imposed pursuant to another law leaves a service provider, person exercising public functions or an association with no choice other than to act in a particular way that the provisions of the Act may be overridden.

This exception and other exceptions which apply to the exercise of public functions or to the Act as a whole are explained in Chapter 15.

What is unlawful discrimination in the exercise of a public function?

- 12.18 The Act makes it unlawful for a person to do anything that amounts to discrimination in exercising a public function. Discrimination in this context means:

- Direct discrimination.
- Indirect discrimination.
- Disability related discrimination.
- Failure to make reasonable adjustments.
- Pregnancy, maternity and breastfeeding discrimination.

These provisions are explained in Chapters 5,6,7 and 8. 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 in relation to public functions

- 12.19 The Act also makes it unlawful for a person to do anything that amounts to harassment in exercising a public function.

Harassment is explained in Chapter 9.

The prohibition on harassment does not apply to harassment relating to sexual orientation, religion or belief. However, in some cases, unwanted conduct that is related to these protected characteristics may constitute direct discrimination, and therefore be unlawful.

The Act also makes it unlawful for a person to do anything that amounts to victimisation in exercising a public function.

Victimisation is explained in Chapter 10.

What do the provisions mean?

- 12.20 The public function provisions mean that unless covered by another provision of the Act, or specifically excluded, every action (or inaction) of a public authority, and the exercise of every public function will be subject to the Act's provisions. This could include refusing to allow someone to benefit from the exercise of a function (for example, being refused a discretionary welfare benefit such as the social fund); and/or treating a person in a worse manner in the exercise of a function (for example, being dismissive of an application to adopt).

Direct discrimination

- 12.21 One of the forms of discrimination is where a person exercising a public function treats a person less favourably because of a protected characteristic.

Example: A gay man from Russia who has entered into a civil partnership has received entry clearance based on his civil partnership. An immigration officer at the port of entry is checking that he has the correct entry clearance. The officer asks him to step to one side so that she can talk to him further, as she does not believe that civil partnership is like a real marriage. This is likely to be direct discrimination and will be unlawful.

Pregnancy, maternity and breastfeeding discrimination

- 12.22 As explained in more detail in Chapter , the Act specifically prohibits unfavourable treatment of a woman because of her pregnancy or maternity, including unfavourable treatment of a woman because she is breastfeeding.

Example: A breastfeeding mother is asked to sit behind a screen in a planning enquiry 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 breastfeeding and will be unlawful.

Discrimination arising from disability

- 12.23 Another of the forms of discrimination is where a disabled person has been treated in a particular way; the treatment amounts to a detriment because of the person's disability; and the treatment cannot be justified.

Example: A disabled person with Tourette syndrome is being interviewed about their claim for Council Tax. They make involuntary noises during the course of the interview. The interviewer says that they cannot continue the interview 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.

Failure to make reasonable adjustments

- 12.24 Discrimination occurs when a person exercising a public function fails to comply with the duty to make reasonable adjustments. The overall approach to the duty to make reasonable adjustments has been explained in Chapter 8.

29(7)

- 12.25 The duty arises where a provision criterion or practice, a physical feature or the lack of an auxiliary aid or service puts disabled persons at a substantial disadvantage. In relation to the exercise of a function, being placed at a substantial disadvantage means:

Sch. 2

- 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 disabled people - in particular, those with visual impairments - at a substantial disadvantage in making a complaint. The ombudsman amends her policy to permit disabled people who cannot use a written complaints procedure to make their complaint over the telephone. This is likely to be a reasonable step for her to have to take.

- 12.26 The wording in relation to the duty to make adjustments reflects the different ways in which the carrying out of functions impacts upon disabled people. As explained in paragraph 8.4 the policy of the Act is not a minimalist one. The aim of these provisions is to ensure that disabled people do not have a worse experience in relation to public functions. The duty applies, broadly, where disabled people are disadvantaged in some way because of their disability by the exercise of a function.
- 12.27 ‘Substantial’ although not defined in the Act, means, as set out in Chapter 8, more than minor or trivial.
- 12.28 ‘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 or being subjected to immigration control. These are ‘negative’ functions. The aim of the reasonable adjustment duty in these circumstances is to ensure that disabled people do not have a worse experience in relation to the exercise of these functions than other people. ‘Unreasonably adverse’ is intended to represent the same level of difficulty as ‘substantial’ disadvantage.

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 than for 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.

12.29 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.

12.30 Those exercising public functions are not required to take any steps which are *ultra vires* – outside their powers.

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.

Other forms of prohibited conduct

- 12.31 Those exercising public functions must not do anything which amounts to harassment in exercising their functions.

The police attend a man's home to arrest him. The door is opened by his wife, who is African. On the way to the police station, and at the station, the police officer make offensive comments about his wife, based on her ethnic origin. This is likely to amount to harassment and will be unlawful.

Other prohibited conduct

- 12.32 Chapter 10x sets out other prohibited conduct which applies to those exercising public functions as well as other persons covered by this Code.

Interaction with the public sector equality duty

- 12.33 Public authorities and organisations or bodies exercising a public function are also subject to the public sector equality duties in respect of that function. The general equality duty provides that a public authority – or a person carrying out a public function – must have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristics and persons who do not share it.

Ensuring that they do not act in the way set out in this part of the act will help those who are subject to the equality duties to meet them.

The equality duties are dealt with in detail in the [code title]

Relationship with the Human Rights Act 1998

- 12.34 Public authorities and those carrying out public functions are also subject to the Human Rights Act 1998 (HRA). They will have obligations under the HRA which include not discriminating against anyone in relation to their rights under the HRA. There may be some overlap between the rights of an individual under the HRA and the rights under the Equality Act. Complying with the public function provisions may assist those with obligations under the HRA in complying with those obligations.

Positive action

- 12.35 In addition, those exercising public functions may wish to consider adopting positive action measures, to seek to ensure that all sections of the community are able to benefit from the exercise of functions. Chapter 14 explains in more detail what sorts of action may be taken and in what circumstances.

Chapter 13

Associations

Introduction

- 13.1 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 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. Part 7

What is an association?

- 13.2 The provisions in the Act apply to any association which is an association of persons if: 106
- 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 can be found in the Code of Practice on Employment.)

- 13.3 It does not matter if the association is incorporated or otherwise, or if any of its activities are carried out for profit. Some associations are charities and will also be subject to additional provisions under the Act relating to charities which are discussed in paragraph 15.28 of Chapter 15 of this Code. 106
191
- 13.4 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 fall within the provisions of Part 7 of the Act.

- 13.5 An organisation that describes itself as a ‘club’ or refers to customers as ‘members’, where to be accepted as a member merely requires payment of a fee without any form of selection, such as a nightclub or a gym, is not an association under the Act. Such bodies are involved in provision of services to the public or a section of the public and their duties are discussed in Chapter 11 above. Other organisations that have ‘members’ but membership is open to anyone on payment of a fee, for example a football team supporters’ club or a campaigning organisation also would not come within the Act’s definition of an association.

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

13.7 Associations under the Act can include:

- organisations established to promote the interests of their members, such as an association of retired gardeners or an association of Asian accountants
- 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, the Grand Lodges of Freemasons.

(This list is for illustration only, and many more types of associations are covered by the Act.)

13.8 An association may also be covered by other parts of the Act, which are outside the scope of this chapter. Thus this chapter does not apply to an association as a provider of services to the public or a section of the public (see Chapter 11 above), as an employer or qualifications body or training body (see Code of Practice on Employment), as the manager or disposer of premises including housing (see Code of Practice on Housing and

Please note: this is draft for consultation and should not be taken as final text

other Premises) or as a body responsible for education (see Code of Practice on Education).

Example: A golf club would be a service provider if it opened its golf course, café and shop to members of the public on certain days of the week; it would be an employer if it had any full- or part-time employees; it would be a manager or disposer of premises if it let its rooms to members of the public or other organisations for their use. It would be a service provider if it let out rooms for short-term hire, as it would if it let bedrooms to members. It would be a manager or disposer of premises if it let out a residential flat or commercial premises above its club premises.

What is unlawful?

13.9 The Act makes it unlawful for an association to discriminate against, to harass and to victimise their members, potential members, associates or guests or potential guests. It is also unlawful for an association to fail to comply with their duty to make reasonable adjustments. 106(5)

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

13.10 A potential member could be any person who is not a member of an association who may be eligible to become a member or a person who is actively seeking to become a member.

Example: As an association may restrict membership to persons who share a protected characteristic, a retired man would not be a potential member of a retired women's club.

13.11 '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 member as a result of being a member of another association. 106(6)

13.12 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. A potential guest is any person who could be invited to be a guest.

What does discrimination, harassment and victimisation mean in this context?

13.13 For associations:

Discrimination means:

- Direct discrimination.
- Indirect discrimination.
- Discrimination arising from disability.
- Pregnancy, maternity and breastfeeding discrimination
- Failure to provide a reasonable adjustment in the relevant circumstances.

These provisions are explained in Chapters 5,6,7 and 8

13.14 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.

Harassment is explained in Chapter 9.

13.15 The prohibition of harassment of members, associates and guests discussed below does not apply where the protected characteristic is religion or belief or sexual orientation. In such cases, conduct which might otherwise come within the specific definition of harassment may be direct discrimination. (See Chapters 5 and 9 above.)

Victimisation is explained in Chapter 10.

		101
	What is unlawful in relation to potential members?	
13.16	The Act makes it unlawful for an association to discriminate against, harass or victimise a potential member.	
		101(1)
13.17	An association must not discriminate: a) in the arrangements it makes for selecting new members b) as to the terms for admission, or c) by rejecting the person's application.	
		101(4)
13.18	An association must not harass a potential member.	
13.19	An association must not victimise a potential member: a) in the arrangements it makes for selecting new members b) as to the terms for admission, or c) by rejecting the person's application.	101(5)
13.20	'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 interview.	
13.21	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. 'Terms for admission' can include level of joining fee, conditions, initiation procedures.	

Example: To join a mountaineering club, applicants must be interviewed by the club secretary. The club is unwilling to make any adjustment for a deaf applicant who is a highly experienced mountaineer. This is likely to be unlawful.

Example: A teenage boy who lives with his lesbian mother and her partner and has no knowledge of his natural father was deterred from applying to join a youth club when he saw that the application form needed to be signed by an applicant's father and mother. This is likely to be unlawful discrimination because of sexual orientation – based on the sexual orientation of the boy's mother.

Example: A sailing club states in its constitution that it is open to men and women of any racial group provided they can sail. The club recruits its new members only by word of mouth and by recommendations of existing members, all of whom are white. These arrangements are likely to be unlawful indirect race discrimination unless the club can justify them as a proportionate way of meeting a legitimate aim of the club.

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 says this is to meet the cost of the extra water used by women having longer showers than men. This is likely to be unlawful direct sex discrimination.

99

Example: A person undergoing gender reassignment is turned down for membership of a club that provides dining and social facilities exclusively for its members because the club believes its members would feel uncomfortable socialising with a transsexual person. This is likely to be unlawful direct gender reassignment discrimination.

Example: A person with arthritis plays bridge more slowly than other players as he has difficulty picking up the cards. For this reason he is refused membership of a bridge club. The slight delay does not prevent other members completing their games and so the refusal of membership is likely to be unlawful discrimination arising from disability.

What is unlawful in relation to members?

- 13.22 The Act makes it unlawful for an association to discriminate against, harass or victimise a member.
- 13.23 An association must not discriminate against a member: 101(2)
- 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.
- 101(4)
- 13.24 An association must not harass any of its members.
- An association must not victimise a member: 101(6)
- 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.

- 13.25 '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. EN 318 - 319
- 13.26 '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.
- 13.27 'Detriment' in the context of treatment by associations of members, associates or guests is not defined in the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. There is no need to demonstrate physical or economic consequences. However an unjustified sense of grievance alone would not be enough to establish detriment.
- 13.28 '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 (a), (b) or (c). Even if an association considers that they are acting in the best interest of a person they may be subjecting that person to a detriment.

Example: For many years the local branch of a political party has operated an unwritten rule that to be shortlisted as a candidate a member must hold an office in the party at branch, district or national level. As historically and currently this party has never had either a black or a disabled

officer at any level, this rule, which is meant to apply to all members, effectively prevents any black or disabled member from being shortlisted as a candidate. It is likely to be unlawful race and disability indirect discrimination unless the party can prove that it is a proportionate means of achieving a legitimate aim of the party.

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 breastfeeding/maternity discrimination.

Example: When a member of a classical music association announced he was about to change his sex, he was asked to resign, as the association was concerned that during the gender reassignment process he/she would not be able to meet the association's high music performance standard. This is likely to be unlawful direct gender reassignment discrimination.

Example: A national association of librarians announced in its newsletter that five members would be selected to represent the association at an international event. A lesbian who had been active in the association applied. Her application was never acknowledged, and when she inquired she was given no information. After the dates of the event had passed she made a formal complaint. She was told that the association had been concerned following reports of homophobic attacks in the country where the event was to be

held, but had not wanted to upset her by explaining why they did not want to send her. She could complain that she had been subjected to a detriment and had been discriminated against directly because of sexual orientation.

Example: The leader of a boys' club on a camping trip jokingly referred to one boy with severe facial disfigurement as 'scarface' and the other boys laughed. The boy found this remark to be very hurtful and the following week he resigned from the club. This is likely to be unlawful harassment related to disability.

Example: When this same leader referred to two Muslim boys as 'young terrorists' and to tease them said he wanted to search their rucksacks for explosives, the boys complained that his conduct had created an intimidating and hostile environment for them and they could not continue as club members. The Act excludes religion or belief from protection against harassment by associations; in this case the boys could claim unlawful direct discrimination because of religion or belief if they could show that the club leader's conduct amounted to less favourable treatment because of religion or belief.

Example: A woman, who was not accepted as a member of a local business association, was supported by her husband, a long-serving member, when she complained that her rejection was sex discrimination. Some months later he was told that he would not be representing this association at a national event as he had for the last five years. This is likely to be unlawful victimisation.

- 13.29 **What is unlawful in relation to associates?** 101 (3)
An association must not discriminate against an associate:
a) in the way it affords or denies them access to a benefit, facility or service
b) by depriving them of their rights as an associate
c) by varying their rights as an associate, or
d) by subjecting them to any other detriment.
- 13.30 An association must not harass an associate. 101(4)
- An association must not victimise an associate: 101 (7)
a) in the way it affords or denies them access to a benefit, facility or service
b) by depriving them of their rights as an associate
c) by varying their rights as an associate, or
d) 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 2 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 unlawful discrimination because of race.

- Guests and potential guests** 102
- 13.31 The Act makes it unlawful for an association in certain circumstances to discriminate against, harass, or victimise a guest or potential guest.
- What is unlawful in relation to potential guests?**
- 13.32 An association must not discriminate: 102(1)
- a) in the arrangements they make for deciding who to invite or who to permit to be invited, as a guest
 - b) as to the terms on which they invite a person or permit that person to be invited, as a guest, or
 - c) by not inviting, or not permitting the person to be invited, as a guest.
- 102 (3)
- 13.33 An association must not harass a potential guest.
- An association must not victimise a potential guest: 102 (4)
- a) in the arrangements they make for deciding who to invite or who to permit to be invited, as a guest
 - b) as to the terms on which they invite a person or permit that person to be invited, as a guest, or
 - c) by not inviting, or not permitting the person to be invited, as a guest.

Example: A club advised a member that he should not invite his gay partner and their child to a 'family night' event.

What is unlawful in relation to guests?

- 13.34 An association must not discriminate against a guest: 102(2)
- a) in the way they afford or deny them access to a benefit, facility or service, or
 - b) by subjecting them to any other detriment.
- 102(3)
- 13.35 An association must not harass a guest or guest.
- An association must not victimise a guest: 102(5)
- a) in the way they afford or deny them access to a benefit, facility or service, or
 - b) 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 the disability of the child with whom she is associated.

Reasonable adjustments

- Sch. 15
- 13.36 The Act makes it unlawful for an association to fail to comply with a duty to make reasonable adjustments. This duty is explained in more detail in Chapter 8.
- 13.37 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. 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.

Example: A dining club has a disabled member who has difficulty in using the cutlery provided at the club's functions. The club provides easy-hold cutlery for this member. This is likely to be a reasonable step for the club to take.

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 and asks that it expand its activity to include the tasting of fruit juices. This would fundamentally alter the nature of the club.

Example: A writers' association with 30 members normally meets in a room on the first floor of a pub. There is no lift so the room is not accessible to two new disabled 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.

Associations may restrict membership to persons who share a protected characteristic

13.38

Sch 16

The Act permits associations of any size or character, other than a political party, 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.

16.4

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 origin and not colour these restrictions would not be unlawful.

- 13.39 This provision does not apply to political parties. Under the Act it is never lawful for a registered political party⁴ 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. 16.5
- 13.40 If an association restricts membership to persons who share a protected characteristic, 16.2
- the association may restrict the access of associates to a benefit, facility or service to associates who share the same protected characteristic, and
 - the association may invite as guests or permit to be invited as guests only persons who share that same protected characteristic. 16.3

⁴ A party registered in the Great Britain register under Part 2 of the Political Parties, Elections and Referendums Act 2000

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

Example: The Act would not prohibit a Christian lawyers' association permitting only Christians to be invited as guests for any of their events.

13.41

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 male to female transsexuals or Bulgarian women or disabled women as members.

Other exceptions that apply to associations and their treatment of their members, associates are discussed in Chapter 15

13.42

These include exceptions relating to national security, 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.

Avoiding unlawful discrimination

13.43

Some steps associations could take to avoid discrimination include:

13.44

- Reviewing conditions or requirements for membership in their constitution or rules to ensure they are not discriminatory.

13.45

- 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.

13.46

- Responding promptly and effectively to any complaint of discrimination, harassment or victimisation and making appropriate changes to policies, procedures or practices.

13.47

Associations may take positive action to overcome disadvantage, to meet different needs and to increase participation of persons who share a protected characteristic.

Positive action is discussed in Chapter 14.

Example of positive action to increase participation of persons who share a protected characteristic:

Example: A cricket club in a multi-racial area has very few non-white members. In organising their annual open day, with the aim of increasing applications from young ethnic minority cricketers, the club sent publicity notices to local youth clubs with a high proportion of young people of Asian or Caribbean ethnic origin on their cricket teams and visited those clubs to encourage their members to attend the open day. These measures, which are unlikely to involve less favourable treatment of other potential members, is likely to be a proportionate means of meeting the club's stated aim.

Political parties: positive action in selection of candidates

- 13.48 The Act recognises that in all of the main publicly elected bodies - Parliament, the Scottish Parliament, the National Assembly for Wales, the European Parliament and local councils – there is significant under-representation of people who share certain protected characteristics. 104
- 13.49 The Act permits a registered political party⁵ 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.

⁵ A party registered in the Great Britain register under Part 2 of the Political Parties, Elections and Referendums Act 2000

- 13.50 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.
- 104(3)
- 13.51 The Act provides that a registered political party
- may make arrangements (known as selection arrangements) for regulating the selection of its candidates for a relevant election where the purpose of the arrangements is to reduce inequality in the party's representation in the elected body concerned, and
- 104(2)
- may act in accordance with these selection arrangements.
- 104(4)
- 13.52 Inequality in a party's representation in an elected body means inequality between the number of the party's candidates elected as members of the body who share a protected characteristic compared to the number of the party's candidates so elected who do not share that protected characteristic.
- 13.53 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.

Example: Fifteen members of a local council are members of one political party. Of that party's elected members, three are women, one is of Pakistani national origin, none is disabled, homosexual or transsexual; the party has no record of their members' religions or beliefs. The Act permits the party to adopt selection arrangements to reduce inequality in representation for one or more of the protected characteristics of sex, race, disability, gender-reassignment and sexual orientation, and to act in accordance with those arrangements.

Reserved places on political party shortlists.

- 13.54 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 13.57 below – women-only shortlists) or disability (see Chapter 5 Direct Discrimination as the Act permits more favourable treatment of disabled people), regardless of the scale of inequality of representation, such selection arrangements cannot require that all persons short-listed must have that characteristic.

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

104(5)

Using the above example:

Example: The party, wishing to improve the equality of their representation on the Council, in selecting candidates for one ward, they could reserve four places on their shortlist of 10 for persons from ethnic minorities and four places for disabled persons; the party could not reserve all of the places on its shortlist for people from ethnic minorities.

13.56

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.

Women-only shortlists

105

13.57

The Act maintains the provision first introduced in 2002⁶ 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.

13.58

The Act extends the application of this provision until 2030.

⁶ Sex Discrimination (Election Candidates) Act 2002

Chapter 14

Positive Action

Introduction

- 14.1 This chapter explains what the positive action provisions in the Act say. As explained at page 17 in Chapter 1 , 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. 157

The aim of positive action provisions in the Act

- 14.2 People with shared protected characteristics 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.

The Act contains provisions which enable those providing a service, or carrying out public functions and associations to take action to achieve fuller and more effective equality in practice for members of groups that are socially or economically disadvantaged, or who otherwise face the consequences of past or present discrimination or disadvantage. These are known as the ‘positive action’ provisions.

- 14.3 Organisations in both the public and private sector will often wish to take action to improve their services to particular groups within the community, as good business practice or more efficient provision of public services.
- 14.4 Many of the actions that a public or private sector organisation might take to improve their services will always be lawful. This might include changing practices that so they no longer create barriers for particular groups, improving awareness of services and access, adjusting services to meet particular needs, training staff.
- 14.5 The positive action provisions in the Act are intended to enable service providers to go beyond actions that are always lawful, by taking proportionate action to remedy discrimination and disadvantage affecting particular groups. As discussed more fully in paragraphs 14.22 to 14.27 below, positive action which may involve treating members of a group who share a particular protected characteristic more favourably than other groups, will be lawful:
- if the precondition recognising the disadvantage of a particular group is met, and
 - if the action is a proportionate means of achieving one of the specified aims.
- 14.6 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. In every case such measures would need to be proportionate to the aim they are meant to achieve.

- 14.7 The Act specifies the circumstances in which positive action measures may be taken and the nature of those measures. Provided action is within these parameters it will not amount to discrimination under the Act.

Distinguishing positive action and ‘positive discrimination’

- 14.8 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 are actions that are always lawful (as described in paragraph 14.4x above).
- Second are actions that fall within the framework of the Act’s positive action provisions which are only lawful if they meet certain conditions and do not exceed certain limitations.
- Third are actions, often referred to as ‘positive discrimination’, which involve preferential treatment to benefit members of a disadvantaged or underrepresented group which do not meet the preconditions, the limitations or the proportionality requirement for positive action under the Act. Such actions will always be unlawful for all of the protected characteristics, other than disability, covered by this Code (unless one of the exceptions discussed in Chapter 15 applies). It is never unlawful to treat a disabled person more favourably than a non-disabled person.

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 disproportionate to the size of the local Chinese community.

Following discussions with members of the Chinese community to understand the reasons for this under-use, the local authority considers the following actions to improve use by Chinese women:

1. Provide better information in accessible languages, speak to community leaders to learn why current use is so low and encourage Chinese families to come to regular open days; none of these steps would involve less favourable treatment of any other groups and therefore all would be lawful.
2. Arrange a special open day for Chinese families, provide separate swimming and gym sessions for Chinese women, employ a swimming instructor who speaks relevant Chinese languages; these steps involve more favourable treatment of Chinese women and will be lawful if they are proportionate ways of achieving the local authority's aim to enable greater participation by Chinese women.
3. Introduce special discounted fees only for Chinese women, 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 that are unlikely to be proportionate ways of achieving this aim and therefore unlikely to be lawful.

Please note: this is draft for consultation and should not be taken as final text

Voluntary nature of positive action provisions

14.9 Positive action is optional, not a requirement.

14.10 By taking positive action, organisations will often derive broader benefits to their business, the quality and take-up of services, improve the effectiveness and quality of public functions and enable the way associations to provide better services and support to their members.

Positive action and public sector equality duties

14.11 For public authorities and other organisations subject to the public sector equality duties under the Act, the positive action provisions take on greater significance. Bodies subject to the public sector equality duty will be expected to have due regard to the need to carry out the positive action measures described in this chapter as part of their equality duties. These duties are explained in separate Codes of Practice.

What does the Act say?

- 14.12 The positive action provisions of the Act permit three types of action to be taken in response to three different conditions:
- 14.13 a) Where a service provider reasonably believes that people sharing a protected characteristic suffer a disadvantage connected to the characteristic, a service provider may take any action which is a proportionate means of achieving the aim of enabling or encouraging people who share the protected characteristic to overcome or minimise that disadvantage (referred to in this chapter as action to remedy disadvantage). 157(1)(a) and (2)(a)
- 14.14 b) Where a service provider reasonably believes that people who share a protected characteristic have needs that are different from the needs of persons who do not share it, a service provider may take any action which is a proportionate means of achieving the aim of meeting those needs (referred to in this chapter as action to meet needs). 157 (1)(b) and (2)(b)
- 14.15 c) Where a service provider reasonably believes that participation in an activity by people who share a protected characteristic is disproportionately low, a service provider may take any action which is a proportionate means of achieving the aim of enabling or encouraging persons who share the protected characteristic to participate in that activity (referred to in this chapter as action to encourage participation in activities). 157 (1)(c) and (2)(c)
- 14.16 Action may be taken in any one or all of these conditions. Sometimes the conditions will overlap – for example, people sharing a protected characteristic may be at a disadvantage and that disadvantage may also give rise to a different need or may be reflected in their low level of participation in particular activities.

Example: Staff in a branch of a bank noticed an increasing number of Polish people using the service, many struggling to communicate in English. A Polish-speaking staff member volunteered to serve customers in this language, and notices in Polish made customers aware of this service. This service both meets the particular needs of this group, and also benefits the business by increasing take-up of services among this group.

Example: A voluntary organisation running bereavement counselling services surveys finds through surveys that lesbian and gay clients are less satisfied with the service than heterosexuals. On closer investigation some of the dissatisfaction arises from failure to meet the particular need of those who have lost partners to be counselled by gay or lesbian counsellors who have a close personal understanding of the impact of homophobia on this experience of loss. The voluntary organisation makes it clear in information on its services that this form of matching will be arranged if a client requests.

Example: A golf club looked at its membership profile and realised that it did not reflect the local community. It took steps to advertise across all sectors of the community, and promoted the club as a venue for weddings with suppliers in place to understand Hindu and Muslim needs. As more people came to the club for other events, they became more interested in joining. The Asian members of the community benefit through increased access, and the club benefits by a growth in membership.

Example: Research indicates that women in Britain experience significant disadvantages in

pursuing successful careers in science subjects as reflected in lesser numbers, at lower status positions, fewer publications etc. One of the key factors contributing to this position is the lack of visible role models. A leading publisher of scientific publications establishes a prize for female writers. This will raise the profile of women currently working in science and encourage girls to consider it as a career.

14.17 Public authorities and those carrying out public functions will be familiar with the three different conditions set out above, as having due regard to the public sector equality duties can reveal disadvantage, unmet need and low participation. Public authorities may therefore be obliged, under their equality duties, to take action in relation to these aims.

14.18 These provisions do not apply where measures are taken under Section 158 (relating to recruitment or promotion) which is dealt with in the Code on Employment. Special positive action that political parties may take in selecting candidates by virtue of Section 104 is discussed at the end of this chapter and explained in detail in paragraphs 13.38 to 13.58 in Chapter 13 of this Code.

What does 'reasonably believes' mean?

- 14.19 A service provider must reasonably believe that one of the above conditions applies in order for them to take positive action aimed at remedying that situation. This means that there must be some evidence of, for example, disadvantage. 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 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 reasonable belief may 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 similar organisations.
- 14.20 An insurance and financial services company had, prior to legislation making this unlawful, refused to provide insurance to gay men. While this practice had stopped some years ago, their gay staff group reported that there was still a great reluctance among gay men to use their services. This was confirmed by focus groups in the gay community. In consultation with the gay staff network and the focus groups the insurance company devised a targeted marketing campaign headed by a well-known gay celebrity. The feedback from the consultation also indicated that existing services did not reflect the particular needs of gay men. A leaflet was produced explaining how the company's products could specifically benefit those in civil partnerships. Gay men benefit from increased access to more appropriate services. The insurance company expands its business into a new market section.

Action to remedy disadvantage

What is a disadvantage for these purposes?

- 14.21 'Disadvantage' is not defined in the Act. It may include exclusion, rejection, lack of opportunity, lack of choice, or barriers to accessing services. Disadvantage may be obvious in relation to some issues - for example the disproportionately high rate of infant mortality for Gypsies and Travellers - but in other cases may be shown by qualitative evidence, by impact assessment, 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?

- 14.22 The Act enables action to be taken to enable or encourage people to overcome or minimise the disadvantage. Provided that the action is a proportionate means of achieving that aim (and more detail on this phrase is given below), the Act does not limit the action that could be taken. Such action could include:
- Clause 13(3)
- Identifying through consultation, survey or review of data possible causes of the disadvantage and then:
 - targeting services at specific disadvantaged groups, for example by advertisements, outreach, special arrangements to encourage increased take-up
 - providing services specifically aimed at a disadvantaged group, and
 - 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 – advertising a service in a publication aimed at a particular group.

Action to meet needs

What are ‘different needs’?

- 14.23 In order for those with a particular protected characteristic to have a ‘different need’, it must be shown that due to past or present discrimination or disadvantage or due to factors that are unique to persons sharing the protected characteristic, this group of persons has needs that are different from the needs of others that are particularly important to that group. For example, all groups need advice on and checks for diabetes but there is evidence that it is experienced to a greater degree by Asian people, and so action might be taken to meet these needs. Needs may be different because they are disproportionately not being met. For example all women need good ante-natal care. The high rate of infant mortality among Gypsies and Travellers indicates that for a variety of reasons they have a different need for mother and child health services.

What action might be taken to meet those needs?

14.24 The Act enables action to be taken to meet the identified needs. Provided that the action is a proportionate means of achieving the aim of meeting the different needs (and more detail on this phrase is given below), the Act does not limit the action that could be taken. Such action could include:

- Providing services in a particular geographical location or at a particular time, for example policing patrols to improve protection against hate crime.
- Developing different ways of providing a service more suited to the needs of particular groups, including use of interpreters; using printed materials that reflect characteristics and needs of users.
- Providing services specifically aimed to meet particular needs, for example English language classes, compensatory education, training.

Example: A Primary Care Trust noted research evidence that key public health messages regarding healthy lifestyles were not getting through to men. They looked at the routes through which information was being provided to the public and took additional steps to deliver health information through the community rather than in traditional health service settings. The locations picked - which include pubs, barbershops, shops, mosques, betting shops and sporting clubs - were selected because they are places where men in the target group are likely to feel comfortable. In addition to meeting the particular information needs of men such action also helps the Trust achieve its overall service goals.

Action to encourage participation in activities

What activities does this apply to?

- 14.25 This provision applies to any activity. It includes activities undertaken or organised or facilitated by a service provider and 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 and 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?

- 14.26 The provisions say that action can only be taken where participation in an activity by people of a particular protected group is 'disproportionately low'. This means that participation must be low compared with other groups or compared with the level of participation that could reasonably be expected. Service providers will need to have evidence to show that this condition is met. This might be by means of statistics; or, where these are not available, by qualitative evidence based on monitoring or consultation; or information derived from an equality impact assessment.

What action could be taken?

- 14.27 The Act enables 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 (and more detail on this phrase is given below), the Act does not limit the action that could be taken. Such action could include:
- Clause 99 & 100
- providing training targeted at people with the protected characteristic

Please note: this is draft for consultation and should not be taken as final text

- extending or changing locations or times for activities to take place
- providing activities in different ways
- improving content and forms of information, advertisements and advice, or
- using outreach and mentoring.

Example: An urban transport provider surveyed non-users as well as users in order to identify unmet needs. The survey showed that while women are frequent users of buses and trains during the day, taking children to school or care, shopping, visiting older or sick relatives, as well as travelling to work, women are far less likely than men to use public transport after 6 pm. The main reasons given by women were cost and fears for their safety. The transport provider introduced cheaper multi-trip fares and installed better lighting in bus stations and at bus stops. They also published a simple leaflet with safety advice for women using public transport. These measures increased women's use of public transport; they also enabled the provider to derive the business benefit of increased customer base and satisfaction.

Disability

14.28 As indicated above at paragraph 14.8x, it is not unlawful to positively discriminate in relation to disability. This is because a non-disabled person or a person with a particular disability cannot bring a claim of disability discrimination based on more favourable treatment of a disabled person with a different disability. This means that a service provider can, if they wish, restrict services to disabled people only, and this will be perfectly lawful.

14.29 **Proportionate means of achieving the aim**
Any action which is taken under the positive action provisions must be a proportionate means of achieving one of the specified aims. 'Proportionate' refers to the balancing of competing relevant factors; the test is whether the action is an appropriate and necessary way to meet the chosen aim. Proportionality can be tested by considering the relevant competing factors, which will vary depending on the basis for the positive action – the disadvantage, needs or under-representation of a particular group - the chosen aim and the action taken or to be taken in all of the circumstances including the cost of the action.

14.30 The level of disadvantage, need or under-representation of a particular protected group will be balanced against the impact of the action on other protected groups, and the relative disadvantage of these groups.

14.31 Organisations need to consider:

Is the action an appropriate way to achieve the organisation's aim? If so, is this action (that is, action in this form) reasonably necessary to achieve the aim, or, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to involve less favourable treatment of others?

Example: There are good data that far fewer women than men compete as judo players. A national judo organisation is considering two options to meet its aim of increasing women's participation in the sport of judo. One option is to stage a major event with prize money for women twice the prize money for men. A second option is to mount a major publicity campaign and feature women on the cover and in leading articles of their monthly journal for six months to promote a discounted training programme for women judo players only.

- 14.32 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 on its own it is unlikely to bring in new women to the sport, but would merely benefit women already active as judo players.
- 14.33 The second option is more likely to be a proportionate way to meet their aim. Like the first, 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; however this action could meet the appropriate and necessary test since it is likely to be effective in attracting women to the sport, and the less favourable treatment of men, who are over-represented, would be short term in relation to publicity and a single occasion in relation to the discounted training.

Example: A football club had historically had significant problems with racism among fans. Their fan base and attendance at matches failed to reflect the ethnic diversity of the local area. Their first step in attempting to attract a more ethnically diverse attendance was to make clear to their existing fan base their absolute intolerance of racist behaviour and to introduce diversity training to all staff. They looked at how they marketed the club to ensure they were targeting all sections of the local community. They teamed up with an Asian media group to search for young Asian football stars of the future. They held open trials for youngsters from Asian backgrounds with the most talented players being offered a short free training course, which then prepares them for open competition to play for the club. The very low level of participation among the Asian community, and the historical reasons for this, made the club conclude that such action was proportionate.

- 14.33 Where a service provider recognises, possibly as a result of a complaint or a legal challenge, that a practice is discriminatory, steps the service provider takes to change that practice to eradicate discrimination and to prevent its recurrence will always be lawful. Such steps will often precede positive action and on their own would not be open to challenge as disproportionate.
- 14.34 When undertaking measures within the positive action provisions, it is essential for service providers to set out action that they intend over a particular and finite time period, and to monitor the impact of their action and review progress towards their aim during that period. 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 pre-condition for positive action. This could make taking the action unlawful.

Example: A social services department in a local authority area where a significant proportion of their client group struggled to communicate in English entered into a contract with an interpreter service to meet this need. As these sections of the community became more settled, the need for this service was kept under review.

Implementing positive action

- 14.35 It is important that service providers explain to staff and users of their services why positive action is being taken, to ensure that there is understanding of the measures and why they are being taken and that it does not create any resentment.

Example: In response to evidence about lesbians' negative experiences with health professionals, the Department of Health produced a series of posters designed to encourage lesbian and bisexual women to access health services and also to provide information on what to do if you have a bad experience. The reason for the posters, and how to respond to any negative comments from other patients, was explained to staff in GP surgeries using the posters.

- 14.36 As indicated above, 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 members of relevant groups. Such groups should also be involved in the evaluation of positive action measures.

Example: A private language college, having surveyed its students about their level of satisfaction with the facilities recognised that it was failing to adequately cater to its multi-cultural student body's needs. It set up a student and staff diversity advisory group, ensuring a broadly based membership. On its advice, the college took steps to provide religiously sensitive meals in the canteen and made available a room for prayer.

- 14.37 Service providers will generally find it helpful to draw up an action plan which sets out:
- evidence of the disadvantage, needs and low levels of participation, as appropriate, and an analysis of the causes
 - specific outcomes which the service provider is aiming to achieve
 - the steps that are going to be taken to achieve the aims, and
 - measurable indicators of progress towards those aims, set against a timetable.

Political parties

- 14.38 When groups of decision-makers seemingly come from a limited section of society, it becomes harder for those they represent to identify with them, and so they may doubt that their needs are being taken into account when policies are being formulated and services being planned. This can lead to people believing that politics has no relevance to their lives. In order to address this under-representation, the Act makes special provision for political parties to enable them to address under-representation in elected bodies.

This is described in Chapter 13.

Chapter 15

Exceptions

Introduction

- 15.1 The Act contains a large number of exceptions which permit discrimination in provision of services, exercise of public functions or the activities of associations which the Act otherwise prohibits.
- 15.2 Certain exceptions discussed in this chapter are permitted under the Act if they can be shown to be 'a proportionate means of achieving a legitimate aim'. This test is explained in Chapter 6 paragraphs 6.23 to 6.28 (Duty not to discriminate indirectly).
- 15.3 Some exceptions permit discrimination where this is intended to enable 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.
- 15.4 Other exceptions permit discrimination in order to allow certain types of services or public functions to operate more effectively or more profitably, for example exceptions permitting differential insurance premiums or differential treatment of persons seeking to enter or remain in the UK.
- 15.5 Any exception to the prohibition of discrimination should generally be interpreted restrictively. Where the Act permits an exception only when certain conditions are met, then it will be important to verify that all of the necessary conditions have been met.

Please note: this is draft for consultation and should not be taken as final text

15.6 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.

15.7 The exceptions discussed in this chapter should be distinguished from positive action which is discussed in Chapter 14.

15.8 In some cases positive action may result in differential treatment; in many cases, however, positive action in relation to services, public functions and associations will not involve less favourable treatment. For example, to provide information in a relevant language in order to encourage participation of persons within certain ethnic minority groups would not involve less favourable treatment of other persons.

In contrast, the provisions in this chapter involve acts of discrimination which, without the exception in the Act, would always be unlawful.

15.9 Some exceptions are discussed in Chapters 11, 12 and 13.

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.

References to particular strands of discrimination

15.10 It is useful in relation to the exceptions in the Act to have regard to the definitions of 'discrimination' for each of the protected characteristics relevant to this Code as set out in Chapters 5,6,7 and 8

- For all protected characteristics 'discrimination' includes direct discrimination and indirect discrimination.

- Disability discrimination also includes discrimination arising from disability and failure to comply with the duty to make reasonable adjustments.

Clause 25

15.11 It should be noted that neither harassment nor victimisation is included in definitions of 'discrimination'. Many of the exceptions discussed below apply only to discrimination or only to certain strands of discrimination so that harassment and victimisation remain unlawful; some exceptions apply to any contravention of the Act, which would include discrimination, harassment and victimisation.

General exceptions

Statutory authority

- 15.12 It is not a contravention of the Act in its application to services, public functions and associations in relation to the protected characteristics of
- disability
 - religion or belief, and
 - sexual orientation
- Clause
189
- Sch 22.1
- to do anything that is required under another law or under a requirement or conditions imposed pursuant to another law 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. This could include not only an Act of Parliament or of the Scottish Parliament and Measures of the National Assembly for Wales, but also orders and regulations made under or for the purpose of such acts or measures.
- 15.13 In relation to the protected characteristic of sex it is not a contravention to do anything that is required under another law.
- 15.14 This exception includes laws passed before or after this Act was passed. It also includes Measures of the General Synod of the Church of England.
- 15.15 It is only where an obligation in another law or a requirement imposed under another law leaves a service provider, person exercising public functions or an association with no choice other than to act in a particular way that the provisions of the Act may be overridden.

Example: A person 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 he is not required to make any changes to it. As Schedule 22 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 be unlawful.

Nationality discrimination authorised by statute or the Executive

Sch.23.1

15.16

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, v

is lawful in relation to services and public functions if it is done

- in pursuance of another law
- in pursuance of an instrument made by the executive under another law
- to comply with a requirement imposed by the executive before or after this Act was passed
- in pursuance of arrangements made before or after this Act was passed by or with the approval of a Minister of the Crown, and
- to comply with a condition imposed before or after this Act was passed by a Minister of the Crown.

Sch 23.1

- 15.17 As for the wider statutory authority exception discussed above, it is only where an obligation under the law, instrument, requirement, arrangement or condition leaves a service provider or a person exercising public functions with no choice other than to act in a particular way – that the Act’s prohibition of discrimination may be overridden.

National security

190

- 15.18 A person does not breach the Act by doing for the purpose of national security anything it is proportionate to do for that purpose.

This exception applies on a case by case basis. To be lawful the particular discriminatory act must be justified as appropriate and necessary for national security.

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; at such times to apply intelligence-led surveillance of particular individuals who have that nationality may be proportionate.

Religious organisations

- 15.19 The Act provides an exception from the duty not to discriminate for religious organisations with regard to services, public functions and associations. Sch 23.2
- 15.20 A religious organisation is an organisation whose purpose is:
- to practise or advance a religion or belief or to teach the practice or principles of a religion or belief
 - to enable persons of a religion or belief to receive any benefit or engage in any activity within the framework of that religion or belief, or
 - to foster or maintain good relations between persons of different religions or beliefs.
- 15.21 This exception does not apply to an organisation whose sole or main purpose is commercial.

Example: A gay couple who have entered a civil partnership are refused a double room by the owners of a hotel who are devout Christians. They inform the couple that they believe that a marriage is a union of one man to one woman and therefore the gay couple cannot stay in the double room. The couple has been discriminated against because of sexual orientation; the hotel is not a religious organisation and therefore there will be no exception under the Act.

- 15.22 It is not unlawful religion or belief discrimination or sexual orientation discrimination for a religious organisation to restrict: Sch 23.2
- membership
 - participation in activities it undertakes on its behalf
 - the provision of goods, facilities or services in the course of such activities, or
 - the use or disposal of premises.
- 15.23 Similarly it is not unlawful religion or belief discrimination or sexual orientation discrimination for a person to do any of the above on behalf or under the auspices of a religious organisation.
- 15.24 It is not unlawful religion or belief discrimination or sexual orientation discrimination for a minister to restrict:
- participation in activities carried out in the performance of their functions as a minister connected with a religious organisation, or
 - the provision of goods, facilities or services in the course of such activities.
- 15.25 None of the above restrictions as they relate to religion or belief is 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.

- 15.26 None of the above restrictions as they relate to sexual orientation is permitted unless it is imposed:
- because it is necessary to comply with the doctrine of the organisation, or
 - to avoid conflict with strongly held religious convictions [belief convictions] of a significant number of the followers of the religion [the belief].
- 15.27 Sexual orientation discrimination is not permitted and remains unlawful where the religious organisation has a contract with a public authority listed in Schedule 19 to provide a service or to carry out a public function and is acting on behalf of that authority.

Example: A local authority has contracted out certain children's services. A religious group has a contract to provide day care for children. The group cannot refuse to accept a child of a gay couple.

Charities

191

- 15.28 A charity will not breach the Act if it provides benefits only to persons who share a particular protected characteristic other than the protected characteristic of colour if this is in pursuance of 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.

- 15.29 This exception does not apply if the protected characteristic is 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
 - if benefits were to be provided only to a group defined by colour, then to all persons generally.
- 15.30 If continuously from a date before 18 May 2005 a charity has 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.
- 15.31 The Act also permits a person, in relation to an activity to promote or support a charity, to restrict participation in the activity to persons of one sex, for example a women-only sponsored swim to raise money for a charity. 191(7)
- Sport** 193
- 15.32 The Act includes two types of exceptions that may apply in relation to a competitive sport, game or other competitive activity.
- Sport – sex and gender reassignment** 193(2) – (4)
- 15.33 The Act permits separate sporting competitions to be organised for men and women where physical strength, stamina or physique are significant factors in determining success or failure.

Please note: this is draft for consultation and should not be taken as final text

- 15.34 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:
- to restrict participation to persons of one sex, or
 - to restrict participation of transsexuals, but only if it is necessary to secure fair competition or the safety of other competitors.

Example: The organisers of a women's wrestling competition who do not permit a male-to-female transsexual to compete are likely to be acting within this exception.

- 15.35 In considering whether for children in relation to a particular sport, game or other activity there is a sex-related disadvantage so that separate events should be organised for boys and girls, the age and stage of development of the children likely to compete should be taken into account. 190 (2) – (4)

Sport – nationality, birthplace etc

- 15.36 In selecting one or more persons to represent a country, place or area or a related association or in complying with eligibility rules, 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. 193(5) – (6)

Services for particular groups

- 15.37 In a number of different situations it is lawful under the Act to restrict who may be provided with services based on a protected characteristics.

Please note: this is draft for consultation and should not be taken as final text

15.38 As discussed in Chapter 14, the Act's positive action provisions make it lawful to provide separate services for persons who share a protected characteristic where that is a proportionate means of encouraging or enabling them to overcome disadvantage or to participate or to meet their different needs.

15.39 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

15.40 The Act provides that it is not unlawful sex discrimination for a service provider to provide separate services for each sex if:

Sch 3.23

- 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.

15.41 The Act provides that the prohibition of sex discrimination does not apply where a service provider provides 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.

Example: A charity has set up separate hostels for men and women suffering domestic abuse. The hostels provide the same service, but the charity believes a unisex hostel would not be able to provide this service as effectively to people of either sex.

15.42 Similarly the prohibition of sex discrimination 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.

Single-sex only services

15.43 The Act provides that the prohibition of sex discrimination does not apply where a service provider provides services exclusively to one sex provided that to do so is a proportionate means of achieving a legitimate aim and any of the conditions set out below apply:

Sch 3.24

15.44 a) Only people of that sex need the service.

For example, a cervical cancer screening service can be provided to women only, since only women need the service.

15.45 b) Where the service is also provided jointly for both sexes, an additional service exclusively for one sex will be lawful if this joint provision would not be sufficiently effective.

For 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.

If women because of a tenet of their religion or belief will not swim at the same time as men, women-only swimming sessions could be provided as well as mainly mixed sessions.

Please note: this is draft for consultation and should not be taken as final text

- 15.46 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.

For example, a women-only support unit for women who have suffered violence can be set up, even if there is no parallel men-only unit because of insufficient demand.

- 15.47 d) The service is provided at a hospital or other place where users need special care or attention.

For example, single-sex wards in hospitals, nursing homes and single-sex facilities in psychiatric institutions. The provision of housing for women with specific care support needs might also fall within this exception.

- 15.48 e) The service is likely to be used by more than one person at a time and a woman might reasonably object to the presence of a man (or vice versa).

For example, separate male and female changing rooms or any service involving intimate personal health or hygiene.

- 15.49 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.

For example, sports sessions involving a high degree of physical contact such as judo or wrestling or self-defence classes.

- 15.50 The objection in (e) and (f) must be 'reasonable'; a low degree of physical contact is unlikely to justify separate provision. For example, the fact that in first aid training there may be some physical contact between users is unlikely to mean that the provision of single-sex sessions is permitted.

15.51 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 providing funding for a single-sex service or a primary care trust carrying out a consultation to determine whether single-sex ante-natal classes should be offered to husbands and male partners of expectant mothers.

Gender reassignment discrimination and separate and single-sex services

15.52 A service provider will not breach the prohibition on gender reassignment discrimination in relation to the provision of separate (including where these are different) or single-sex services, but only if such provision is a proportionate means of achieving a legitimate aim. Sch 3.25

The service provider will be expected to consider the needs and wishes of the transsexual person as well as those of the women or men using separate or single-sex services.

Separate or single-sex services – minister or religious organisation

15.53 It is permissible for a minister to provide separate or single-sex services if:

- a) the service is provided for the purposes of an organised religion
- b) it is provided at a place which is (permanently or temporarily) used for those purposes, and
- c) 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

Please note: this is draft for consultation and should not be taken as final text

of the religion's followers.

15.54 Acts of worship do not themselves constitute 'services' within the meaning of the Act; this exception applies to ancillary issues such as the separate seating of men and women.

In this context, a minister is either

- a minister of religion, or
- a person who performs functions

in connection with the religion who holds an appointment or is recognised for the purposes of a religious organisation. (See paragraph 15.20 above for definition of a religious organisation.)

Example: For some faiths, after-school or weekend religious classes are provided separately for boys and girls.

Services restricted to persons with a shared protected characteristic

15.55 If a service is generally provided only for persons who share a protected characteristic (such as people of a particular religion or ethnic group), a service provider who normally provides the service for persons who share the protected characteristic does not breach the Act by continuing to provide the service in this way, or if they reasonably think that it is impracticable to provide the service to someone who does not share that particular characteristic by refusing to provide the service. 3.27

15.56 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 means that a service provider who normally does provide a limited service may continue to do so without breaching the Act. It also means that a service provider who normally provides a limited service can only refuse to provide the service to a person who does not share the particular characteristic if it would be impracticable to do so.

Sch 16.1

15.57 Associations restricting membership to persons who share a particular protected characteristic (see Chapter 13 regarding associations).

Communal accommodation

Sch 23.3

15.58 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 to providing any benefit facility or service linked to the accommodation.

15.59 '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 residential accommodation which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

15.60 Providing communal accommodation for one sex is permitted only if accommodation is managed as fairly as possible for both women and men.

15.61 Discriminatory treatment of transsexuals in relation to communal accommodation must be justified as a proportionate means of achieving a legitimate aim.

Pregnant women – health and safety

15.62 The Act permits a service provider or an association to treat a pregnant woman differently in order to remove or reduce a risk to her health and safety where the service provider or the association:

- reasonably believes that to do otherwise would create a risk to her health and safety, and
- also treats differently people with other physical conditions to remove or reduce a risk to their health or safety.

Sch 3.14
and
Sch 16.2

15.63 Subject to the above conditions a service provider may for this purpose:

- refuse to provide a pregnant woman with a service, or
- provide or offer to provide the service on conditions.

15.64 The proprietor of a fairground bumper-car ride displays a notice which states that the ride is unsuitable for people with back injuries. When he refuses to allow a pregnant woman to go on the ride his action is likely to come within this exception.

15.65 Subject to the above conditions, an association may for this purpose:

- apply different terms for admission of a pregnant woman as a member or to be invited as a guest
- provide a pregnant member, associate or guest access to a benefit, facility or service

Please note: this is draft for consultation and should not be taken as final text
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.

Insurance

15.66 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. Equally gender reassignment, maternity or pregnancy could be treated as relevant considerations. The Act sets out special rules to deal with these circumstances. Sch3 part 5

Disability

15.67 The prohibition against disability discrimination in the provision of services does not apply to anything in connection with insurance business⁷ 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) the treatment is reasonable.

⁷ Insurance business: Schedule 2 Financial Services and Markets Act 2000: Buying, selling, subscribing for or underwriting a contract of insurance and carrying out a contract of insurance.

15.68 Information which might be relevant to the assessment of the risk to be insured includes actuarial or statistical data or a medical report. The information must also be current and from a source on which it is reasonable to rely. An insurer cannot rely on untested assumptions or stereotypes or generalisations in respect of a disabled person.

15.69 An insurer is prohibited from adopting a general policy or practice of refusing to insure disabled people or people with particular disabilities or only offering disabled people or people with particular disabilities insurance on additional or adverse terms or conditions.

Example: A disabled man with diabetes applies to a motor insurer for comprehensive insurance on his motor car. In completing the application form he states that he is disabled because of diabetes. 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 is not based on any sound data about diabetes or on the man's actual medical condition and is likely to be unlawful.

Please note: this is draft for consultation and should not be taken as final text

Sex, gender reassignment, pregnancy and maternity

- 15.70 In contracts of insurance, or for related financial services, entered into before 6 April 2008, the prohibition against gender reassignment, pregnancy and maternity, or sex discrimination in provision of services does not apply to anything that is done in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk if the act:
- Sch 3.22
- a) is done by reference to actuarial or other data from a source on which it is reasonable to rely, and
 - b) is reasonable.
- Sch 3.21
- 15.71 This exception allows differential premiums and benefits for men and women as long as these are reasonable based on actuarial or other reliable data.
- 15.72 More rigorous conditions apply to contracts of insurance or for related financial services, entered into on or after 6 April 2008. For such contracts the prohibition against gender reassignment, pregnancy and maternity, or sex discrimination in the provision of services will not apply to differences in premiums and benefits 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 act in question.

Example: A woman challenged an insurance company that required her to pay higher travel insurance premiums while pregnant. As the insurance company did not have up-to-date reliable data showing greater insurance risk because of pregnancy, this higher premium is likely to be unlawful.

- 15.73 For contracts entered into on or after 6 April 2008 in relation to gender reassignment discrimination, insurers must calculate premiums and benefits based on the legal sex of the person seeking the service. Sch 3.22(5)

Example: If women are required to pay a lower premium than men, for example for life insurance, then a male-to-female transsexual, who has a gender recognition certificate and who is legally recognised as female, would pay the lower rate.

Existing insurance policies

15.74 The Act also contains an exception for insurance policies which came into existence before [date on which Schedule 3 paragraph 22 came into force]. This exception applies to: Sch 3.23

- a) disability discrimination
- b) gender reassignment discrimination
- c) pregnancy and maternity discrimination
- d) race discrimination
- e) religious or belief-related discrimination
- f) sex discrimination, and
- g) sexual orientation discrimination.

15.75 It will not be unlawful discrimination under the Act to do anything in connection with insurance business in relation to an existing insurance policy.

15.76 Where such policies are renewed or have their terms reviewed on or after [the *date in which Sch. 3 para 23 comes into force*] this exception will cease to apply.

Financial services arranged by an employer

15.77 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 insurance to the employer's employees: Sch 3.20

- insurance or a related financial service, or
- 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

- 15.78 The Act includes exceptions that apply to Sch 3
Part 4
- disability discrimination
 - race discrimination (relating to nationality and ethnic or national origin only), and
 - religion or belief discrimination
- which permit certain immigration decisions to be made and certain immigration functions to be carried out without breaching the Act.
- 15.79 Different conditions apply for each of the types of discrimination.

Disability

- 15.80 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 in pursuance of any such decision, but only if to take any of the following decisions is necessary for the public good: Sch 3.16
- 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.
- 15.81 The prohibition of disability discrimination does not apply to a decision or guidance by the Secretary of State or a decision taken following guidance of the Secretary of State when the decision or guidance is in connection with a decision in (a) to (e) above.

Nationality and ethnic or national origin

15.82 The prohibition of race discrimination (as it relates to nationality and ethnic or national origin only) in the provision of services and the exercise of public functions does not apply to anything done by Sch 3.17

- 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.

15.83 'Relevant enactments' are:

- the Immigration Acts
- the Special Immigration Appeals Commission Act 1997
- a provision in UK law giving effect to EC law relating to immigration or asylum, and
- EC law which relates to immigration or asylum.

15.84 A 'relevant authorisation' is a requirement imposed or an authorisation given by a Minister of the Crown or by a relevant enactment or an instrument made under a relevant enactment.

For example immigration officers carrying out their functions in relation to the grant or refusal of leave to enter or remain in the UK would be acting lawfully under the Act if they had been authorised by a Minister to interrogate more intensively persons of Colombian nationality and they acted in accordance with this authorisation.

Religion or belief

15.85 The prohibition of religion or belief discrimination in provision of services or exercise of public functions does not apply in relation to certain decisions relating to immigration control or anything done in Sch 3.18

Please note: this is draft for consultation and should not be taken as final text
pursuance of such decisions.

- 15.86 This exception applies to a decision:
- to refuse entry clearance or leave to enter or remain in the UK on grounds that exclusion of the person is conducive to the public good, or
 - 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.

- 15.87 This exception also applies to a decision in connection with an application for entry clearance or leave to enter or remain in the UK on grounds that:
- the person holds an office or provides a service in connection with a religion or belief,
 - that one religion or belief is treated differently from others, or
 - that the exclusion of a person who holds an office or provides a service is conducive to the public good.

- 15.88 This exception applies to a decision taken, or guidance given, by the Secretary of State in connection with either of the above decisions.

Care within the family

- 15.89 The prohibition of discrimination under the Act does not apply where a person takes another person of any age 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 3.15

Blood services

- 15.90 It is not unlawful under the Act for a person operating a service for the collection and distribution of human blood or blood components Sch 3.13

Please note: this is draft for consultation and should not be taken as final text

for medical purposes to refuse to accept a person's donation of blood. Discrimination, for example based on sexual orientation or recent country of residence (race/nationality) in refusing blood donation is permitted only where:

- the refusal is because of an assessment of the risk to the public or to the person based clinical, epidemiological or other reliable data, and
- the refusal is reasonable.

Exceptions for certain transport services in relation to disability discrimination

Sch 3
Part 7

15.91 The Act excludes from the prohibition of disability discrimination in the provision of services certain services involving transport by air or transport by land other than where designated types of vehicles are used for transport by land. The excluded transport services are set out in Chapter 11 on Services.

Exceptions for services provided by Information Society Service Providers

15.92 The Act provides that an Information Society Services Provider (ISSP), a provider of website services, does not contravene the Act in specified circumstances where their role is a limited one, including where:

Sch. 25

15.93

- the ISSP is a mere conduit, not initiating the transmission, selecting the recipient or selecting or modifying the information in the transmission

Sch 25.3

15.94

- the ISSP provides automatic, intermediate and temporary storage ('caching' of information, 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

Sch 25.4

Please note: this is draft for consultation and should not be taken as final text

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, or

- 15.95
- 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 the ISSP when they actually knew the provision of the information was a contravention of the Act they expeditiously removed the information or disabled access to it.
- Sch 25.5

Exceptions relating to the scope of public functions under Part 3 of the Act

- 15.96
- The Act excludes certain particular activities, certain public authorities and certain types of functions from the scope of public functions for the purpose of the prohibition of discrimination, harassment and victimisation in the exercise of public functions. These are set out in Chapter 12 on Public Functions.
- Sch 3
Part 1

Chapter 16

Enforcement

Introduction

- 16.1 This chapter deals with enforcement by the civil courts of Part 3 of the Act (which applies to services and public functions) and Part 7 (which applies to associations). Clause 10113

As explained at page 17 in Chapter 1, 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.

This chapter is not intended to be a procedural guide to presenting a claim to the civil courts. The civil courts procedure is contained in the Civil Procedure Rules in England and Wales and in the Sheriff Court Small Claims, Summary Cause and Ordinary Procedure Rules.

- 16.2 This chapter covers the following:
- Enforcement in the civil courts.
 - Alternative Dispute Resolution and Conciliation.
 - Starting proceedings and time limits.
 - Obtaining information.
 - Burden of proof (L5).
 - Civil courts in England and Wales, and Scotland.
 - Jurisdiction.

Please note: this is draft for consultation and should not be taken as final text

- Use of judicial review.
- Enforcement of public sector equality duty.
- Enforcement of the HRA.
- Immigration cases.
- National security.
- Remedies.

What unlawful acts can be remedied by the civil courts under the Act?

16.3 The unlawful acts that the civil courts can remedy include:

- Direct discrimination.
- Indirect discrimination.
- Discrimination arising from disability.
- Pregnancy and maternity discrimination.
- Failure to provide a reasonable adjustment in the relevant circumstances.
- Harassment.
- Victimisation.

- 16.4 These provisions are explained in Chapters 5, 6, 7, 8, 9 and 10. Also, claims brought against those who cause, induce or aid these unlawful acts may be brought in the civil courts. These terms are explained in Chapter 10. For brevity these will all be referred to as ‘unlawful acts’. The service provider is responsible for the unlawful acts of those employed by them and for the acts of those who act on their behalf.
- 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 in Scotland, the Sheriff) (‘the Court’). 113(1)
- 16.5 If a person thinks that a service provider has done an unlawful act against them, it may be helpful, before starting proceedings to question the service provider (see obtaining information paragraph 16.22). Clause 134137
- 16.6 Before starting proceedings a person should normally write to the service provider explaining that they are considering bringing a claim and setting out what their claim involves (called ‘a letter before action’ in England and Wales). However it is not always necessary to do this. The courts in England and Wales may consider whether the person’s failure to do so was reasonable if the question of who pays the costs of the proceedings is considered. The letter should state whether the person is willing to enter into alternative dispute resolution. In Scotland there is no requirement to write a letter before action.
- 16.7 In England and Wales, ‘alternative dispute resolution’ is the collective description of methods of resolving disputes otherwise than through the normal trial process.
- (Please note further information will be published in the appendices of the final code.)

Conciliation

- 16.8 Where a dispute arises between a person and a service provider it may be sensible to see whether the dispute can be resolved without recourse to the courts. Arrangements exist for the Equality and Human Rights Commission to assist with this process.
- 16.9 The Equality and Human Rights Commission does not have powers to organise other forms of alternative dispute resolution.

Time limits

- 16.10 Court action must be started within six months (minus a day) of the alleged unlawful act or such longer period as the court thinks is just and equitable. Clause 114 117
- 16.11 If the proceedings are not brought within that period the Court has a discretion to hear the proceedings. It will hear proceedings brought within a longer period where it thinks it is just and equitable to do so.
- 16.12 In England and Wales proceedings are started when the court issues the claim form at the request of the person bringing the claim. In Scotland proceedings start when the action is served by the person bringing the claim.
- 16.13 Where a dispute is referred for conciliation in pursuance of Equality and Human Rights Commission arrangements for conciliation the period within which the claim may be brought is nine months, after which the court may hear the claim if it is brought within a longer period that the court or sheriff thinks just and equitable. 117 (4)

(Please note further information will be published in the appendices of the final code.)

When does the period for bringing the claim start?

- 16.14 The Act says that the period starts with the date of the unlawful act. Often this will be the date on which the service provider took the action which was unlawful, for example refusing a person entry to their shop on an unlawful basis.
- 16.15 Sometimes, however the unlawful act is in fact a failure to do something by the service provider. Here 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 to fail to do a thing 117(6),(7)
- (a) when they do an act inconsistent with doing the thing

Example: A disabled person requests that a reasonable adjustment be made by asking for an entrance to be cleared allowing access for a wheelchair. The service provider does not make the adjustment and in fact places a greater obstacle in the way of the disabled person accessing the service, for example by storing more rubbish across the entrance. The period would start with the date on which further rubbish was placed across the entrance as this is inconsistent with the duty to remove it.

or

(b) if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do the thing.

Example: In the same example the service provider simply fails to clear the rubbish across the entrance. However the rubbish is very bulky and requires special lifting equipment. The equipment could not be brought to the site earlier than a week after the request. All other things being equal it would be reasonable to expect the service provider to obtain it within two weeks. The period for bringing the claim will start at the end of those two weeks.

Example: A hotel becomes aware that one of its guests is a committed vegan and is staying for a week. It fails to offer any vegan food the day after this discovery despite the fact that it has daily food deliveries ordered the day before and regularly accommodates dietary wishes. It would be reasonable for the hotel to have ordered suitable food at the next available opportunity. Therefore the period for making the claim starts the day after the request.

- 16.16 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 took place. 117(6)(a)
- 16.17 A policy, rule or practice, in accordance with which decisions are taken from time to time, might constitute an ‘act extended over a period’ for these purposes, even where such policy is unwritten and informal. So if a service provider maintains an unlawful policy by which they treat a person less favourably on many occasions, the claim relating to all the examples of less favourable treatment will be brought within the time limit if the claim is brought within the time limit for the last example of less favourable treatment.

- 16.18 A continuing state of affairs may constitute an act extended over a period for these purposes. This means that even if the individual acts relied upon are done by different persons and are done at different places an act extending over a period may be found.

Example: Security at a club repeatedly turn away a gay man from coming into the club using a variety of reasons, none of which seem plausible to him. However after the fifth occasion the door staff tell him plainly it is because he is gay and the owner told them to turn gay people away. 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 not presented within the initial time limit?

- 16.19 Where the claim is brought outside these time limits, the courts have a discretion whether to hear the case. They will exercise that discretion if satisfied that the claim has been brought within a period which is just and equitable. 117(1)(b)
- 16.20 The courts will consider the prejudice which each party would suffer as the result of the decision to be made. What would the impact be on the service provider if the case proceeds or on the person bringing the claim if it does not?

The courts will also have regard to all the

16.21 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 service provider had cooperated with any requests for information
- the promptness with which the person bringing the claim acted once they knew of the facts giving rise to the claim, or
- the steps taken by that person to obtain appropriate professional advice once they knew of the possibility of taking action.

Obtaining information

16.22 Before starting proceedings it may be helpful to the person considering bringing proceedings to make a complaint to the service provider to see whether the issue can be determined to the satisfaction of both parties.

In addition, any person who has a complaint under the Act may request information relevant to their claim from the person against whom they complain. This is known as the 'questions procedure' and it is additional to other means of obtaining information under the courts' rules.

137

16.23 There is a standard form of questionnaire and accompanying booklet which explains how the procedure works. (Please note further information will be published in the appendices of the final code.)

However the questions do not need to be presented in this way.

The questionnaire is a way for service users to

Please note: this is draft for consultation and should not be taken as final text

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. For example an atheist man may suspect that he was not accepted as a member of a lawyers' association because of his belief; he could use the questionnaire to request information from the association about their decision which could support his suspicion.

The questions and answers are admissible in evidence in court proceedings.

- 16.24 The recipient of the questions is not obliged to answer the questions. However if the recipient chooses not to answer the questions within eight weeks (starting on the day they are received), or if they give an equivocal or evasive answer, then the court may draw an adverse inference. Special rules apply where a reply might prejudice a criminal matter. 137(4)

Burden of proof

- 16.25 A person alleging they have been a victim of unlawful discrimination, harassment, victimisation (including instructing, causing or aiding another to discriminate, harass or victimise) or a failure to make reasonable adjustments, must prove facts from which a court could decide or draw an inference that another did treat them in such a manner. If such facts are not proved, a claim will fail. A court will make findings as to the basic facts and determine whether those facts are sufficient to justify an inference of unlawful discrimination, harassment, victimisation or a failure to make reasonable adjustments. A court can look at circumstantial evidence (which may include events before and after the alleged unlawful act) to help establish the basic facts. 135

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.

- 16.26 If a person has proved facts from which a court could conclude that there has been an act of unlawful discrimination, harassment or victimisation, the burden of proof shifts to the service provider. To successfully defend a claim, the service provider will have to prove, on the balance of probabilities, that they did not unlawfully discriminate, harass, victimise or fail to make reasonable adjustments. If the service provider's explanation is inadequate or unsatisfactory, the court must find that unlawful discrimination, harassment or victimisation has occurred.
- 16.27 A court will hear all of the evidence from the person bringing a claim and the service provider before deciding whether the burden of proof has shifted to the service provider.

16.28 Where the basic facts are not in dispute, a court may simply consider whether the service provider is able to prove, on the balance of probabilities, that it did not unlawfully discriminate, harass, victimise or fail to make reasonable adjustments.

In cases of direct discrimination or combined discrimination, the person alleging direct discrimination or combined discrimination will have to prove facts from which a court could conclude that they had been subjected to treatment that was less favourable than a real or hypothetical comparator (see Chapter 5).

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.

Example: A bank operates a loan approval system which gives higher approval value to those in full time work. A woman complains that this indirectly discriminates against women. She can show that the rule disadvantages women because they are less likely to work full time than men, and that it disadvantages her because she works part time. The authority must show that the rule is justified or face a finding of unlawful sex discrimination.

Civil courts

16.29

The civil courts can hear claims about acts which are made unlawful by the Act.

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.

16.30

The Act allows the civil courts to hear cases concerning unlawful acts relating to goods facilities and services and public functions. In relation to these it does not matter whether the unlawful act occurs outside the United Kingdom.

113(4)(b)

However in relation to unlawful acts by associations (see Chapter 13), the act must take place within the United Kingdom.

Assessors in cases under the Act

16.31

In cases about unlawful acts under the Act, the courts will normally sit assisted by 'assessors'. These are persons of skill and experience in the matter to which the proceedings relate (that is the area of discrimination concerning the protected characteristic(s) involved in the case). They help to evaluate the evidence. The Act says that in unless the judge or sheriff is satisfied that there are good reasons for not doing so, they must appoint one or more assessors. Normally therefore there will be assessors.

Clause 113(6) (7) and section 63(1) of the County Courts Act 1984 the power under rule 44.3 of Schedule 1 to the Sheriff Court (Scotland) Act 1907

16.32 It would not be a good reason that the court believes itself capable of hearing the issues in the case without assessors or that having assessors would lengthen proceedings.

A party to proceedings can object in writing to an assessor either in respect of the person's qualifications or to the particular assessor.

The remedies which the civil courts can grant are dealt with in paragraph 16.50 to 16.63 below.

Settlements

16.33 Nothing in the Act prevents the parties to a claim or potential claim which can be decided by the civil courts from reaching an agreement to settle the claim without the need for a hearing. An agreement of this nature can include any terms the parties are willing to put into it, and therefore can include agreements concerning compensation, future actions by the service provider, costs and other lawful matters.

Use of judicial review

16.34 If the complaint under the Act is about the lawfulness of a decision, action or a failure to act in relation to the exercise of a public function, the person complaining may bring proceedings for judicial review.

16.35 For example, if the person's claim is for unlawful discrimination by a public authority, such as a local authority, one possible route is to make a claim for judicial review of the authority's act.

Please note: this is draft for consultation and should not be taken as final text

- 16.36 A claim for judicial review will be appropriate where the person bringing it wants to quash (remove) an administrative decision of the public authority.
- 16.37 In England and Wales a person who brings a claim for judicial review must obtain permission from the court. An application for permission must be made promptly and in any event not later than three months after the grounds to make the claim first arose.
- 16.38 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.

Enforcement of the public sector equality duty

- 16.39 A person who is affected or would be affected by a breach of a public authority's equality duty may bring a claim for judicial review. This claim, which can include a claim for unlawful discrimination due to breach of the equality duty, must be brought before the High Court or the Court of Session.

Details of how the public sector equality duty is enforced are in the separate codes on the duty for England and Wales, and for Scotland.

Enforcement of the Human Rights Act 1998

- 16.40 Any of the Courts to which a person can complain must read and give effect of their powers in a way which is compatible with their human rights.

In addition the courts can give a remedy against a public authority if the authority has breached a person's human rights. In some cases there will be a cause of action under the Act and the Human Rights Act 1998. The person bringing the claim should make sure that the court knows that both are contained in the claim and must indicate that a claim for breach of the Human Rights Act 1998 is being made where that is the intention.

Immigration cases

- 16.41 Certain claims of unlawful acts relating to decisions of the immigration authorities (or appeals against their decisions) have to be dealt with by the immigration appeal authorities. Clause 114
- 16.42 So complaints relating to acts made unlawful under the Act and which concern decisions:
- 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, or
 - e) to refuse an application to vary leave to enter or remain in the UK
- are considered by the Immigration Appeal Authorities.
- 16.43 The Immigration Appeal Authorities can determine the question of whether the unlawful act has taken place but they do not have jurisdiction to award compensation. If the Immigration Appeal Authorities find that an unlawful act has taken place then the question of compensation may be brought before the civil courts.
- 16.44 The finding made by the Immigration Appeal Authority is binding and cannot be challenged before the ordinary court. The court will be able to give the person a remedy for the act of discrimination.
- 16.45 There are special time limits that apply in a case where the Immigration Appeal Authority finds that there was an act of discrimination. The person can bring the claim to the court within a period of six months beginning with the day after the time limit for appealing against the Immigration Appeal Authority's decision has expired.

National security

- 16.46 The Act includes an exception for acts for the purpose of safeguarding national security (see paragraph 15.18 Chapter 15, Exceptions). Clause 116
- 16.47 In cases involving an assertion that national security is involved special rules apply. The rules of the courts may allow the courts to exclude from all or part of the proceedings the person bringing the claim (known as the claimant in England and Wales and the pursuer in Scotland). Their representative may be excluded, and the court may exclude the assessor(s).
- 16.48 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.
- 16.49 The Attorney General 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

- 16.50 The county courts in England and Wales and the Sheriff in Scotland have the power to grant any remedy the High Court or the Sessions, respectively could grant. 118(2),(3)
- They may therefore grant an injunction. These are orders of the courts which either require a person to do something or prohibit them from doing something. They can be made on a temporary basis, pending the outcome of a full hearing of the claim (when they are called 'interim') or they can be made permanently by the courts at a full hearing.
- 16.51 In Scotland the courts order interim interdicts and final interdicts which prohibit a person from doing

Please note: this is draft for consultation and should not be taken as final text

something. They can also make a final order for specific implementation which requires a person to do something.

16.52 However the courts must not grant an interim injunction or interdict unless satisfied that no criminal matter would be prejudiced by doing so. Unless the court is satisfied that criminal proceedings will not be prejudiced they are obliged to grant an application to stay or assist proceedings which are made on grounds of prejudice to a criminal matter.

16.53 The courts can grant any of the following remedies:

- 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
- damages to compensate for any loss suffered by the person bringing the claim
- interest on damages, and
- costs (England and Wales) or expenses (Scotland) if appropriate.

Damages

16.54 Damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). In most cases it will be appropriate to make such an award. 118(4)

16.55 An award of damages can include any loss the person has suffered. In England and Wales the award can include aggravated damages which are awarded when the person committing the unlawful act has behaved in a high-handed, malicious, insulting or oppressive manner in doing

Please note: this is draft for consultation and should not be taken as final text

so. These damages are additional compensation for injured feelings.

- 16.56 In England and Wales where a public authority acts unlawfully under the Act, the courts may award 'exemplary' damages. These are awarded for oppressive, arbitrary or unconstitutional action by servants of the government.
- 16.57 They are also awarded where the defendant's conduct has been calculated by them to make a profit for themselves which may well exceed the compensation to the claimant. However exemplary damages are not available in Scotland.

Indirect discrimination

- 16.58 Where the courts find that there was an unlawful act of indirect discrimination but they are satisfied that the provision criterion or practice was not applied with the intention of discriminating against the person bringing the claim, they must first consider whether to dispose of the case by providing a remedy other than damages. Having considered that point the courts may then make an award of damages even if the indirect discrimination was not intentional. 118(5),(6)
- 16.59 The service provider will intend discrimination where they knew that certain consequences would follow from their acts and they want those consequences to follow. The service provider's motive, for example to promote business efficiency does not mean that they did not intend to discriminate against the person on one of the protected grounds.

Effect on criminal matters

- 16.60 The court cannot grant a remedy (other than an award of damages or the making of a declaration) unless satisfied that no criminal matter would be prejudiced by doing so. So the courts cannot grant injunctions or interdicts, for example in cases where this would be the effect.

Public authority cases

- 16.61 In England and Wales the County Court has the power to award all the remedies which the High Court can grant in a claim for judicial review. 118(2)(b)
- 16.62 Likewise, in Scotland, the sheriff has the power to make any order which could be made by the Court of Session on a petition for judicial review.
- 16.63 In addition to ordering damages, interim or final injunctions or interdicts, the courts can make quashing orders by which they can set aside an administrative decision or action of the authority.

Appendix

The meaning of disability

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?

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.

What about people who have recovered from a disability?

People who have had a disability within the definition are protected from discrimination even if they have since recovered (though those with past disabilities are not covered in relation to Part 12 (transport) and section 183 (improvements to let dwelling houses)).

What does 'impairment' cover?

It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

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?

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 an impairment not its cause

What is a 'substantial' adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be

Please note: this is draft for consultation and should not be taken as final text

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; 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?

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?

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’?

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 specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

Day to day activities thus include activities such as walking, driving, using public transport , cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams) continence, talking and hearing reading, taking part in normal social interaction or forming social relationships, nourishing and carry for one’s self. They also encompass the activities which are relevant to professional life

What about treatment?

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?

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?

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.

Please note: this is draft for consultation and should not be taken as final text

Are there any other people who are automatically treated as disabled under the Act?

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist, are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act's definition of disability.

What about people who know their condition is going to get worse over time?

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.

Are people with genetic conditions covered?

If a genetic condition has no effect on the ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.