

*Please note: this is a first draft text for consultation*

Equality Act 2010

# **Draft Code of Practice: Schools in Scotland**

## **For consultation**

January 2011

*Please note: this is a first draft text for consultation*

Chapter 1 - Purpose of the Equality Act 2010

Chapter 2 - Who has rights under the schools' provisions of Part 6 of the Act?

Chapter 3 – An overview of the schools' provisions of the Act

Chapter 4 – Direct discrimination

Chapter 5 – Indirect Discrimination

Chapter 6 – Discrimination arising from disability

Chapter 7 – Disabled pupils: reasonable adjustments

Chapter 8 – Harassment

Chapter 9 – Victimisation

Chapter 10 – Admissions

Chapter 11 – Education

Chapter 12 – Exclusions

Chapter 13 – Positive Action

Chapter 14 – Exceptions

Chapter 15 – Enforcement

Appendix 1 – General Qualification Bodies

Appendix 2 - The Meaning of Disability

*(Additional detail to be added to Contents page after the consultation).*

## Chapter 1

### Introduction

#### **Purpose of the Equality Act 2010**

- 1.1 The Equality Act 2010 (the Act) consolidates and replaces the previous discrimination legislation for England, Scotland and Wales. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as ‘protected characteristics’.
- 1.2 An important purpose of the Act is to unify the legislation outlawing discrimination against people with different protected characteristics where this is appropriate. There are, however, some significant differences and exceptions, which this Code explains.
- 1.3 As well as consolidating existing law, the Act makes discrimination unlawful in circumstances not covered previously. Discrimination in most areas of activity is now unlawful subject to certain exceptions. These areas of activity include, for example, employment and other areas of work, education, housing, the provision of services, the exercise of public functions and membership of associations.
- 1.4 Different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and the exercise of public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education and general qualifications bodies. Part 7 deals with discrimination by membership associations.

Schools may have duties under one or more Parts of the Act where, for example, they employ people and provide

education.

### **Status of the Code**

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

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

If schools follow the guidance in the Code, it may help them to avoid an adverse decision by a court in such proceedings.

### **Use of the terms ‘school’, and ‘pupil’**

- 1.6 The Act imposes duties on all bodies falling under the schools provisions in Part 6 of the Act. These bodies include all Education Authorities and all schools in Scotland.

Education authorities also have obligations as service providers and bodies carrying out public functions. These are covered in a separate Code [ The Code of Practice on Services, Public Functions and Associations – this can be downloaded from the Commission’s website: [www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) ]

The Code uses the terms ‘school’ and ‘pupil’ and terms which flow from these generically to refer to all those who have duties (not just schools) or who are protected in the areas covered by this Code.

### **Scope of the Code**

- 1.7 This Code covers discrimination in schools as set out in Chapter 1 of Part 6 of the Act.

It sets out the duties on schools in relation to provision of education and access to benefits, facilities or services. These cover all of the services, facilities and benefits, both educational and non-educational that a school provides or offers to provide for pupils.

*Please note: this is a first draft text for consultation*

The duties on schools as employers, bodies which carry out public functions and service providers are not covered by Part 6 of the Act and are set out in separate Codes. [ The Code of Practice on Employment and The Code of Practice on Services, Public Functions and Associations – these can be downloaded from the Commission’s website:

[www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) ]

1.8 Chapter 1 of Part 6 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in schools, when seeking admission to schools or by being excluded from schools. This does not necessarily mean that schools should treat everybody in exactly the same way; in some circumstances a school will need to provide education in a different way to meet the needs of pupils, for example through the use of positive action, and for disabled pupils so that they can receive the same standard of education as far as this is possible. The steps that schools should take to ensure that they do not discriminate are explained in this Code.

1.9 This Code applies to Scotland. There is a separate Schools Code for England and Wales. In addition, education provided outside Great Britain may be covered by the Act.

### **Marriage and civil partnership**

1.10 The Act does not provide protection against discrimination because of marriage and civil partnership in the areas covered by this Code (Chapter 1 of Part 6 of the Act). Therefore, this Code does not cover discrimination because of these characteristics in schools.

### **Purpose of the Code**

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

1.12 The Equality and Human Rights Commission (the Commission) has also produced practical guidance for schools which assumes no knowledge of the law. This may be more helpful and accessible for people who need an introduction to the Act. It can be obtained from the Commission, or downloaded from the Commission’s

*Please note: this is a first draft text for consultation*

website: [www.equalityhumanrights.com/advice-and-guidance/guidance-for-education-providers-schools](http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-education-providers-schools)

- 1.13 The Code, together with the practical guidance produced by the Commission, will:
- help schools to understand their responsibilities and to avoid complaints and discrimination claims
  - help parents and pupils 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 guidance to the courts and tribunals on matters designed to ensure or facilitate compliance with the Act and which is admissible in evidence and must be taken into account by it in any case in which it appears to the court to be relevant.

### **Role of the Equality and Human Rights Commission**

- 1.14 The Equality and Human Rights Commission was set up under the Equality Act 2006 to work towards the elimination of unlawful discrimination and promote equality and human rights.
- 1.15 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.

### **Human rights**

- 1.16 Public authorities have a duty under the Human Rights Act 1998 (HRA) not to act incompatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). The public functions of schools are functions of a public nature as defined in the HRA. As indicated above, the duties on schools as bodies which carry out public functions are not covered by Part 6 of the Act, and how the HRA interfaces with the Equality Act in these circumstances is set out in a separate Code [The Code of Practice on Services, Public Functions and Associations – this can be downloaded from the Commission’s website: [www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) ]

*Please note: this is a first draft text for consultation*

- 1.17 Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with the Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a public authority is involved in the case or not. So, in any discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.
- 1.18 Human rights issues can arise in relation to the exercise of any public function where any Convention right is engaged. If a public authority or any other body discriminates when carrying out a function of a public nature, this may also amount to a breach of the HRA if a Convention right is engaged because discrimination in the enjoyment of Convention rights is a breach of the Convention (under Article 14). Where discrimination in the enjoyment of Convention rights is based on a characteristic protected under the Equality Act this could also be a breach of the Equality Act.
- 1.19 Because of the close relationship between human rights and equality it is good practice for those exercising public functions to consider equality and human rights together when drawing up equality or human rights policies.

### **How to use the Code**

- 1.20 **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, marriage and civil partnership are not covered by this Code.
- Chapter 3** gives an overview of schools' provisions in Part 6 of the Act.
- Chapter 4** explains direct discrimination.
- Chapter 5** explains indirect discrimination.
- Chapter 6** explains discrimination arising from disability.
- Chapter 7** explains the duty to make reasonable adjustments for disabled pupils, including the duty to change a provision, criterion or practice; the duty to provide auxiliary aids or services; and the duty to make

*Please note: this is a first draft text for consultation*

reasonable adjustments to physical features.

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

**Chapter 9** explains victimisation.

**Chapter 10** explains the provisions of Part 6 as they relate to schools' admissions and what discrimination (or other prohibited conduct) looks like in practice.

**Chapter 11** explains the provisions of Part 6 as they relate to schools providing education and access to benefits, facilities and services and what discrimination (or other prohibited conduct) looks like in practice.

**Chapter 12** explains the provisions of Part 6 as they relate to schools' exclusions and what discrimination (or other prohibited conduct) looks like in practice.

**Chapter 13** explains the positive action provisions of the Act. This Chapter explains the measures the Act permits schools to take which may involve treating groups differently to address disadvantage, meeting different needs or improving low levels of participation.

**Chapter 14** explains exceptions which permit differential treatment in some, limited circumstances.

**Chapter 15** deals with enforcement by the civil courts of Part 6.

**Appendix 1** provides an overview of how Part 6 of the Act applies to General Qualification Bodies.

**Appendix 2** contains further information about the meaning of disability in the Act.

## **Examples**

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

## **References in the Code**

- 1.22 In this Code, 'the Act' means the Equality Act 2010. References to particular sections and Schedules of the Act are shown in the margins, abbreviated as 's' and



*Please note: this is a first draft text for consultation*

‘Sch’ respectively. Occasionally other legislation or regulations are also referred to in the margins.

### **Changes to the law**

- 1.23 This Code refers to the provisions in the Equality Act which came into force on 1 October 2010. There are expected to be changes to the Act made by Order and other legislation may have an effect on the duties explained in the Code. The duty on schools (as explained in detail in Chapter 7) to provide auxiliary aids as part of the reasonable adjustments duty is not expected to come into force before September 2011.

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

The Act contains provisions relating to dual discrimination (also known as combined discrimination) and the new public sector equality duty. The government is considering how the dual discrimination provision can be implemented in the best way for business and for others with rights and responsibilities under the Act. The public sector Equality Duty will come into force on the 6<sup>th</sup> April 2011.

Readers of this Code will need to keep up to date with any developments that affect the Act’s provisions and should also be aware of the other Codes issued by the Commission. Further information can be obtained from the Commission. See below for contact details.

### **Further information**

#### **How to get hold of the Act**

The Equality Act 2010 can be found on the UK Government’s Legislation website:  
<http://www.legislation.gov.uk/ukpga/2010/15>

#### **How to get hold of a copy of this Code**

Copies of this draft Code can be downloaded from the Commission’s website:  
[www.equalityhumanrights.com/equalityact-consultations](http://www.equalityhumanrights.com/equalityact-consultations)

*Please note: this is a first draft text for consultation*

**Contact details for the Equality and Human Rights Commission**

Equality and Human Rights Commission Scotland

Telephone 0845 604 5510

Textphone 0845 604 5530

Email: [scotland@equalityhumanrights.com](mailto:scotland@equalityhumanrights.com)

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## Chapter 2

# Who has rights under the schools provisions of Part 6 of the Act?

### Introduction

- 2.1 Part 2 of the Act contains the key concepts of equality.
- 2.2 The Act protects people from discrimination and harassment based on ‘protected characteristics’. The terms ‘school’ and ‘pupil’ and terms which flow from these are used generically to refer to all those who have responsibilities or who are protected in the areas covered by this Code.
- 2.3 The ‘protected characteristics’ in relation to the schools’ provisions are: disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

### Disability

#### What the Act says

- 2.4 Only a person who meets the Act’s definition of disability has the protected characteristic of disability. When the Act refers to people who share a protected characteristic in relation to disability, it means they share the same disability. **s.6**  
**s.6(3)**
- 2.5 In most circumstances, a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability. **s.6(4)**
- 2.6 People who currently have a disability are protected because of this characteristic against harassment and discrimination – including discrimination arising from disability (Chapter 6) and a failure to comply with the duty to make reasonable adjustments (Chapter 7). People who have had a disability in the past are also protected against harassment and discrimination (see Appendix 2,

*Please note: this is a first draft text for consultation*

paragraph 3). Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (see paragraphs 4.19 to 4.21). In some circumstances a non-disabled person may be protected where they experience harassment (see Chapter 8) or some other unlawful act such as victimisation (see Chapter 9).

- |      |  |                               |
|------|--|-------------------------------|
| 2.7  | The Act says that a person has a disability if they have a physical or mental impairment which has a long term and substantial adverse effect on their ability to carry out normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing.                                     | <b>s.6 (1)</b>                |
| 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.   | <b>Sch. 1, para 3</b>         |
| 2.9  | Long term means that the impairment has lasted or is likely to last for at least 12 months or for the rest of the affected person's life.  | <b>Sch. 1 , para 2(1)</b>     |
| 2.10 | Substantial means more than minor or trivial.  | <b>s.212(1)</b>               |
| 2.11 | Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day-to-day activities, it is still to be treated as though it does have such an effect. | <b>Sch. 1, para 5</b>         |
| 2.12 | This means that 'hidden' impairments are also covered (for example, mental illness or mental health problems, diabetes and epilepsy) where they meet the definition in the Act.  |                               |
| 2.13 | Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.   | <b>Sch. 1, para 6</b>         |
| 2.14 | Progressive conditions and those with fluctuating and recurring effects will amount to disabilities in certain circumstances.  | <b>Sch. 1 para 2(2) and 8</b> |
| 2.15 | For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix 2 of this Code.  |                               |
| 2.16 | The Act's definition of disability is not the same as the definition of additional support needs in the Education  | <b>Education (Additional</b>  |

(Additional Support for Learning) (Scotland) Act 2004. There will be some pupils who are covered by the Equality Act's definition of disability but not the Education Act's definition of additional support needs and vice versa, although a significant number of pupils are covered by both. See Chapter 7 for an explanation of how the Act's reasonable adjustments provisions interact with those of the additional support needs legislation.

## Support for Learning (Scotland) Act 2004

### Gender reassignment

#### What the Act says

- 2.17 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. **s.7(1)**
- 2.18 A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. **s.7(2)**
- 2.19 Under the Act 'gender reassignment' is a personal process (that is, moving away from one's birth sex to the preferred gender), rather than a medical process.
- 2.20 The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

**Example:** A pupil who was born physically female decides he wants to live his life as a male. He dresses like a male and tells his school he wishes to be known by a male name and have his school records changed. The pupil decides not to undergo any medical treatment such as hormone treatment at this stage. He would be protected under the gender re-assignment provisions of the Act.

- 2.21 This broad, non-medical definition is particularly important for gender variant children: although some children do reassign their gender while at school, there are others who are too young to make such a decision. Nevertheless they may have begun a personal process of changing their

*Please note: this is a first draft text for consultation*

gender identity and be moving away from their birth sex. Manifestations of that personal process indicate that a process is in place and they will be protected by the Act.

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

2.23 **Example:** A pupil born physically male tells her school she intends to undergo gender reassignment. She attends counselling sessions to start the process. However, the pupil then decides to go no further. The pupil is protected under the law because she has undergone part of the process of reassigning her sex.

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

**Example:** Before going to an end of year school formal dance a pupil tells his teacher he plans to dress as a girl 'for a laugh'. However, the teacher tells him he cannot attend the event dressed as a girl because it is a formal event with a dress code for male and female pupils.

The school also tells a transsexual pupil that he can't come dressed as a male because of the dress code, despite the fact that they know he has been attending school as a male for the past year.

The first pupil would not have a claim for discrimination because he does not intend to undergo gender reassignment and because the reason he is told not to come dressed as a female relates to the school's dress code for the dance, not because they think he is a transsexual person.

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

*Please note: this is a first draft text for consultation*

- 2.25 Where an individual has been diagnosed as having ‘Gender Dysphoria’ or ‘Gender Identity Disorder’ and the condition has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, they will also be protected under the disability discrimination provisions of the Act (see Chapters 6 and 7).

### **Gender Recognition Certificates**

- 2.26 The Gender Recognition Act 2004 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act; see also the Data Protection Act 1998 which deals with processing sensitive personal information). To apply for a gender recognition certificate a person must be at least 18 years of age.
- 2.27 Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If a school requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation.

### **Pregnancy and maternity**

#### **What the Act says**

- 2.28 The Act lists pregnancy and maternity as a protected characteristic. Pregnancy and maternity discrimination is considered at paragraphs 4.35 to 4.49. **s.4**  
**s.13(6) and 13(7)**

### **Race**

#### **What the Act says**

- 2.29 The Act defines ‘race’ as including colour, nationality and ethnic or national origins. **s.9(1)**
- 2.30 A person has the protected characteristic of race if they fall within a particular racial group. A racial group can also be made up of two or more distinct racial groups. See paragraph 2.39 for the meaning of ‘racial group’. **s.9(2)**

## Nationality

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

## Ethnic origins

- 2.32 Everyone has an ethnic origin but the provisions of the Act only apply where a person belongs to an 'ethnic group' as defined by the courts. This means that the person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community. **s.9(1)(c)**
- 2.33 There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language; a common literature; a common religion or common geographical origin; or being a minority or an oppressed group.
- 2.34 An ethnic group or national group could include members new to the group, for example, a person who marries into the group. It is also possible for a person to leave an ethnic group.
- 2.35 The courts have confirmed that the following are protected ethnic groups: Sikhs, Jews, Romany Gypsies, Irish Travellers, Scottish Gypsies and Scottish Travellers.

## National origins

- 2.36 National origins must have identifiable elements, both historic and geographic, which at least at some point in time indicates the existence or previous existence of a nation. For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense. **s.9(1)(c)**



*Please note: this is a first draft text for consultation*

- 2.37 National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries.
- 2.38 A person's own national origin is not something that can be changed, though national origin can change through the generations.

### **Meaning of 'racial group'**

- 2.39 A racial group is a group of people who share a colour, nationality or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act. **s.9(3)**
- 2.40 A person may fall into more than one racial group. For example, a 'Nigerian' may be defined by colour, nationality or ethnic or national origins.
- 2.41 A racial group can be made up of two or more distinct racial groups. For example, a racial group could be 'black Britons' which would encompass those people who are both black and who are British citizens. Another racial group could be 'South Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans. **s.9(4)**
- 2.42 Racial groups can also be defined by exclusion. For example, those of 'non-British' nationality could form a single racial group.

### **Religion or belief**

#### **What the Act says**

- 2.43 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of religion or belief. **s.10(1) and (2)**
- 2.44 For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or any lack of one.
- 2.45 The meaning of religion and belief in the Act is broad and is consistent with the scope of Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).

### Meaning of religion

- 2.46 'Religion' means any religion and includes a lack of religion. The term 'religion' includes the more commonly recognised religions in the UK such as the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for the courts to determine what constitutes a religion. **s.10(1)**
- 2.47 A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

### Meaning of belief

- 2.48 Belief means any religious or philosophical belief and includes a lack of belief. **s.10(2)**
- 2.49 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.
- 2.50 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.
- 2.51 A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.
- 2.52 For a philosophical belief to be protected under the Act:
- it must be genuinely held
  - it must be a belief, and not an opinion or viewpoint, based on the present state of information available
  - it must be a belief as to a weighty and substantial aspect of human life and behaviour
  - it must attain a certain level of cogencyseriousness, cohesion and importance
  - it must be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

**Example:** A pupil believes in a philosophy of racial superiority for a particular racial group. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a 'belief' for the purposes of the Act.

### Manifestation of religion or beliefs

- 2.53 While people have an absolute right to hold a religion or belief under Article 9 of the European Convention on Human Rights, the manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10).
- 2.54 Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or a belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination: this would usually amount to indirect discrimination.

**Example:** A school has a school uniform policy that specifies that pupils should not wear baseball caps or any other head gear. This is likely to be indirect discrimination against a Jewish boy who wears a skull cap at the school unless the policy can be objectively justified.

## Sex

### What the Act says

- 2.55 Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls. **s.11(a) and (b) and s.212(1)**
- 2.56 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraphs

*Please note: this is a first draft text for consultation*

2.17 to 2.27) or sexual orientation (see paragraphs 2.58 to 2.62).

2.57 There are specific provisions which apply where the treatment of a female pupil is because of her pregnancy and maternity or because she is breastfeeding (see paragraphs 4.35 to 4.49). **s.13(7) (a) and s.13(8)**

## **Sexual orientation**

### **What the Act says**

2.58 Sexual orientation is a protected characteristic. It means a person's sexual orientation towards: **s.12(1)**

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

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

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

2.61 When the Act refers to the protected characteristic of sexual orientation, it means the following: **Section s.12(2)**

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

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

## **Restrictions on protection under the Act**

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

- For pregnancy and maternity, there is no express protection from direct discrimination by association or perception (see paragraphs 4.19 to 4.21); indirect discrimination (see Chapter 5); or harassment (see Chapter 8). However, in these three situations described above, the sex discrimination provisions may provide protection.
- For gender reassignment, sexual orientation or religion or belief there is no express protection from harassment in relation to the schools provisions. However, where unwanted conduct related to any of these protected characteristics results in a pupil suffering disadvantage that would constitute direct discrimination.
- Apart from discrimination by association or perception, protection from direct discrimination because of disability only applies to disabled people.
- Indirect disability discrimination and discrimination arising from disability only applies to disabled people (see Chapter 5 and 6).
- A school is only under a duty to make reasonable adjustments for a disabled pupil or applicant (see Chapter 7).

## Chapter 3 Schools (Scotland)

### An overview of the schools' provisions of the Act

#### Introduction

- 3.1 This Chapter gives an overview of the schools' provisions in Part 6 of the Act. It explains who has rights and who has obligations under those provisions and outlines what is made unlawful by them. Later Chapters explain the provisions in greater detail.
- 3.2 This Chapter also explains the potential liability of schools as employers for the actions of their employees and agents.
- 3.3 It suggests steps that schools may wish to take to ensure they are meeting their obligations under the Act.

#### Who has rights under the Act?

- 3.4 The Act protects people applying for admission to school, pupils at a school and former pupils. The duties to former pupils are explained in more detail in paragraph 3.19 to 3.22. For the purposes of the Act 'pupil' has the meaning as defined in section 135(1) of the Education Act (Scotland) 1980.

This definition is 'a person (of any age) for whom education is, or is required to be, provided for at a school or nursery school'.

**EA  
(Scotland)  
1980  
s135(1)**

#### Who has duties?

- 3.5 The Act imposes obligations on all schools in Scotland, England and Wales (there is a separate Code for Schools in England and Wales). This includes:

- Public schools (i.e. schools under the management of an Education Authority) **s85(7)**

- Grant-aided schools
- Independent schools
- Special schools
- Nursery schools.

### Nursery education

3.6

Nursery schools managed by an education authority and nursery classes provided within a school have the same obligations as schools.

s85 (7)

s89

Independent nurseries are covered by Part 3 of the Act as service providers.

EA(S)  
1980  
s1(5)(a)  
(i)

### Who is responsible?

3.7 Who is responsible for a school's obligations under the Act varies depending on the type of school. For any school, the body that has responsibility is called the 'responsible body'.

s85 (9)

Throughout this Code the term 'school' is used for ease to refer to anyone who has duties under the schools' provisions of the Act and covers the 'responsible body' for a school.

The table below shows who is the responsible body for different types of schools:

Type of school	Responsible Body
Independent school	The proprietor
Education authority school	The education authority
Grant-aided school	The managers

### **What is unlawful?**

3.8 The Act makes it unlawful for a school to discriminate against a pupil in relation to:

- admissions
- the provision of education
- access to any benefit, facility or service
- exclusions.

The Act also makes it unlawful for a school to harass or victimise an applicant or pupil.

Schools' obligations under the Act in relation to admissions are explained in detail in Chapter 10, in relation to education, access to benefits, facilities and services in Chapter 11 and in relation to exclusions in Chapter 12.

### **Discrimination**

3.9 The different forms of discrimination relevant to the schools' provisions of the Act are:

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

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.

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

### **Treating disabled people more favourably**

3.10 It is never unlawful discrimination to treat a disabled pupil more favourably than a non-disabled pupil because of their disability. A non-disabled pupil cannot bring a claim of disability discrimination. This means that a school can, if it wishes, lawfully restrict certain courses, benefits, facilities or services to disabled pupils only or offer them on more favourable terms.

**Example:** A school provides extra lessons for a disabled pupil who has missed a number of lessons due to medical appointments which



relate to their disability.

### **Gender reassignment**

- 3.11 It is also never unlawful discrimination to treat a pupil who is undergoing gender reassignment more favourably than a pupil who is not transsexual. This means that a school, can if they wish, provide benefits or facilities for transsexual pupils only, if appropriate or offer them on more favourable terms.

**Example:** The school provides access to a trained counsellor specifically to assist a transgender pupil to deal with the emotional impact of their transition.

### **Pregnancy and maternity**

- 3.12 It is never unlawful discrimination to treat a pupil who is pregnant or breastfeeding more favourably than a pupil who is not pregnant or breastfeeding. A pupil who is not pregnant or breastfeeding cannot bring a claim of pregnancy or maternity discrimination. This means that a school can, if they wish, lawfully restrict certain courses, benefits, facilities or services to pregnant and breastfeeding pupils only or offer them on more favourable terms.

**Example:** A secondary school provides pregnant school pupils and those who have recently given birth with specialist provision including catch up sessions if they miss classes due to ante-natal appointments and one-to-one help from a member of staff to support them to remain in mainstream education.

**Example:** A school allows a pregnant pupil in the late stages of her pregnancy to study at home as the journey to her school is proving too tiring to allow her to concentrate in class.

### **Positive action**

- 3.13 The positive action provisions of the Act permit schools to take proportionate steps to help particular groups of pupils to overcome disadvantages which are linked to a protected characteristic. Where this results in more favourable treatment of pupils with a particular protected characteristic this is lawful provided the requirements of the positive action provisions are met. The Act defines the circumstances in which a school may take positive action to overcome disadvantage, to meet different needs or to increase participation of people in a particular equality group. Positive action is explained in detail in Chapter 13.

## Other unlawful conduct

### Harassment

s26

3.14 The Act prohibits three different types of harassment:

- a) harassment related to a 'relevant 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.

Chapter 8 provides a detailed explanation of harassment.

### Victimisation

3.15 The Act prohibits victimisation. It is victimisation for a school to subject a pupil or an applicant for admission as a pupil to a detriment because the pupil or applicant has done a 'protected act' or because the school believes that the pupil or applicant has done or may do a protected act in the future. It is also victimisation for a school to subject a parent, or other member of the public to a detriment because they have done a protected act or the school believes that they have done or may do a protected act in the future but this is covered by Part 3 rather than Part 6 of the Act. s27

3.1 A protected act is any of the following: s. 27(2)

6

- a) bringing proceedings under the Act **s.27(2)(a)**
- b) giving evidence or information in connection with proceedings brought under the Act **s.27(2)(b)**
- c) doing anything else for the purposes of or in connection with the Act **s.27(2)(c)**
- d) making an express or implicit allegation that another person has done something in breach of the Act (whether or not the allegation is later dropped). **s.27(2)(d)**

## Victimisation for actions of a parent or sibling

3.1  
7 s86  
Victimisation of a pupil also occurs where a school subjects a pupil to a detriment because their parent or sibling has done one of the acts listed in the above paragraph.

3.1  
8 s135  
Education (Scotland) Act 1980  
For the purposes of the Act 'parent' has the meaning as defined in s135 (1) of the Education (Scotland) Act 1980. This definition includes a guardian and any person who is liable to maintain or has parental responsibilities in relation to, or has care of a child or young person.

Chapter 9 provides a detailed explanation of victimisation.

### Relationships that have come to an end

3.1  
9 s108  
It is unlawful for a school to discriminate against or harass someone who used to be a pupil, where the adverse treatment arises out of and is closely connected with the person having been a pupil; and which would have been prohibited if the person had still been a pupil.

**Example:** A school is hosting an anniversary reunion dinner for all ex-pupils. A transsexual ex-pupil is not invited because they are a transsexual. This would constitute unlawful direct gender re-assignment discrimination.

3.2  
0 A person will be able to enforce protection against discrimination or harassment as if they were still a pupil.

**Example:** In the example above the ex-pupil could make a claim of discrimination in the sheriff court in the same way as if he was still a pupil.

3.2  
1 Reasonable adjustments must be made for disabled people who have previously been pupils at the school if they are put at a substantial disadvantage in comparison to people without a disability. This duty arises only if the substantial disadvantage arises out of and is closely connected with their having been pupils at the school, and relates to activities or benefits the school provides for former pupils.

**Example:** A school publishes an annual alumni update for former pupils of the school for networking purposes. Although the majority of its publications are available in different formats, the alumni report is only issued as a pdf and is therefore inaccessible to visually impaired former pupils. This could constitute a failure to make a

Please note: this is a first draft text for consultation

reasonable adjustment.

- 3.2 If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be covered by the victimisation provisions. s 108(7)

### Liability for acts of employees and agents

- 3.2 The Act makes schools as employers legally responsible for acts of discrimination, harassment or victimisation committed by their employees in the course of their employment. Schools are also liable for such acts committed by their agents while acting under the school's authority. It does not matter whether the school knows about or approves of the acts of its employee or agent. s109

**Example:** A physical education teacher makes homophobic remarks about male pupils in his class creating an intimidating atmosphere which causes distress and offence. The school would be legally responsible for the discrimination by the teacher.

- 3.2 A school's liability does not extend to criminal offences. 4

### When is an act 'in the course of employment' or 'within the authority of the [school]'?

- 3.2 The phrase 'in the course of employment' has a wide meaning: employees who commit an unlawful act against pupils will usually be regarded as acting in the course of their employment. The same breadth of meaning should be given to acting 'with the authority of the [school]' in the case of agents. 5

### The employer's defence

- 3.2 A school will not be liable for unlawful acts committed by its employees in the course of employment where the school has taken all reasonable steps to prevent such acts. s109(4)

**Example:** In the physical education teacher example above in 3.23, although the school had issued written guidance to all teachers on their conduct in respect of discriminatory or offensive comments this might not be sufficient for the school to avoid liability as there were further steps the school could have taken such as staff training.

- 3.2 A school would be considered to have taken all reasonable steps if there were no further steps that it could have been expected to take. In deciding whether a step is reasonable, a school should consider its likely effect and whether an alternative step could be more effective. 7

## Liability of employees and agents

### What the Act says

- 3.2 Individual employees may be held personally liable under the Act for s110  
8 unlawful acts which they commit during the course of employment  
with the school whether or not the school has a defence against  
liability (see paragraph 3.23). Agents are also personally liable for  
acts which they commit under the school's authority, whether or not  
the school condoned the acts.
- 3.2 An employee or agent will not be personally liable if the unlawful act s110(7)  
9 constitutes disability discrimination.

### Knowledge that the act is unlawful

- 3.3 It is not necessary for the employee or agent to know that they are  
0 acting unlawfully to be liable for their actions.
- However, if the employee or agent reasonably relies on a statement  
by the school that an act is not unlawful, then the employee or agent  
is not liable for the unlawful act.
- 3.3 It is an offence punishable by fine, for a school knowingly or s110(4)  
1 recklessly to make a false or misleading statement on which the  
employee or agent relies to carry out an unlawful act.

## Other prohibited conduct

### Aiding unlawful acts

- 3.3 The Act makes it unlawful knowingly to help someone to s112  
2 discriminate against, harass or victimise another person. A person  
(including a school) who helps another in this way will be treated as  
having done the act of discrimination, harassment or victimisation  
themselves.
- 3.3 It is also unlawful to help a person to discriminate against or harass  
3 another person after a relationship has ended where the  
discrimination or harassment arises from and is closely connected to  
the relationship.
- 3.3 The Act makes it unlawful to help with an instruction to discriminate  
4 or with causing or inducing discrimination.

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

- 3.3 'Help' should be given its ordinary meaning. The help given to  
5 someone to discriminate against, 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 person aiding need to know to be liable?**

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

**Reasonable reliance on another's statement**

- 3.3 If the helper is told that they are assisting with a lawful act and it is  
7 reasonable for them to rely on this statement, then the help they  
give will not be unlawful even if it transpires that it assisted with a  
contravention of the Act. s112(2)  
(3) and  
(4)

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

- 3.3 It is a criminal offence knowingly or recklessly to make a false or  
9 misleading statement as to the lawfulness of an act.

**Instructing, causing or inducing discrimination**

- 3.4 It is unlawful to instruct someone to discriminate against, harass or  
0 victimise another person, or to instruct a person to help another  
person to do an unlawful act. Such an instruction would be unlawful  
even if it is not acted upon. s111(1)

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

- 3.4 An inducement may amount to no more than persuasion, and need  
2 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.

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

- 3.4 The Act also prohibits a person from causing or inducing someone  
4 to help another person to do an unlawful act. s111(4)

- 3.4 It does not matter whether the person who is instructed, caused or  
5 induced to commit an unlawful act carries it out because instructing,  
causing or inducing an unlawful act is in itself unlawful. However, if  
the person does commit the unlawful act, they may be liable for it.  
The person who instructed, caused or induced them to carry it out  
may also be liable. s111(6)

### **When does the Act apply?**

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

### **Contracts**

- 3.4 The Act prevents schools from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts. **S142-144**

### **Unenforceable terms**

- 3.4 A term of a contract that promotes or provides for treatment that is prohibited by the Act is unenforceable. However, this will not prevent a person who is or would be disadvantaged by an unenforceable term from relying on it to get any benefit to which they are entitled. **s142**

- 3.4 The Act also says that a term of a contract that attempts to exclude or limit the anti-discrimination provisions of the Act is unenforceable by a person in whose favour it would operate. However, this does not prevent the parties to a claim in the Sheriff Court from entering into an agreement which has the effect of settling the claim. **s144**

S143

### **Removal or modification of terms**

- 3.5 Any person who has an interest in or is affected by a contract containing an unenforceable term may apply to the Sheriff Court to have that term removed or modified. However, no order will be made unless every person who would be affected by the order has been given notice of the application and has the opportunity to make representations.

The order can be retrospective in its effect.

### **Territorial scope**

- 3.5 The provisions of Part 6 do not apply, and cannot be enforced, in Northern Ireland.

- 3.5 The Act does not limit the scope of the schools' provisions to activities which take place in Great Britain. Whether or not an act, which takes place outside Great Britain (such as allegations of discrimination on a school trip to Paris, for example,) is covered by the Act's provisions will be determined by the courts or Tribunal.

### **Exceptions**

- 3.5 Exceptions from the Act's provisions that apply to all or some

*Please note: this is a first draft text for consultation*

3 schools are explained in Chapter 14.

### **What is not covered by the schools' provisions of the Act?**

#### **Further and Higher Education**

3.5 Further and higher education providers also have obligations under  
4 Part 6 of the Act. These provisions are not covered by this Code but are covered by a separate Code.

#### **General Qualifications Bodies**

3.5 General Qualifications Bodies such as the Scottish Qualifications  
5 Authority (SQA) also have obligations under Part 6 of the Act. An overview of these provisions is set out in Appendix 1 of this Code. There is a separate Code covering General Qualifications Bodies

#### **Other providers of education and training**

3.5  
6 Part 3 of the Act prohibits discrimination by service providers and those exercising public functions which include some education and training providers, such as:

- Adult learning, vocational training and children's services provided by local authorities
- Youth clubs and services run by voluntary organisations.

There is a separate Code covering services, public functions and associations [ this can be downloaded from the Commission's website: [www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) ].

**Example:** A youth club run by a voluntary organisation uses a school premises for its sessions. Some of the school staff are volunteers at the youth club. This would be covered by Part 3 not Part 6 of the Act.

3.5 Part 5 of the Act prohibits discrimination by employers and  
7 employment services which include:

- Vocational guidance or training services
- Work placement providers
- Apprenticeship contracts.

There is a separate Code covering Employment [ this can be downloaded from the Commission's website: [www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) ]



**Example:** Whilst on a work placement a pupil is discriminated against by her placement provider. This would be covered by Part 5 of the Act.

### **School services not covered by Part 6**

- 3.5 Services which a school provides to people other than pupils are  
8 likely to be subject to the services provisions of Part 3 of the Act. This would include services to parents or other members of the community. Where a pupil uses the school's services as a member of the public rather than as a pupil then that relationship would be covered by Part 3 of the Act.

**Example:** A school with a swimming pool opens the pool to members of the public on a Saturday morning. A pupil of the school uses the pool with his parents on a Saturday morning. In this context he would be covered by the services provisions of Part 3 of the Act rather than the schools provisions of Part 6 of the Act. His parents would also be covered by Part 3 of the Act.

### **Avoiding discrimination**

- 3.5 As set out above, the Act prohibits certain forms of behaviour. In  
9 some situations, the Act also requires active steps to be taken. Complying with the reasonable adjustment duty requires schools to anticipate and undertake measures to meet disabled pupils' needs to avoid substantial disadvantage. More generally, schools must take active steps to ensure that discrimination is not occurring in the education or services that they provide. As explained above, a school will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts. This is also required under the public sector equality duty, details of which are set out below (see paragraphs 3.61 to 3.62).

- 3.6 Schools are more likely to be able to comply with their duties under  
0 the Act, including the public sector equality duty, and prevent their employees from discriminating against pupils if they take the following steps:

- establish a policy to ensure equality in access to and benefit from education, services and facilities for pupils from all groups in society
- communicate the policy to all staff, parents and pupils ensuring that they know that it is unlawful to discriminate when they are providing education or access to any benefit, facility or service
- train all staff, including those not directly involved in the provision of education, to understand the policy, the meaning of equality in this context and their legal obligations
- monitor the implementation and effectiveness of the policy by

Please note: this is a first draft text for consultation

reference to pupils' protected characteristics and important benchmarks such as achievement or exclusion

- 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
- monitor and review practices to ensure that they do not unjustifiably disadvantage particular groups,
- consider use of positive action to tackle disadvantage and inequality (see Chapter 13)
- involve and consult pupils, parents, staff and organisations representing groups who share protected characteristics about the quality and equality of the education, benefits, facilities and services they provide and how they could be made more inclusive.

### Interaction with the Public Sector Equality Duty

3.6 All maintained schools are either public authorities or bodies which  
1 exercise a public function, and as such they are also subject to the public sector equality duty in Part 11 of the Act. The general equality duty requires a public authority – or a person carrying out a public function – to 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 characteristic and persons who do not share it.  
(*Specific duties to be added*).

3.6 Those public authorities and other organisations who are subject to  
2 the public sector equality duty may find it easier to meet the requirements of the duty if they act in the way set out in the avoiding discrimination section this Chapter (paragraphs 3.59 to 3.60). Complying with the public sector equality duty will also help schools meet their obligations under the schools' provisions.

The public sector equality duty is dealt with in detail in a separate Code (not yet available). However, guidance providing an overview

*Please note: this is a first draft text for consultation*

of the equality duty, including the general duty, the specific duties and who they apply to is available from the Commission's website: [www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance](http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance)

## Chapter 4

### Direct discrimination

#### Introduction

- 4.1 This Chapter explains what the Act says about direct discrimination in relation to the schools' provisions of the Act for all of the protected characteristics covered by this Code. It discusses how the requirement for a comparator may be met. It also refers to provisions in the Act making it unlawful to treat a female pupil unfavourably because of her pregnancy and maternity.
- 4.2 The terms 'school' and 'pupil' and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

#### What the Act says

- 4.3 Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. **S.13(1)**
- 4.4 Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:
- in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person;
  - where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (see Chapter 14).

#### What is 'less favourable' treatment?

- 4.5 To decide whether a school has treated a pupil 'less favourably', a comparison must be made with how it has treated other pupils or would have treated them in similar circumstances. If the school's treatment of the pupil puts the pupil at a clear disadvantage compared with other pupils, then it is likely that the treatment will be less favourable: for example, refusing to allow a pupil to join a

*Please note: this is a first draft text for consultation*

school club. Less favourable treatment could also involve being deprived of a choice or excluded. If the quality of the education, benefit, facility or service being offered or the manner in which it is offered is comparatively poor, this could also amount to less favourable treatment.

**Example:** A pupil undergoing gender reassignment is told she will not be able to attend the school camp because they do not have any suitable toilet facilities. This is likely to be less favourable treatment because of gender reassignment which would constitute direct discrimination.

4.6 The pupil does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the pupil can reasonably say that they would have preferred not to be treated differently from the way the school treated – or would have treated – another pupil.

4.7 Under the Act it is not possible for the school to balance or eliminate less favourable treatment by offsetting it with the provision of more favourable treatment.

**Example:** At the start of the new school year, the boys' hockey team are issued with a new sporting kit including new uniforms and hockey equipment. The girls' hockey team are not provided with any new equipment or uniforms. This is likely to be unlawful direct sex discrimination if the reason for the less favourable treatment of the girls is their sex. This is also likely to be discrimination even if the female pupils are offered first choice on which days they use the hockey field for training.

4.8 The test for direct discrimination because of pregnancy and maternity, is whether the treatment is unfavourable rather than less favourable. Hence there is no need for the female pupil to compare her treatment with that experienced by other pupils (see paragraphs 4.35 to 4.49 for a further discussion of pregnancy and maternity discrimination). **s.17**

### **Segregation**

4.9 When the protected characteristic is race, deliberately segregating a pupil or group of pupils from others of a **s.13(5)**

*Please note: this is a first draft text for consultation*

different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because racial segregation is always discriminatory. But the segregation must be due to a deliberate act or policy rather than a situation that has occurred inadvertently.

**Example:** A school sports club has had trouble with racial conflicts between pupils during after-school training sessions. It decides to run after-school training sessions on Tuesdays and Thursdays for black pupils and on Wednesdays and Fridays for white pupils. As separating pupils by race is a deliberate policy of the school, this is likely to be unlawful direct discrimination.

**Example:** At the after school training sessions where all young people are welcome at every session, if black boys always choose to separate themselves from white boys and train together or simply stand together in a group, as this is a choice of the pupils participating in the training session and not an enforced policy of the school, it would not amount to segregation and would not be unlawful discrimination.

- 4.10 Segregation linked to other protected characteristics may be direct discrimination. However, it is necessary to show that it amounts to less favourable treatment. If the protected characteristic is sex, separating male and female pupils may be permitted in certain circumstances (see exceptions in Chapter 14 and Chapter 13, Positive Action).

### **Shared protected characteristics**

- 4.11 Direct discrimination can take place even if the person carrying out the discriminatory act and the pupil share the same protected characteristic giving rise to the less favourable treatment.

**s.24(1)**

**Example:** A woman teacher actively discourages the female pupils in her class from undertaking a vocational course in plumbing because she believes this type of manual work is less suitable for women. This is likely to be direct discrimination because of sex even though the

teacher is also a woman.

### **‘Because of’ a protected characteristic**

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

**Example:** After a fight in the school playground between Asian and White pupils, an independent school limits the time the Asian pupils involved in the fight can spend in the playground during lunch hour but does not impose a similar restriction on the White pupils. If ethnicity is one of the causes of the disadvantageous treatment of this group of pupils, this will be sufficient to establish direct racial discrimination.

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

**Example:** A PE teacher at a small primary school announces trials for the school football team will be held but they will only be open to male pupils. A female pupil who turns up at the trials is told she cannot take part despite there being only one school team. It is obvious from the teacher’s announcement and the pupil being told that she is unable to participate that the less favourable treatment is because of sex and would constitute unlawful direct discrimination.

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

**Example:** A group of Chinese boys are talking loudly and being boisterous in a science class. The teacher excludes them from the class for their behaviour even though an Asian boy who was also participating is not excluded. In this case it will be necessary to find out why the teacher excluded the boys from the class to determine whether the less favourable treatment was because of race and therefore unlawful direct discrimination.

**Example:** A gay pupil is excluded from a class for arguing strongly with another pupil about whether gay people should be allowed to get married. The other pupil is not excluded. In this case it will be necessary to find out why the teacher excluded only the gay pupil from the class to determine whether the less favourable treatment was because the pupil is gay and therefore unlawful direct discrimination.

- 4.15 Direct discrimination is unlawful, irrespective of the school's motive or intention, and regardless of whether the less favourable treatment of the pupil is conscious or unconscious. School staff may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the pupil differently because of a protected characteristic.

**Example:** A teacher decides to deny a pupil with a facial disfigurement a place on the school debating team because he believes other pupils taking part in the debates will make fun of him and cause him upset. Although the teacher may be well-intentioned, denying the pupil a chance to be on the team is likely to be direct disability discrimination.

**Example:** A school organises a trip to the theatre to see a Shakespeare play. The school decides a pupil with a hearing impairment would receive greater benefit from watching a sub-titled film version of the play so they arrange for her to stay behind at school to watch the film in the audio visual suite. Although the school may be well intentioned, preventing the pupil from seeing the play at the theatre is likely to be direct disability discrimination.

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



**Example:** A general stereotype is that certain types of work are more suited to males or females. A school receives offers of a number of work experience placements at local businesses. The school offers all the placements at a car manufacturer to male pupils because the school believes boys are more interested in this type of work. A female pupil complains that she is not given the opportunity of a placement at the car manufacturer, but instead is allocated a placement at a local hairdressing salon. This is likely to be unlawful direct sex discrimination and an example of gender stereotyping.

- 4.17 A school cannot base its treatment on another criterion that is discriminatory – for example, where the treatment in question is based on a decision to follow a discriminatory external rule.

**Example:** A school organises a trip to an outdoor centre run by an evangelical church. On booking, the centre manager tells the school that they view homosexuality as a sin and bar any openly gay people from using the centre's facilities. The centre's rule on barring gay people from attending is discriminatory. As the school decides to follow this rule and tells two gay pupils that they have to pretend they are straight or they can't attend, this is likely to be unlawful direct sexual orientation discrimination.

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

### **Discrimination by association**

- 4.19 It is direct discrimination if a school treats a pupil less favourably because of the pupil's association with another person who has a protected characteristic; however, this does not apply to pregnancy and maternity. Discrimination by association can occur in various ways – for example, where the pupil has a relationship of son, daughter, brother sister or friend of someone with a protected characteristic.

*Please note: this is a first draft text for consultation*

The association with the other person need not be a permanent one.

**Example:** A pupil is unsuccessful in gaining a place at a Catholic primary school because his parents are a lesbian couple. This is direct sexual orientation discrimination by association because of the boy's association with his parents.

**Example:** A group of four pupils are given detention for getting into a fight with another group of pupils. Three of the pupils from the group that receives a detention are from a Gypsy and Traveller background and one pupil is from the settled community. The other group which is made up of all pupils from the settled community are not punished. The first group could make a complaint that they have been treated less favourably because of race, even the pupil from the settled community because of his association with the pupils from Gypsy and Traveller backgrounds. If however, the only reason the pupils were given detention is because they had been caught fighting on numerous occasions or because they had initiated this fight, then this would not be unlawful race discrimination.

- 4.20 Direct discrimination because of a protected characteristic could also occur if a pupil is treated less favourably because they supported people with a particular characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the school believes to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here (see paragraphs 3.40 to 3.45).

**Example:** A school advises the Chair of a parent run fund-raising group to avoid trouble at the forthcoming school fete by not inviting pupils and parents from the local Gypsy and Traveller community. When the Chair of the committee refuses, the school warns her that if there was any sign of trouble, she could be removed as Chair of the group. Her treatment would amount to direct race discrimination.

## Discrimination by perception

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

**Example:** A secondary school pupil with a hormonal condition that makes her appear 'masculine' is excluded from an inter-school athletics competition because the school is worried she will be perceived by other competitors as undergoing gender reassignment. This is likely to be unlawful direct discrimination because of gender reassignment.

**Example:** A pupil is refused admission to an independent school because the school wrongly assumes from his surname that he is black. This is likely to be unlawful direct discrimination because of race.

## Comparators

- 4.22 In most circumstances, direct discrimination requires that the school's treatment of the pupil is less favourable than the way the school treats, has treated or would treat another pupil to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'. However, no comparator is needed in cases of racial segregation or pregnancy and maternity discrimination (see paragraph 4.9 and paragraphs 4.35 to 4.49). **s.13(1)**

## Who will be an appropriate comparator?

- 4.23 The Act says that in comparing people for the purpose of direct discrimination there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the pupil and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the pupil are the same or nearly the same for the pupil and the comparator. **s.23 (1)**

**Example:** A male pupil is not successful in gaining a place in the school choir while a female pupil who auditioned at the same time is successful. The male pupil has recently started vocal lessons whereas the female pupil has been singing in choirs for three years and has reached an advanced stage in vocal training. As a relevant criterion for selection to the choir is the level of experience, which is not the same for the male and female pupil, the male pupil would not be able to refer to the female pupil as an appropriate comparator.

**Example:** A sister and brother play chess to the same standard and she often wins. They both ask to join the school team. The male pupil is accepted but his sister is not as 'there are no other girls playing in the team'. The female pupil could refer to her brother as a comparator in a claim of direct discrimination because of sex.

**Example:** A primary school refuses to admit a pupil with a severe facial disfigurement because she may 'upset' the other pupils. The pupil is treated less favourably than another pupil who does not have a disfigurement and who is admitted to the school. The pupil without a disfigurement is the comparator for a direct disability discrimination claim.

## Hypothetical comparators

- 4.24 In practice, it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.
- 4.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless, their treatment may help to construct a hypothetical comparator.
- 4.26 Referring to the example above of the pupil with a severe disfigurement, if it turned out that a pupil who is admitted to the school has a different impairment, such cystic fibrosis, there would be a significant difference in the circumstances of the two pupils. So the individual with

*Please note: this is a first draft text for consultation*

cystic fibrosis would not be an actual comparator. However, the difference in treatment of the two pupils could help to define a hypothetical comparator who might be treated more favourably than the pupil with the severe disfigurement.

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

**Example:** An Asian pupil arrives late for the first two classes of term. The teacher tells him that his late arrival disturbed the concentration of the other pupils and he is given a detention. In the absence of an actual comparator (i.e. another pupil who had also arrived late but been treated differently) the Asian student could compare his treatment to that given to two white pupils in slightly different circumstances. One white pupil had refused to return to his desk on two occasions and had disrupted the class but he was not punished. The other white student played music on his mobile phone during class on a couple of occasions which distracted the tutor and the students and he wasn't punished either. Elements of the treatment of these two comparators could allow a court to construct a hypothetical comparator showing the Asian pupil had been treated less favourably because of race.

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

**Example:** A Muslim pupil asks for some flexibility in the school timetable to fit in with his religious commitments linked to the month of Ramadan. He asks not to have to participate in physical education classes held in the afternoon during the month of Ramadan when he will be

fasting. This request is denied and he must attend PE classes in the afternoon. Another pupil requests some flexibility in the timetable to fit in with his confirmation classes at his church. He is permitted to leave class half an hour early on Fridays. In considering the school's treatment of both pupils it is decided that the reason for the treatment is because of the Muslim pupil's religious beliefs and therefore a comparison with a hypothetical comparator can be made.

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

### Comparators in disability cases

- 4.30 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled pupil, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled pupil's impairment but who has the same abilities or skills as the disabled pupil (regardless of whether those abilities or skills arise from the disability itself). **s.23(2)(a)**
- 4.31 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

**Example:** A disabled pupil with asthma is a keen tennis player. He asks whether he can join the school team, but is told his game is not good enough. Another pupil with a similar level of ability to his, who doesn't have this disability, is selected for the team. This new team member could be a comparator to the pupil with a disability.

### Comparators in sexual orientation cases

- 4.32 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 **s.23(3)**

*Please note: this is a first draft text for consultation*

each case. This is particularly relevant within the schools' provisions in relation to discrimination by association.

**Example:** A primary school asks most of the pupils in primary 6 to act as guides at a school open evening. The only pupil who is not asked to do this is a pupil whose parents are civil partners. In determining an appropriate comparator for a potential claim for direct sexual orientation discrimination by association the fact that the parents of some of the other pupils are married rather than civil partners would not be a material difference in the circumstances and so such pupils would be appropriate comparators.

### **Advertising an intention to discriminate**

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

**Example:** An independent school's admissions policy published on their website states that they will give preference to pupils from Asian backgrounds. A reasonable person is likely to consider this as advertising an intention to discriminate because of race as this will prevent children from white families applying.

### **When is it lawful to treat a person more favourably?**

#### **More favourable treatment of disabled people**

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

person because of their disability.

**Example:** A school offers pupils with mental health problems a chance to attend art workshops at a national gallery. These workshops are known to be a successful therapeutic intervention for young people with mental health problems. It is not discrimination against non-disabled pupils not to offer them the same opportunity.

### Discrimination because of pregnancy and maternity

- 4.35 The Act protects female pupils from discrimination because of their pregnancy and maternity in the provision of education, benefits, facilities and services. **s.17**
- 4.36 It is discrimination to treat a female pupil unfavourably because:
- she is, or has been, pregnant; **s.17(2)**
  - she has given birth, and the unfavourable treatment occurs within a period of 26 weeks beginning with the day on which she gave birth; or **s.17(3)**
  - she is breastfeeding, and the unfavourable treatment occurs within the period of 26 weeks beginning with the day on which she gave birth. **s.17(4)**
- 4.37 A female pupil is protected even when her baby is stillborn, so long as she was pregnant for at least 24 weeks before she gave birth.
- 4.38 Outside the 26-week period, she may be protected by the sex discrimination provisions. (See paragraph 4.45 to 4.49.)
- 4.39 The unfavourable treatment will be pregnancy and maternity discrimination if the female pupil would not have received the treatment but for the fact that she is or has been pregnant, has given birth within the previous 26 weeks or is breastfeeding a baby that is not more than 26 weeks old.

### What does 'unfavourable' mean?

- 4.40 For pregnancy and maternity discrimination to occur, a



*Please note: this is a first draft text for consultation*

female pupil must have been treated 'unfavourably'. This means that she must be put at a disadvantage. If the disadvantage is obvious, it will be clear that the treatment has been unfavourable: for example, she may have been denied the provision of education or access to a benefit, facility or service. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment. Even if a school thinks that it is acting in the best interests of a pregnant pupil or a pupil who has recently given birth, it may still be considered to have treated her unfavourably.

**Example:** A school reduces the number of Standard Grades a pregnant pupil is studying for as it believes that she will not be able to cope with as many subjects now that she is pregnant. The pupil and her parents have clearly stated that she wants to continue with all of her Standard Grades. The pupil does not receive the same choices as other pupils and therefore this is likely to constitute unlawful pregnancy and maternity discrimination.

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

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

**Example:** A pregnant pupil applies to do a work placement in a garage. The school will not allow her to undertake this placement and states that this is because it would not be a suitable placement for a girl and certainly not a pregnant girl. Her pregnancy is only one of the reasons for the unfavourable treatment, the other being sex, but this is sufficient for her to make a claim of pregnancy and maternity discrimination.

- 4.42 The motive of the school is irrelevant, and it does not matter if the unfavourable treatment is conscious or

*Please note: this is a first draft text for consultation*

unconscious.

- 4.43 Pregnancy and maternity discrimination includes unfavourable treatment of a female pupil based on a stereotype whether or not the stereotype is accurate.

**Example:** A pupil who has recently given birth is not given the opportunity to attend a careers session on the stereotypical assumption that she will want to focus on bringing up her baby rather than making decisions about her education and future career. This decision resulting in unfavourable treatment based on a stereotype is likely to be pregnancy and maternity discrimination.

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

#### **Direct sex discrimination: pregnancy and maternity**

- 4.45 Treating a female pupil less favourably because she is breastfeeding a baby who is more than 26 weeks old amounts to direct sex discrimination. **s.13(6)(a)**
- 4.46 The direct sex discrimination provisions apply, and the special provisions for pregnancy and maternity discussed above do not apply, when a female pupil is breastfeeding a child more than 26 weeks old. **s.17(6)**
- 4.47 Where the claim is direct sex discrimination the pupil will need to show that she has been treated less favourably than others are (or would be) treated in comparable circumstances and so a comparator will need to be identified. If a hypothetical comparator is used, it would be to establish how the female pupil herself would have been treated were she not breastfeeding. (For a fuller discussion of comparators see paragraphs 4.22 to 4.29.)

**Example:** A female pupil is breastfeeding her eight-month-old baby in the school canteen and is asked to stop feeding or leave the canteen, as other pupils have said they are offended. She could claim direct sex discrimination, and would need to show that had she not been breastfeeding she would not have been asked to

leave the canteen.

- 4.48 In considering discrimination against a male pupil it is not relevant to take into account any special treatment given to a female pupil in connection with pregnancy or childbirth. **s.13(6)(b)**

**Example:** A school provides a flexible timetable for a pregnant pupil to fit in ante-natal appointments and other health needs related to her pregnancy. A male pupil complains that he also needs a flexible timetable to fit in with his sporting commitments. This is not discrimination because a male pupil cannot compare himself to a female pupil in connection with pregnancy, childbirth or breastfeeding.

### **Exceptions for pregnancy and maternity**

- 4.49 See Chapter 14 for the limited circumstances in which a school may treat a female pupil differently because of pregnancy and maternity, by refusing to make a particular provision or making it conditionally.

## Chapter 5

### Indirect discrimination

#### Introduction

- 5.1 This Chapter explains indirect discrimination and 'objective justification'. The latter concept applies to discrimination arising from disability, positive action and to some of the exceptions permitted by the Act. **s.19(3)**
- 5.2 Indirect discrimination applies to all the protected characteristics except pregnancy and maternity (although in pregnancy and maternity situations, indirect sex discrimination may apply).
- 5.3 As explained in paragraph 1.21 the terms 'school' and 'pupil' and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

#### What does the Act say?

- 5.4 Indirect discrimination may occur when a school applies an apparently neutral provision, criterion or practice which puts pupils sharing a protected characteristic at a particular disadvantage. **s.19(1), 19(2)**
- 5.5 For indirect discrimination to take place, four requirements must be met:
- the school applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular pupil
  - the provision, criterion or practice puts, (or would put), pupils who share the pupil's protected characteristic at a particular disadvantage when compared with pupils who do not have that

characteristic

- the provision, criterion or practice puts, (or would put), the pupil at that disadvantage
- the school cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.

### **What constitutes a provision, criterion or practice?**

- 5.6 The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase ‘provision, criterion or practice’ is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a ‘one-off’ or discretionary decision. **s.19(1)**

**Example:** A school instigates a policy that no jewellery should be worn. A young woman of the Sikh religion is asked to remove her Kara bangle in line with this policy, although the young woman explains that she is required by her religion to wear the bangle. This could be unlawful indirect discrimination on the grounds of religion and belief.

### **Is the provision, criterion or practice a neutral one?**

- 5.7 The provision, criterion or practice must be applied to all pupils in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way, but expressly applies to pupils with a specific protected characteristic, it is likely to amount to direct discrimination.

**Example:** A school decides that it will avoid enrolling children who are asylum seekers, because it is of the view that they will either be moved to another part of the country or deported. They state that enrolling asylum seekers makes the management of the school roll complicated. This would be direct race discrimination against a group of non-British citizens.

Example: By contrast, a school requires parents to be on the electoral register before it allows a child to be considered for admission. A traveller family applies for their child to be admitted to the school. The school notes that the traveller family are not on the electoral register and refuses the application. The requirement to be on the electoral register is a neutral one, but is likely to disadvantage Gypsies and Travellers so would be indirect race discrimination unless it can be justified.

What does 'would put' mean?

- 5.8 It is a requirement of the Act that for indirect discrimination to take place the provision, criterion or practice puts or would put pupils who have a protected characteristic at a particular disadvantage when compared with pupils who do not have that characteristic. The Act also requires that it puts or would put the particular pupil at that disadvantage. This allows challenges to provisions, criteria or practices which have not yet been applied but which would have a discriminatory effect if they were. **s.19(2)(c)**
- 5.9 However, for a claim of indirect discrimination to succeed, the pupil must show that they would experience a disadvantage if the provision, criterion or practice were applied to them.

**Example:** A school proposes to change its uniform policy to revert to a more 'traditional' uniform which they feel is more in the ethos of the schools culture as a disciplined high achieving school. However the proposals impose strict gender defined uniforms – skirts for girls and trousers for boys – which do not take into account the needs of transgender pupils. This could be indirect

discrimination unless the policy can be justified.

### **What is a disadvantage?**

- 5.10 'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that they would have preferred to be treated differently.
- 5.11 Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic.

**Example:** A school determines who can be eligible to become a prefect on the basis of a portfolio of achievements which include extra-curricular activities, membership of clubs, and positions of achievement. A girl with ME has not had the physical capacity to participate in many of these activities and could be indirectly discriminated against because of the criteria being applied.

- 5.12 In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, a uniform policy may create a disadvantage for pupils with particular religious beliefs. In other situations it will be less obvious how pupils sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.
- 5.13 Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it

causes. Statistics relating to the education provision in question can be obtained through the questions procedure where applicable (see Chapter 15 for more details on the questions procedure). It may also be possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage.

- 5.14 However, a statistical analysis may not be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison. In this situation, the court or tribunal may find it helpful for an expert to provide evidence as to whether there is any disadvantage and, if so, the nature of it.
- 5.15 There are other cases where it may be useful to have evidence (including, if appropriate, from an expert) to help the court or tribunal understand the nature of the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principles of a particular religious belief.

**Example:** A pupil has a belief that pork renders them ritually unclean for the purposes of their religion. He takes part in a school cookery class where pupils make jelly containing pork gelatine. The pupil's parents claim that the school is indirectly discriminating against him by not providing cooking ingredients which don't contain pork gelatine. The Court would be assisted by evidence of the place of this belief in the pupil's religion in order to establish that that it amounted to a disadvantage.

### **The comparative approach**

- 5.16 Once it is clear that there is a provision, criterion or practice which puts (or would put) pupils sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between pupils with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances.
- s.19(2)(b),  
s.23(1)**



*Please note: this is a first draft text for consultation*

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

**Example:** A school provides a work placement in joinery with a local firm. The school states that it is necessary for any applicant for this course to have taken woodwork at the school as an option in their design and technology course. There is a significant under-representation of girls on both the design and technology course and the woodworking option within that, so this could be considered indirect sex discrimination as it will put girls at a particular disadvantage. However for pupils who want to undertake a work placement in fashion and fabric design it is not necessary for them to have undertaken the textiles option in design and technology. This could be a valid comparator.

### **The ‘pool for comparison’**

- 5.18 The people used in the comparative exercise are usually referred to as the ‘pool for comparison’.

In general, in a schools context, the pool should consist of the pupil group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding pupils who are not affected by it either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the court or tribunal will decide which pool to use.

**Example:** A secondary school makes plans for a series of meetings, for pupils to discuss their career options. These meetings are planned for Friday evenings. Booking the meetings on a Friday night is a neutral practice. A Jewish pupil points out that this would prevent them from attending as they observe Shabbat from dusk on a Friday evening. The pool for comparison could be all those pupils at the school. Assuming it affects a significant enough number of Jewish pupils, it is reasonable to assume that they would be placed at a particular

disadvantage, so the school must either justify its practice or change the day to avoid acting unlawfully.

### **Making the comparison**

- 5.19 Looking at the pool, a comparison must then be made between the impact of the provision, criterion or practice on pupils without the relevant protected characteristic, and its impact on pupils with the protected characteristic.
- 5.20 The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may, in some circumstances, be necessary to carry out a formal comparative exercise using statistical evidence.

**s.19(2)(c)**

### **Carrying out a formal comparative exercise**

- 5.21 If the court or tribunal is asked to undertake a formal comparative exercise to decide an indirect discrimination claim, it can do this in a number of ways. One established approach involves the court or tribunal asking these questions:
- What proportion of the pool has the particular protected characteristic?
  - Within the pool, does the provision, criterion or practice affect pupils without the protected characteristic?
  - How many of these pupils are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
  - Within the pool, how does the provision, criterion or practice affect pupils who share the protected characteristic?
  - How many of these pupils are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?
- 5.22 Using this approach the court or tribunal will then compare (x) with (y). It can then decide whether the pupil group with the protected characteristic experiences a

*Please note: this is a first draft text for consultation*

‘particular disadvantage’ in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

**Example:** Taking the situation above, with careers meetings being held on Friday evenings, and whether these will indirectly discriminate against Jewish pupils, the following approach would be used.

- a. The school looks at the information it holds on the religious make-up of the ‘pool’ (which is the 1,000 pupils in the school). Of these, 200 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 school knows that non-Jewish pupils are unlikely to be prevented from attending the meetings by their religious beliefs.
- c. It estimates that none of the 800 non-Jewish pupils will be disadvantaged by this practice.
- d. However at least 100 Jewish pupils have stated that holding the meetings on a Friday night will mean that they will be prevented by their religion from attending the meeting; and
- e. Therefore, 10 per cent of pupils at the school will be disadvantaged by the practice. This may be sufficiently significant to require the school to rearrange the day of the meetings to ensure it does not indirectly discriminate against Jewish pupils.

### **Is the pupil concerned put at that disadvantage?**

5.23

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

*Please note: this is a first draft text for consultation*

an individual. (See paragraph 5.9.)

**Example:** A school requires that all female pupils wear a regulation one piece swimming costume for swimming lessons. A Muslim pupil requests that she be able to wear a 'burkini', a two-piece swimming costume that is acceptable attire according to her culture and religion. As the pupil is unable to take part in the swimming lessons unless she wears a 'burkini' the school permits this change to the PE uniform policy.

### **The intention behind the provision, criterion or practice is irrelevant**

5.24 Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. If a school applies the provision, criterion or practice without the intention of discriminating against the pupil, in a claim before the Sheriff Court the court may decide not to order a payment of compensation (see Chapter 15 for further details on Enforcement).

**s.119(5),(6)**

**Example:** A single-sex girls' school puts on a ceildh for their sixth year pupils, and makes it clear that everyone needs to bring along a male partner or friend. A lesbian pupil wants to bring along her female partner but is told that this won't be possible as the ceildh dancing traditionally requires the same number of girls and boys. This is likely to amount to unlawful indirect discrimination on grounds of sexual orientation unless it can be objectively justified.

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

5.25 If the person applying the provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination. This is often known as the 'objective justification' test. The test applies to other areas of discrimination law for example, discrimination arising from

**s.19(2)(d)**

*Please note: this is a first draft text for consultation*

disability (see paragraph 6.12).

- 5.26 If challenged in the courts, it is for the school to justify the provision, criterion or practice. So it is up to the school to produce evidence to support its assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the school can set out the justification to the court.
- 5.27 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:
- Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?
  - If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

### **What is a legitimate aim?**

- 5.28 The concept of ‘legitimate aim’ is taken from European Union (EU) Directives and decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and it must represent a real, objective consideration.
- 5.29 Although reasonable business needs and economic efficiency may be legitimate aims, a school solely aiming to reduce costs cannot expect to satisfy the test. For example, the school cannot simply argue that to discriminate is cheaper than not to discriminate.
- 5.30 Examples of legitimate aims include:
- ensuring that education, benefits, facilities and services are targeted at those who most need them

*Please note: this is a first draft text for consultation*

- the fair exercise of powers
- ensuring the health and safety of pupils and staff providing risks are clearly specified
- maintaining academic and behaviour standards
- ensuring the wellbeing and dignity of pupils.

### **What is proportionate?**

- 5.31 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. A court or tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the school's reasons for applying it, taking into account all the relevant facts.
- 5.32 Although not defined by the Act, the term 'proportionate' is taken from the EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.
- 5.33 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the school's justification if there are other good reasons for adopting it.

**Example:** A school playground has a variety of active adventure play equipment. On health and safety grounds, it has concerns that disabled pupils with physical impairments will not be able to use the equipment without significant financial expenditure, so makes a decision to not allow these pupils to use the equipment. Although ensuring health and safety is a legitimate aim, the blanket application of the policy is likely to be unjustified if these pupils would in fact be able to use the equipment with a

*Please note: this is a first draft text for consultation*

few modifications for a moderate cost.

- 5.34 In a case involving disability if the school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for the school to show that the treatment was proportionate.
- 5.35 The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be.

**Example:** A school bans 'cornrow' hairstyles as part of its policies on pupil appearances. These hairstyles are more likely to be adopted by specific racial groups. Hence a blanket ban is likely to constitute indirect discrimination on grounds of race as it is unlikely to be objectively justified and proportionate. The criteria although indirectly discriminatory are very close to direct discrimination, in particular if it only applies to a small group of individuals.

### **Public authorities and justification of indirect discrimination**

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

**Example:** In the example above, the school would need to pay due regard to the positive duty to eliminate unlawful race discrimination and to advance equality of opportunity and good race relations. If the school has not properly complied with these duties, it will be more difficult for it to justify the criteria.

## **Indirect discrimination and the duty to make reasonable adjustments for disabled pupils**

- 5.37 As well as having an obligation not to indirectly discriminate against disabled pupils, schools also have an anticipatory duty to make reasonable adjustments for disabled pupils (more detail of which is given in Chapter 7). These two obligations frequently overlap and it is sensible to consider them together.
- 5.38 When planning its provision, a school will need to consider whether its practices indirectly discriminate against disabled pupils. If a practice indirectly discriminates against disabled pupils, then the school must consider whether the practice can be justified.
- 5.39 If the school plans to make reasonable adjustments for disabled pupils and makes those adjustments, then it will not have to change the practice for non-disabled pupils, but will simply adjust the practice appropriately.

**Example:** A private school has guided tours for prospective pupils and their parents which depart at 30 minute intervals. The teachers providing the tour are told to follow a strict timetable and to complete the tours within 45 minutes. Disabled applicants with mobility impairments are put at a disadvantage by this practice. When challenged by a group of disabled applicants and their parents, the school realises:

- that the practice is indirectly discriminating against such disabled pupils and that they need to consider whether there is any justification for the practice
- that making reasonable adjustments by permitting one group more time would be incompatible with the policy, as groups following on the slower group would be held up
- they could provide a suitable tour to disabled and non-disabled pupils by removing the strict timetable and permitting tours to overlap; and
- the indirectly discriminatory effect on pupils with a mobility impairment is unnecessary because they can achieve their aim of showing the school to all



*Please note: this is a first draft text for consultation*

prospective pupils, thus allowing them to make an informed choice about whether to enrol.

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

- 5.40 In many cases when the school considers whether a practice is justifiable despite its impact on disabled pupils, it will discover ways in which anticipatory reasonable adjustments can be made.

## Chapter 6

### Discrimination arising from disability

#### Introduction

- 6.1 This Chapter explains the duty on schools not to treat disabled pupils unfavourably for a reason connected with disability. Protection from this type of discrimination, which is known as 'discrimination arising from disability', only applies to disabled people. **s.15**

The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 10, 11 and 12.

- 6.2 As explained in paragraph 1.21, the terms 'school' and 'pupil' and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Code.

#### What is discrimination arising from disability?

#### What does the Act say?

- 6.3 The Act says that treatment of a disabled pupil amounts to discrimination where: **s15**
- a school treats the disabled pupil unfavourably;
  - this treatment is because of something arising in consequence of the disabled pupil's disability; and
  - the school cannot show that this treatment is a proportionate means of achieving a legitimate aim,

unless the school does not know, and could not reasonably be expected to know, that the pupil has the disability.

**Example:** A school determines selection for the annual school play only from those pupils with good school attendance records for the year. A pupil with clinical depression whose attendance record does not meet this standard is not selected. The bulk of this pupil's absences are connected to his disability. The unfavourable treatment (not being eligible for selection) therefore arises in consequence of the pupil's disability and will be unlawful, unless the treatment can be justified by the school.

### **How does it differ from direct discrimination?**

- 6.4 Direct discrimination occurs when the school treats someone less favourably because of disability itself. By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

**Example:** In the previous example, the same school decides that visually impaired pupils cannot participate in the school play because of health and safety problems. This could constitute direct disability discrimination unless the treatment can be objectively justified.

**Example:** A mother seeks admission to a school for her son who has Hirschsprung's disease, which means that he does not have full bowel control. The school says that they cannot admit her son because he is not toilet trained and all the children at the school are. The refusal to admit the boy is not because of his disability itself; but he is being treated unfavourably because of something arising in consequence of his disability.

### **How does it differ from indirect discrimination?**

- 6.5 Indirect discrimination occurs when a disabled pupil is (or would be) disadvantaged by an unjustifiable provision,

criterion or practice applied to everyone, which puts (or would put) pupils sharing the disabled pupil's disability at a particular disadvantage compared to others, and puts (or would put) the disabled pupil at that disadvantage (see paragraph 5.5).

- 6.6 In contrast, discrimination arising from disability only requires the disabled pupil to show they have experienced unfavourable treatment because of something connected with their disability. If the school can show that it did not know and could not reasonably have been expected to know that the disabled pupil had the disability, it will not be discrimination arising from disability (see paragraphs 6.14 to 6.19). However as with indirect discrimination, the school may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraph 6.12).

**Example:** A school uniform policy requires pupils to wear clothes made from synthetic material. A pupil with eczema is unable to wear synthetic materials as it aggravates his condition. He repeatedly makes a request to wear similar clothing made from natural fabrics, but is refused. He is then disciplined for wearing the wrong clothing at school. Although the uniform policy is applied equally to every pupil, the disabled pupil is being treated unfavourably because of something arising in consequence of his disability.

### **Is a comparator required?**

- 6.7 Both direct and indirect discrimination require a comparative exercise (see Chapters 4 and 5). But in considering discrimination arising from disability there is no need to compare a disabled pupil's treatment with that of another pupil. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of their disability.

**Example:** A pupil who has cancer is disciplined for failing to obey a teacher's instructions during a school trip to a museum. The pupil has acted in this way because she is feeling tired and frustrated, solely due to the effects of medical treatment that she has recently received. In these circumstances, the pupil has been treated unfavourably

because of something arising as a consequence of her disability. It is irrelevant whether other pupils would have been disciplined if they also refused to obey a teacher's instructions. It is not necessary to compare the treatment of the disabled pupil with that of any comparator. This will amount to discrimination arising from disability, unless it can be justified or the teacher did not know or could not reasonably be expected to know the pupil was disabled.

### **What is unfavourable treatment?**

- 6.8 For discrimination arising from disability to occur, a disabled pupil must have been treated 'unfavourably'. This means that he or she must be put at a disadvantage (see paragraph 5.10 for an explanation of disadvantage). Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable: for example, being excluded from the school. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment. Sometimes the unfavourable treatment may be less obvious. Even if a school thinks that it is acting in the best interests of a disabled pupil, it may still treat that pupil unfavourably. **s.15(1)(a)**

### **What does 'something arising in consequence of disability' mean?**

- 6.9 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. **s.15(1)(a)**
- 6.10 The consequences of a disability include anything which is the result, effect or outcome of a disabled pupil's disability. The consequences will be varied, and will depend on the individual effect upon a disabled pupil 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 concentrate for long periods of time or the need for regular rest breaks or toilet breaks or the need for instructions to be repeated or presented in visual form.
- 6.11 So long as the unfavourable treatment is because of something arising in consequence of the disability, it will

*Please note: this is a first draft text for consultation*

be unlawful unless it can be objectively justified, or unless the school did not know or could not reasonably have been expected to know that the pupil was disabled.

**Example:** A pupil with Autism is not allowed to have a school meal because she refuses to join the queue on a number of occasions, and is asked to bring in a packed lunch and eat it separately, away from her friends. Her refusal is a result of her having Autism. The refusal to allow the pupil to have a school meal is unfavourable treatment which is because of something that arises in consequence of the pupil's disability.

### **When can discrimination arising from disability be justified?**

- 6.12 Unfavourable treatment will not amount to discrimination arising from disability if the school can show that the treatment is a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained in detail in paragraphs 5.25 to 5.35. **s.15(1)(b)**
- 6.13 It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on mere generalisations.

**Example:** A rural primary school arranges a visit to a local dairy farm to look at how milk is produced. A disabled pupil who uses a wheelchair is refused the opportunity to go on the visit. The school justifies the refusal on the grounds that, having viewed the site, it is not possible for the dairy farm to make reasonable adjustments to enable access to the cowshed for wheelchair users.

### **What if the school does not know that the pupil is disabled?**

- 6.14 If the school can show that it: **s15(2)**
- did not know that the disabled pupil had the

*Please note: this is a first draft text for consultation*

disability in question; and

- could not reasonably be expected to know that the disabled pupil had the disability,

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

6.15 It is not enough for the school to show that it did not know that the disabled pupil had the disability. It must also show that it could not reasonably have been expected to know about it.

**Example:** A pupil tells the school counsellor about his recent diagnosis of depression. He consents to the counsellor disclosing this information to the school. A few weeks later the pupil is excluded from school for having an emotional breakdown during a lesson. This is likely to amount to unfavourable treatment arising from disability. The school is unlikely to succeed with a defence that it did not know the pupil was disabled because this information was something the school could reasonably have been expected to have known about through the school counsellor.

**Example:** A disabled pupil who has dyslexia fails a written test undertaken at short notice at the request of a new supply teacher. If reasonable adjustments had been made, such as by providing extra time for the student with dyslexia, then he might well have passed the test, and he had passed tests in the past when additional time had been provided as a reasonable adjustment. Because the school had relevant information about the disabled pupil, which it failed to provide to the supply teacher, the teacher in question could reasonably have been expected to know that the pupil was disabled. As a result, the school is likely to be liable for discrimination arising from disability unless it can show that the treatment is objectively justified.

6.16 A school must do all it can reasonably be expected to do to find out if a pupil has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, schools should consider issues of dignity and privacy and ensure that personal information is dealt with

confidentially.

- 6.17 A school will be expected to take steps to find out if a pupil has a disability, for example, by asking on an application form or encouraging disclosure in the school's handbook.

**Example:** A school provides separate forms in its admissions documents asking parents if their child has any needs related to a disability that they wish to advise the school of. The form makes it clear what this information will be used for, that it will not be disclosed to anyone without the parent's consent and it will not be used to determine if the child is admitted to the school.

- 6.18 Where there is no ongoing relationship, for example when an applicant is attending an open day or an interview, a school 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:** A pupil seeking admission who has Tourettes Syndrome is being interviewed for a place at a school. He swears during the course of the interview, and for this reason is not selected for admission. The fact that the school didn't know the prospective pupil has Tourettes may not be a defence because no attempt is made by the school to establish if there was a particular reason for this behaviour. This could constitute unlawful discrimination arising from disability, unless it can be objectively justified.

- 6.19 If one of a school's employees or agents knows of a disability, the school will not usually be able to claim that it does not know of the disability, and that it cannot therefore have subjected a disabled pupil to discrimination arising from disability.



## **Can schools treat a disabled pupil more favourably?**

- 6.20 It is never unlawful for schools to treat a disabled pupil more favourably than a non-disabled pupil within the terms of the Equality Act 2010. Therefore, schools may provide education, benefits, facilities and services on more favourable terms to a disabled pupil compared to a non-disabled pupil.

## **Relevance of reasonable adjustments**

- 6.21 Schools can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 7).
- 6.22 If a school has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for it to show that the treatment was objectively justified.
- 6.23 Even where a school has complied with a duty to make reasonable adjustments in relation to the disabled pupil, it may still subject a disabled pupil to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

## Chapter 7

# Disabled pupils: reasonable adjustments

### Introduction

- 7.1 This chapter explains a school's duty to make reasonable adjustments for disabled pupils.
- 7.2 In this chapter the terms 'school' and 'pupil' and terms which flow from these are used generically to refer to all those who have duties and rights in the areas covered by the Code, unless the text makes clear otherwise.
- 7.3 The duty to make reasonable adjustments requires schools to take positive steps to ensure that disabled pupils can fully participate in the education, and that they can enjoy the other benefits, facilities and services, which schools provide for pupils. This duty goes beyond simply avoiding discrimination. As further explained later in this chapter, it requires schools to anticipate the needs of potential pupils for reasonable adjustments. Many reasonable adjustments are inexpensive and will often involve a change in practice rather than the purchase of expensive pieces of equipment or additional staff.
- 7.4 The duty to make reasonable adjustments is not a minimalist requirement of simply ensuring that some access is available to disabled pupils; it is a duty, so far as is reasonably practicable, to approximate the access enjoyed by disabled pupils to that enjoyed by the rest of the pupils. The purpose of the duty to make reasonable adjustments is to enable disabled pupils to have access to an education as close as is reasonably possible to the education normally offered to pupils at large.

## **Interaction with additional support for learning framework**

- 7.5 Some, but not all, disabled pupils will also have been identified as having additional support needs and may already be receiving adequate additional support to allow them to benefit from education. The schools duties under the Equality Act do not replace the duties of schools and local authorities under the Education (Additional Support for Learning) (Scotland) Act 2004 but are designed to sit alongside these duties and ensure that all disabled pupils receive the support they require to participate fully in education irrespective of whether or not they are classified as having additional support needs.
- 7.6 In some cases the substantial disadvantage experienced by a disabled pupil will be avoided by the support they receive under the additional support needs framework. In other cases a disabled pupil may need reasonable adjustments to be made in addition to the additional support arrangements made for them. Some disabled pupils do not have additional support needs but if they experience a substantial disadvantage for a reason related to their disability the school will have a duty to make reasonable adjustments. The extent to which a pupil is being provided with support under the Education (Additional Support for Learning) (Scotland) Act 2004 is one of the factors to be taken into account when considering what adjustments it is reasonable for a school to make.

### **What does the Act say?**

- 7.7 The Act says that a school has a duty to make reasonable adjustments for disabled pupils if:
- a provision, criterion or practice puts a disabled pupil at a substantial disadvantage in comparison with non-disabled pupils; or

*Please note: this is a first draft text for consultation*

a disabled pupil would be at a substantial disadvantage in comparison with non-disabled pupils unless an auxiliary aid is provided.

7.8 For schools, this duty applies in relation to the following circumstances:

- deciding who is offered admission as a pupil;
- the provision of education;
- access to any benefit, service or facility.
- excluding the pupil from school
- subjecting the pupil to any other detriment

### **What is “substantial disadvantage”?**

7.9 The reasonable adjustments duty is triggered only where there is a need to make adjustments to avoid substantial disadvantage”. The Act defines substantial as more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

7.10 In considering what might constitute a substantial disadvantage, a school will need to take account of a number of factors. These may include:

- the time and effort that might need to be expended by a disabled pupil to do something;
- the inconvenience, indignity or discomfort a

disabled pupil might suffer;

- the loss of opportunity or the diminished progress that a disabled pupil may make in comparison with his or her peers who are not disabled.

**Example:** A disabled pupil with cerebral palsy which severely affects his manual dexterity finds it difficult to handwrite. When a lesson requires pupils to handwrite large amounts of text this takes him more time and effort than other pupils. He is at a substantial disadvantage in relation to his non-disabled peers.

**Example:** A disabled pupil who requires regular pain relieving medication suffers discomfort and pain if he does not receive his medication at regular intervals throughout the school day. If he does not receive his medication then he is at a substantial disadvantage in comparison with his non-disabled peers.

### **Who should the disabled pupil be compared with?**

- 7.11 A comparison with pupils who are not disabled may be useful to establish whether it is because of disability that a particular provision, criterion, practice or the absence of an auxiliary aid, disadvantages the disabled pupil in question. However – and unlike direct or indirect discrimination – there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled pupil's under the duty to make reasonable adjustments.
- 7.12 Rather than by reference to a comparator, the disadvantage created by the lack of reasonable adjustments is measured by comparison with what the position would be if the disabled pupil in question did not have a disability.

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

- 7.13 A school might have a provision, criterion or practice which places disabled pupils at a substantial disadvantage. In such a case, the school must take

*Please note: this is a first draft text for consultation*

such steps as it is reasonable for it to have to take, in all the circumstances, to change the provision, criterion or practice so that it no longer has such an effect. This may simply mean waiving a criterion, or amending a practice to allow exceptions, or abandoning it all together. Often, such a change involves little more than an extension of the flexibility and individual approach which most schools already show to their pupils.

### **What is a provision, criterion or practice?**

- 7.14 The phrase “provision, criterion or practice” is not defined by the Act. These concepts should be construed widely so as to include for example, any formal or informal policies, rules, practices, arrangements, criteria, procedures, activities or provisions. They can cover one off decisions and actions. In simple terms, they are about the way an education provider does things.

**Example:** A school has a uniform policy that states that pupils must wear grey polyester trousers from a particular manufacturer. The trousers exacerbate a disabled pupil’s severe eczema so the school amends the policy to allow the pupil to wear cotton trousers of a similar style and colour. This would be a reasonable adjustment to a provision, criterion or practice.

### **What is the duty to provide auxiliary aids?**

- 7.15 A school must take such steps as it is reasonable for them to have to take, to provide auxiliary aids so as to avoid the disadvantage experienced by disabled pupils.

### **What is an auxiliary aid?**

- 7.16 An auxiliary aid includes an auxiliary service and is anything which provides additional support or assistance to a disabled pupil. Examples include:
- a piece of equipment;
  - the provision of a sign language interpreter,

*Please note: this is a first draft text for consultation*

lip-speaker or deaf-blind communicator

- extra staff assistance for disabled pupils
- an electronic or manual note-taking service
- induction loop or infrared broadcast system
- videophones
- audio-visual fire alarms
- readers for people with visual impairments
- assistance with guiding

**Example:** A school provides a disabled pupil who is visually impaired with lesson notes in an electronic format which he can download onto his MP3 player. This would be an auxiliary aid.

**Example:** A school provides a disabled pupil with a support assistant to push them in their wheelchair around school. This would be an auxiliary service.

**Example:** A school provides a disabled pupil with restricted growth syndrome with a step to enable them to reach the desks in the science lab. This would be an auxiliary aid.

7.17 Schools should ensure that any auxiliary aids that 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.

**Example:** A school provides a disabled pupil with manual dexterity difficulties with an electronic note taker to take notes during lessons. However, the note taker needs to be charged up every few hours. The school enables the pupil to charge the note taker at school so she is able to use it for the whole day.

*Please note: this is a first draft text for consultation*

- 7.18 Nothing in the Act requires a school to provide an auxiliary aid to be used for personal purposes unconnected to the services being provided by the school.

**Example:** A disabled pupil who is a permanent wheelchair user requires a wheelchair for use outside of school as well as in school. A school would not be required to provide a wheelchair.

- 7.19 The Act leaves open what particular auxiliary aids might be provided in specific circumstances. The duty remains with the school to determine what steps they might reasonably be expected to take.

### **Accessible information**

- 7.20 The Act states that where the provision, criterion or practice, or the need for an auxiliary aid, relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format

**Example:** A disabled pupil who is visually impaired requires all worksheets, handouts and written text to be provided in Braille. This would be a reasonable step for a school to take.

### **When is meant by 'reasonable' steps?**

- 7.21 The duty to make reasonable adjustments places schools under an obligation 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 school to have to take depends on all the circumstances of the case.



*Please note: this is a first draft text for consultation*

- 7.22 The question of the reasonableness of an adjustment is an objective one and would ultimately be for the tribunal to determine.
- 7.23 Schools should bear in mind that there are no rigid solutions and there may often be several reasonable solutions to one situation. Action which may result in reasonable access to education being achieved for some disabled pupils may not necessarily achieve the same for others.

**Example:** A disabled pupil who is deaf is due to attend a small rural primary school and his parents indicate that he requires an induction loop to be able to participate in class. In line with its anticipatory duty the school has already purchased a portable induction loop and provided some basic training for staff. The school discusses with the pupil's parents his reasonable adjustment requirements and ascertains that they do not need to install an induction loop in every part of the school as the student can use the portable loop. The school then arranges for further staff training and also alerts maintenance staff to the need to ensure that the loop is working and is periodically tested.

**Example:** Another deaf pupil is due to attend the same small primary school. The school assumes that it will need to purchase another portable hearing loop. However, after discussing with the pupil's parents her requirements, the school finds that the pupil does not normally use a hearing loop and prefers to lip-read. The school ensures that all staff are aware of the need to face the pupil and to speak clearly when they are talking to her.

- 7.24 The purpose of taking the steps is to ensure that disabled pupils are not placed at a substantial disadvantage compared with non-disabled pupils. Where there is an adjustment that the school could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the school to take some lesser step that would not provide education or access to a benefit, facility or service in as accessible a manner.
- 7.25 Similarly, a school will not have taken reasonable steps if they attempt to provide an auxiliary aid which in practice does not help alleviate the disadvantage faced

*Please note: this is a first draft text for consultation*

by disabled pupils.

- 7.26 In all cases, it is important to use, as far as is reasonable, a means of communication which is itself accessible to disabled pupils.
- 7.27 If, having considered the issue thoroughly, there are genuinely no steps that it would be reasonable for a school to take to make its education, benefits, facilities or services more accessible, the school is unlikely to be in breach of the law if it makes no changes. Such a situation is unlikely to arise.

### **Factors to be taken into account**

- 7.28 Without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what adjustments it is reasonable for a school to have to make:
- whether taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
  - The practicability of the adjustment
  - The effect of the disability on the individual
  - The financial and other costs of making the adjustment
  - The extent to which support is provided to the disabled pupil under the Education (Additional Support for Learning) (Scotland) Act 2004.
  - The resources of the school and the availability of financial or other assistance.
  - Health and safety requirements
  - The need to maintain academic, musical,

sporting and other standards

- The interests of other pupils and persons who may be admitted to the school as pupils

### **The effectiveness of the step in avoiding the disadvantage**

7.29 Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by the individual disabled pupil. Even pupils with the same disability might need different adjustments to overcome the disadvantage. It is unlikely to be reasonable for a school to have to make an adjustment involving little benefit in reducing the disadvantage experienced by the disabled pupil, even if the pupil requests this. Likewise it is unlikely that a school will discharge its reasonable adjustments duty if the adjustment made provides little benefit to the pupil.

**Example:** A school admits a disabled pupil who is deaf and decides without consulting the pupil to install an induction loop in all teaching rooms; however the pupil does not use a hearing aid and so is unable to benefit from the induction loop. The pupil lip-reads and so a reasonable adjustment would have been to train all staff to ensure that they face the pupil when speaking to him.

7.30 However, an adjustment which when taken alone is of marginal benefit, may be one of several adjustments which grouped together would be effective in overcoming the disadvantage and in that case, would be reasonable to have to make. Effective steps might not always be the most obvious steps.

**Example:** A disabled pupil with ME finds moving around a large three storey secondary school very tiring and despite the school adjusting the timetable and location of classes to minimise the amount she has to move around the school she is still too exhausted to complete the school day. The school then make further adjustments of having a “buddy” to carry her books for her, a dictaphone to record those lessons which she misses and a policy that she will not be penalised for arriving at lessons late. These adjustments enable her to attend more lessons and to be less disadvantaged when she does miss lessons.

### **The practicability of the adjustment**

- 7.31 It is more likely to be reasonable for a school to have to make an adjustment which is easy and cheap to make than one which is difficult or expensive. In some circumstances though it may be reasonable to have to make an adjustment, even if it is difficult or expensive.
- 7.32 There may also be instances, when, even though an adjustment might overcome the substantial disadvantage, it will not be reasonable for the school to have to take such a step.

### **The effect of the disability on the individual**

- 7.33 The effect of an individual's disability may affect what adjustments are reasonable for a school to make.

**Example:** A disabled pupil with dyslexia finds it very difficult to read text typed on white paper. The school routinely uses white paper for all lesson handouts. The school decides to provide handouts on yellow paper for the disabled pupil. This would be a reasonable adjustment for this pupil.

Another disabled pupil with dyslexia finds it difficult to read text on any colour of paper without a plastic overlay sheet. The school provides the pupil with a plastic overlay sheet to use in all lessons. This would be a reasonable adjustment for this pupil.

### **The financial and other costs of the adjustment**

- 7.34 If an adjustment costs little or nothing to implement it is likely to be reasonable to do so unless some other factor (such as practicability or effectiveness) makes it unreasonable. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the school might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

**The extent to which support will be provided to the disabled pupil under the Education (Additional Support for Learning) (Scotland) Act 2004**

- 7.35 As stated in paragraph 7.5, there is a significant overlap between those pupils who are disabled and those who have additional support needs. Therefore many disabled pupils may receive support in school through the additional support needs framework. In some cases the substantial disadvantage may be overcome by support received under the additional support needs framework. In other cases a disabled pupil may need reasonable adjustments to be made in addition to the additional support needs provision they are receiving. Some disabled pupils are not classified as having additional support needs but if they are disabled and are suffering a substantial disadvantage they may still need reasonable adjustments to be made.

**Example:** An early stages primary school pupil has diabetes and requires daily support with reading blood sugar levels and insulin injections. He is not classified as having additional support needs and therefore receives no support through the additional support needs framework. He is however, disabled and therefore if the lack of daily support places him at a substantial disadvantage the school is under a duty to make the adjustment of providing the support, if it would be reasonable to do so.

**Example:** A disabled pupil with dyslexia attends a public secondary school and is receiving additional support under the additional support needs framework. She receives two hours a week of specialist teaching and uses an electronic notetaker in lessons. Although this support is provided through the additional support needs framework the support ensures that she is not at a substantial disadvantage and therefore the school duty to make reasonable adjustments does not arise.

**Example:** The same pupil with dyslexia moves to an independent school which does not have a duty under the additional support needs framework to provide pupils with additional support. The independent school may need to provide the same support as the pupil was receiving in the public school as an adjustment to avoid the pupil being at a substantial disadvantage, as long as

it would be reasonable to do so.

**Example:** An early years primary school disabled pupil with ADHD receives some individual teaching assistant support through the additional support needs framework. He is diagnosed with severe asthma and needs assistance with his nebuliser. Although this is not a special educational need, failure to provide a reasonable adjustment will place him at a substantial disadvantage. The school trains his teaching assistant and she provides him with the assistance that he needs. This could be a reasonable adjustment for the school to make.

- 7.36 There will be some instances when a disabled pupil is provided with support from another agency. In these cases, it would not be reasonable to expect the school to duplicate this support.

**Example:** A disabled pupil with profound and multiple learning difficulties attends a special school where he receives high levels of support and weekly therapies. He has a co-ordinated support plan and receives support from the education authority and his local health board. The school becomes aware that his needs are changing and he now requires daily physiotherapy. As the health board is responsible for this provision he receives it is unlikely that it would be considered reasonable for the school to have to provide the daily therapy

### Health and safety requirements

- 7.37 The Act does not override health and safety legislation. If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled pupil in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. However, schools are not required to eliminate all risk. Suitable and sufficient risk assessments should be used to help determine where risks are likely to arise and what action can be taken to minimise those risks. Risk assessments should be specific to the individual pupil and the activities in question. Risk management should be an ongoing

*Please note: this is a first draft text for consultation*

process throughout a pupil's time at the school.

- 7.38 There might be instances when, although an adjustment could be made, it would not be reasonable to do so because it would endanger the health and safety either of the disabled pupil or of other people.
- 7.39 There might be other instances where schools could make anticipatory reasonable adjustments in line with health and safety legislation, ensuring compliance with, and not infringing, that legislation.
- 7.40 Health and safety issues must not be used spuriously to avoid making a reasonable adjustment. Schools should avoid making uninformed assumptions about health and safety risks.

**Example:** A disabled pupil with a stair climbing wheelchair attends a large secondary school with several flights of stairs. The school prevent him from using the stair climbing wheelchair in the school as they think it will be dangerous. However, after carrying out a risk assessment and finding out more about the wheelchair the school realise that doesn't present a significant health and safety risk and therefore it would be reasonable for them to allow him to use it.

**Example:** A disabled pupil is fitted with a tracheotomy which needs monitoring and he needs occasional intervention to clear his airways. The school carries out a risk assessment and identifies that he needs to have a member of staff who is able to provide the necessary monitoring and intervention with him at all times. The school has several support staff who are trained and contractually obliged to administer medication to pupils. The school arranges for these staff and any others who volunteer to be trained in tracheotomy care and then timetables the trained staff so one is always able to monitor the pupil. All staff are trained in identifying when the pupil needs intervention and provided with radio microphones so that they can summon assistance from another member of staff if necessary. These are reasonable adjustments for the school to make in response to the risk assessment.

**Example:** A disabled pupil with epilepsy is due to attend his local primary school. His parents speak to the head teacher and express their concern that someone at the school needs to be trained to provide the necessary

medical support if he has a fit in school. The head teacher carries out a risk assessment and seeks advice from the education authority and from another school in the area with a pupil with epilepsy. She identifies that the risks decrease the more members of staff that are trained and able to assist in the case of a fit. The head teacher decides to provide training to all staff, teaching and non-teaching, and then after the training has been undertaken asks staff to volunteer to agree to support the pupil and administer the necessary medication. The head teacher also puts in place an individual healthcare plan for the pupil which includes instructions on how the medication is to be administered and the need for a second adult to witness the dosage and administration of the medication. Although no individual member of staff is required to undertake the training, by offering it to all staff it is possible to maximise the number of people who can assist, raise staff awareness generally and minimise the health risk for the pupil. These could be reasonable adjustments for the school to make.

### **The need to maintain academic, musical, sporting and other standards**

- 7.41 The Act does not prevent a school from choosing its best footballers, singers or mathematicians where a consideration of standards is relevant; for example in an inter-school competition. However, it should not be assumed that a consideration of standards will mean that a disabled pupil will be barred from an activity.

**Example:** A school regularly takes part in football matches with other local schools and selects its best footballers to play in the team. A disabled pupil who has mobility difficulties is very keen on sport but not able to play football at the necessary standard to be chosen for the team. The school is not required to select him for the team as it is able to select the best football players.

### **The relevant interests of other people including other pupils**

Ordinarily the interests of other pupils regarding the reasonable adjustments required by a disabled pupil will be irrelevant. However, there are limited circumstances where the provision of a particular reasonable adjustment for a disabled pupil will disadvantage other



*Please note: this is a first draft text for consultation*

pupils. This is only relevant where the adjustment results in significant disadvantage for other pupils. In such a case, it may not be reasonable to expect the school to make the adjustment.

**Example:** A disabled pupil has a skin condition which is aggravated by heat and his parents ask that his classroom is kept at a low temperature. However, this would mean that the other pupils in the class would be uncomfortably cold. The school may not be expected to keep the classroom at the requested temperature, however it could take other steps such as lowering the classroom temperature to a level that is still comfortable for other pupils, placing the pupil in the coldest part of the room such as by an open window and relaxing the school uniform policy to allow him to wear cooler and more comfortable clothing.

7.42 There will, however, be other instances where there is a duty to make an adjustment despite some inconvenience to others. In deciding what adjustments are reasonable it is important to weigh the level of inconvenience to others against the substantial disadvantage faced by the disabled pupil.

**Example:** A primary school plans a school trip to a local history museum in their town to undertake some activities. One of the pupils in the class is deaf and as the museum does not have a hearing loop installed she will be unable to participate in the trip. The school decides to change the trip and attend a museum in a neighbouring town which has a hearing loop. Although this will cause some inconvenience to the other pupils as the travel time to and from school is longer, the school decides that this is a reasonable adjustment to make given the substantial disadvantage faced by the disabled pupil if she can't attend the trip.

**Example:** A secondary school takes its final year pupils on a week-long outdoor activity course every year. The school always goes to the same place which offers a wide range of exciting activities for the pupils to participate in. This year one of the final year disabled pupils has to have kidney dialysis on a daily basis so needs to be able to return home every day. In deciding on what adjustment to make for the disabled pupil, the school considers cancelling the trip and seeking an alternative such as doing day trips closer to the school. The school weighs up whether denying pupils the opportunity to attend the week-long trip is reasonable

and decides to stick with the planned trip to the outdoor activities centre so pupils don't miss out on this valuable residential experience and are not required to travel to and from activities each day. But, in order to address the disadvantage faced by the disabled pupil, they arrange for transport from his home to attend the centre for day visits on three days so the pupil has the benefit of being able to participate in the activities with his peers. If the school had not made this adjustment he would not have been able to participate at all.

### **The resources of the school and the availability of financial or other assistance**

- 7.43 It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost, than for a school with fewer resources. The resources in practice available to the school as a whole should be taken into account as well as other calls on those resources. Where the responsible body is the education authority, the resources of that authority should be taken into account and not only the budget available to an individual school. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

**Example:** A disabled pupil with cerebral palsy uses a manual wheelchair occasionally but not every day. The wheelchair he normally uses is being repaired and so he is having difficulties moving around the school. The school has a wheelchair which it allows him to use in school until his is repaired. This is a reasonable adjustment for the school to make. However, if the school did not have a wheelchair it would not be expected to purchase a wheelchair for the pupil as a reasonable adjustment.

**Example:** A disabled pupil requires assistance with personal care needs such as toileting, washing and dressing. This assistance is provided during the school day by his learning support assistant provided through his co-ordinated support plan. The school arranges a residential school trip for his year group. The pupil wishes to attend but is not able to do so unless his personal care needs are met. The school considers the following options to enable the pupil to attend:

*Please note: this is a first draft text for consultation*

- asking his learning support assistant to go on the trip and provide support beyond the normal school day
- liaising with social services to see if any support can be provided by them
- discussing with the pupil and his parents ways they think the support could be provided, such as a family member going on the trip to provide the overnight support.

If it is not possible for the school to find a reasonable means of enabling the pupil to attend then it should consider whether there is an alternative trip that could be organised for that year group that the disabled pupil would be able to participate in.

- 7.44 If a disabled pupil has a particular piece of special or adapted equipment which he is prepared to use whilst at school, this might make it reasonable for the school to allow the use of the equipment.

#### **Costs of providing reasonable adjustments**

- 7.45 It is unlawful for a school to charge a pupil for making a reasonable adjustment in any circumstances, whatever the financial cost to the school and however the school is funded.

**Example:** An independent school provides a disabled pupil with dyslexia with overlay sheets to assist him in reading text, and weekly sessions with a specialist teacher. The school adds the cost of these adjustments to the pupil's school fees. This would be unlawful discrimination.

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

- 7.46 Where the duty to make reasonable adjustments arises, a school can no longer justify a failure to make a reasonable adjustment. However, the Act does place specific restrictions on the duty in relation to schools.

7.47

---

The reasonable adjustments duty does not require schools to make reasonable adjustments to avoid the disadvantage caused by physical features of school premises. This is covered by the obligation on schools to prepare and implement accessibility strategies for disabled pupils. The responsible body for a school is required to draw up an accessibility strategy to improve access to education for disabled pupils at schools (including improvement of the physical accessibility of the school environment) over time and to keep this strategy under regular review. These duties are contained in the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002

**To whom is the duty to make reasonable adjustments owed?**

7.48 The duty covers pupils at the school as well as those applying for admission to the school and, in limited circumstances, to former pupils.

7.49 A school's duty to make reasonable adjustments is also an anticipatory one owed to disabled pupils generally and not solely a duty that is measured in relation to each individual pupil or applicant.

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

7.50 In relation to schools 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 pupil seeking to access education or the benefits, facilities and services offered to pupils by the school. Schools should therefore not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments but should anticipate the requirements of disabled pupils and the adjustments that may have to be made for them. Otherwise, the adjustment(s) could become costlier at a later stage, and this greater cost might not provide a good answer for failing to make the adjustment(s).

**Example:** A school ensures that all worksheets and handouts that staff use are stored electronically so they can easily be produced in large font if required by a disabled pupil.

**Does the duty to make reasonable adjustments apply even if the school does not know that a person is disabled**

- 7.51 Because this is a duty to disabled pupils at large, it applies regardless of whether the school knows that a particular pupil is disabled or whether it currently has any disabled pupils.
- 7.52 In the majority of cases, schools will be aware of a child's disability due to a number of reasons such as the arrangements for the assessment of and the provision of additional support needs. In many cases parents will volunteer information about their child's disability.
- 7.53 It may not be immediately obvious that a child is disabled. Underachievement and unexplained behaviour may, in some cases, indicate an underlying disability which has not yet been identified.

**Must schools anticipate every barrier?**

- 7.54 Schools are not expected to anticipate the needs of every prospective pupil, but what they are required to think about and take reasonable steps to overcome are the barriers that may impede pupils with particular kinds of disability. For example, pupils with visual or mobility impairments or specific learning difficulties may face different types of barriers.
- 7.55 Disabled people are a diverse group with different requirements – for example, hearing impaired pupils who use BSL will be unable to access education where BSL is not used, whereas hearing impaired pupils who lip read will be able to access such education. The duty to make reasonable adjustments will still be owed to members of both groups.
- 7.56 Once a school has become aware of the requirements of a particular disabled pupil, it might then be reasonable for the school to take a particular step to meet these requirements. This is especially so where a disabled pupil, or their parent, has pointed out the difficulty that they face or has suggested a reasonable solution to that difficulty.

**Example:** An independent school considers carefully how disabled children can take their entrance exams without being at a substantial disadvantage. As part of its reasonable adjustments duty the school sets up early ‘admissions meetings’ with the parents of disabled prospective pupils. The meetings are used to discuss any special arrangements for the exams. The particular arrangements for an individual child can then be put in place in time. This would be a reasonable adjustment for the school to make.

### **How long does the duty continue?**

- 7.57 The duty to make reasonable adjustments is a continuing duty. Schools should keep the duty, and the ways they are meeting the duty, under regular review in light of their experience with disabled pupils. In this respect it is an evolving duty, and not something that needs simply to be considered once and then forgotten. What was originally a reasonable step to take might no longer be sufficient, for example because the pupil has a deteriorating condition and the provision of further or different adjustments might then have to be considered.
- 7.58 Equally, an adjustment that might previously have been an unreasonable one for a school to have to make could subsequently become a reasonable adjustment in light of changed circumstances. For example, technological developments may provide new or better solutions to the difficulties faced by disabled pupils.

### **Confidentiality and reasonable adjustments**

- 7.59 A disabled pupil (whom the school believes has sufficient understanding of the nature and effect of their request), or their parent, has a right to request that the existence or nature of the pupil’s disability be treated as confidential. In determining whether it is reasonable to make an adjustment the school must have regard to the extent that making the adjustment is consistent with a disabled pupil’s request for confidentiality.

- 7.60 In some instances this might mean that reasonable adjustments have to be provided in an alternative way in order to ensure confidentiality.

**Example:** A disabled pupil with a visual impairment can only read clearly if he has text enlarged into 16-point type. He has requested strict confidentiality about his disability. Normally, teachers would give a visually impaired pupil large-print handouts at the beginning of each lesson. However, because he has asked the school not to tell any of his fellow pupils about his disability, or to draw attention to it in any way, the school agrees that he will be given the handouts in advance so he can look at them before the lesson but does not have to be seen being given them during the class.

- 7.61 In some cases a confidentiality request might mean that a less satisfactory reasonable adjustment can be provided, or that it would not be reasonable to make an adjustment.

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

- 7.62 Where a school does not comply with the duty to make reasonable adjustments it will be committing an act of unlawful discrimination. A disabled pupil and in some instances their parents will be able to make a claim based on this (see Chapter 15 for more detail about claims).

## Chapter 8

### Harassment

#### Introduction

- 8.1 This Chapter explains the Act's general test for harassment. It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment, and less favourable treatment for rejecting or submitting to harassment.
- 8.2 Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the pupil to show that another person was (or would have been) treated more favourably. For an explanation of direct discrimination, please see Chapter 4.
- 8.3 The terms 'school' and 'pupil' and terms which flow from these are used generically to refer to all those who are potentially legally responsible for harassment or who are protected in the areas covered by this Code respectively.

#### What does the Act say?

- 8.4 The Act prohibits three types of harassment. These are:
- harassment related to a 'relevant protected characteristic' **s.26 (1)**
  - sexual harassment; and **s.26(2)**
  - less favourable treatment of a pupil because they submit to or reject sexual harassment or harassment related to sex. **s.26 (3)**
- 8.5 In the case of sexual harassment of a pupil, there is a range of other legislation including that covering criminal



acts, which will come into play. Such legislation is beyond the scope of this Code.

8.6 The 'relevant protected characteristics' for the schools' provisions are:

- Disability
- Race; and
- Sex.

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

8.8 The definition of harassment as described below does not apply to the protected characteristics of sexual orientation, gender reassignment or religion or belief in relation to the schools' provisions of the Act. However, where unwanted conduct related to any of these protected characteristics results in a pupil suffering a detriment, that pupil could bring a claim of direct discrimination (see Chapter 4). **s.212(5)**

**Example:** A pupil is called a 'poof' and a 'nancy boy' by a school rugby coach. Although this conduct is not covered explicitly by the harassment provisions, it is likely to amount to direct sexual orientation discrimination under the Act.

**Example:** A Christian pupil disagrees with comments made by a teacher that the 'Bible is just a good story' and God does not exist. Although she finds the comments offensive, this would not constitute harassment and is unlikely to amount to direct discrimination under the Act.

### **Harassment related to a protected characteristic**

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

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

**Example:** A teacher regularly makes offensive and derogatory remarks about Chinese pupils at the school to a colleague calling them 'chinks' and 'slit eyes' saying he

can't tell any of the pupils apart because they all look the same. The comments are overheard by a Chinese pupil who regularly gets picked on by the teacher and made the but of his jokes about Chinese people. The pupil makes a complaint.

It is likely that the pupil would succeed in a harassment claim because the conduct had the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

**Example:** A Black African pupil has just enrolled in her local secondary school, and during a food technology lesson, the teacher starts talking to the Black African student about her favourite African Caribbean restaurant. The student takes offence, saying she finds this patronising and offensive.

It is unlikely that the pupil would succeed in a harassment claim because, while the action may be insensitive, the pupil was over-reacting. An action would not constitute harassment if it was not reasonable for a person to react in the way they do.

- 8.10 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a pupil's surroundings or other physical behaviour.
- 8.11 The word unwanted means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can amount to harassment.
- Example:** A teacher makes several comments to a pupil with restricted growth about an advertisement she has seen on television depicting people of restricted growth as Christmas elves saying how funny it would be if he came to the end of school Christmas play dressed as one of 'santa's helpers'. The pupil finds these comments very degrading and humiliating. He does not have to protest to the teacher about them for the conduct to be unwanted and constitute harassment under the Act.

### **‘Related to’**

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

#### **a) Where the conduct is related to the pupil’s own protected characteristic**

**Example:** Female pupils are repeatedly asked by the male PE teacher, in front of male pupils, whether it is their time of the month, and if so whether they should be taking part in PE sessions. This could amount to harassment related to sex.

- 8.13 Protection from harassment also applies where a person is generally abusive to pupils but, in relation to a particular pupil, the form of the unwanted conduct is determined by that pupil’s protected characteristic.

**Example:** A classroom assistant starts yelling at the pupils in a class telling them to shut up and stop being such ‘retards’. A pupil in the class with cerebral palsy finds these comments offensive and degrading and it is likely that it would be reasonable for this conduct to amount to harassment under the provisions of the Act.

#### **b) Where there is any connection with a protected characteristic**

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

*Please note: this is a first draft text for consultation*

- The pupil may be associated with someone who has a protected characteristic.

**Example:** A pupil accompanies his parents to a parents' evening as they are both deaf and he translates everything being said to him into British Sign Language for their benefit. One of the teachers starts shouting loudly and patronisingly at the parents. The pupil is upset by the conduct of the teacher, as he feels the teacher has created a degrading and humiliating environment for him and his parents. The pupil could bring a claim of harassment related to disability in addition to any claim the parents may wish to bring against the school under Part 3 of the Act.

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

**Example:** During a history class, a teacher starts berating a pupil about being South African and asking whether his family had slaves and supported apartheid. The pupil is from Zimbabwe and although wrongly perceived as having the protected characteristic of being South African, this could still amount to harassment under the Act.

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

**Example:** A pupil who is extremely shy is teased by a teacher about not being confident enough to answer questions in class. The teacher mimics him in front of the class by speaking with a stutter. Although the teacher knows the pupil does not have a speech or language disability, this conduct could still amount to disability-related harassment under the Act.

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

**Example:** A teacher tells her pupils that her house was burgled at the weekend and comments that as she lives near the Gypsy and Travellers' site the 'Gypo's probably had something to do with it as they are well known for their thieving behaviour'. A pupil from a Gypsy and Traveller background in the class finds these comments very degrading and although they were not directed specifically at her, the conduct could amount to harassment under the Act.

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

**Example:** A teacher in an inner city school who finds that a bright female student has withdrawn her university applications because she is in serious relationship with a local boy, makes her school-life difficult by constantly belittling her in front of other pupils and teachers and suggesting that academic education for people like her 'who are only interested in marriage and babies' is a waste of time. The behaviour is not because of the sex of the pupil but because of the relationship which is related to her sex. This could amount to harassment related to sex.

- 8.15 In all of the circumstances listed above, there is a connection with the protected characteristic and so the pupil could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 8.9.

### **Sexual harassment**

- 8.16 Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 8.9 and which is of a sexual nature. **s.26(2)**
- 8.17 Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

**Example:** A school implements a new search policy as a number of pupils are smoking cannabis during lunch break outside the school gates. A female pupil is subject to a search, and as the staff are putting their hands in her pockets they make jokes of a sexually offensive nature. This is likely to be sexual harassment.

### Less favourable treatment for rejecting or submitting to unwanted conduct

- 8.18 The third type of harassment occurs when a pupil is treated less favourably by a school because that pupil has submitted to, or rejected, unwanted conduct of a sexual nature or unwanted conduct which is related to sex and the unwanted conduct creates for them any of the circumstances defined in paragraph 8.9. **s.26(3)**
- 8.19 Under this type of harassment, the initial unwanted conduct may be committed by the school who treats the pupil less favourably, or by another person. **s.26(3)(a)**

**Example:** A student teacher on a placement asks a sixth-year pupil out, and flirts openly with him in class, but the pupil rejects her advances, and assumes that is the end of it. The student teacher then marks the pupil's work very harshly. This could amount to less favourable treatment for rejecting unwanted conduct.

### 'Purpose or effect'

- 8.20 For all three types of harassment, if the **purpose** of subjecting the pupil to the unwanted conduct is to create any of the circumstances defined in paragraph 8.9, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of the conduct on that pupil.
- 8.21 Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the **effect** of creating any of the circumstances defined in paragraph 8.9.

**Example:** Care staff in a residential special school make racist remarks on a regular basis in the presence of a pupil of Indian heritage, mistakenly believing that he cannot understand them. He feels that this is a degrading and humiliating environment, even though the remarks were not directed at him, and makes a claim for racial harassment.

**Example:** A teacher regularly makes comments in class that the female Pakistani pupils don't really need to worry about doing well in their Standard Grades as they will be 'married off' soon. It is not the teacher's purpose to offend or humiliate any of the pupils in the classroom, but this may still amount to racial harassment where the effect of the comments and language creates a humiliating or offensive environment for any of the pupils present.

- 8.22 In deciding whether conduct had that effect, each of the following must be taken into account: **s.26(4)**
- a) **The perception of the pupil;** that is did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the pupil regards the treatment. **s.26(4)(a)**
- b) **The other circumstances of the case;** circumstances that may be relevant and therefore need to be taken into account can include: **s.26(4)(b)**
- the personal circumstances of the pupil experiencing the conduct, for example, their health, including mental health, mental capacity, cultural norms, or previous experience of harassment; or
  - the relationship between the person carrying out the harassment and the pupil experiencing the conduct
- c) **Whether it is reasonable for the conduct to have that effect;** this is an objective test. **s.26(4)(c)**
- Courts or tribunals are unlikely to find that the unwanted conduct has the effect of, for example, offending a pupil if the court or tribunal considers

*Please note: this is a first draft text for consultation*

the pupil to be hypersensitive and that another pupil subjected to the same conduct would not have been offended.

**Example:** A teacher remarks that the reason a Black Caribbean pupil is often late for class is that they are too laid back and run on 'Jamaican time'. Although the pupil may find this comment to be stereotypical it is unlikely that it would be considered reasonable for the conduct to have the effect of amounting to racial harassment under the Act.

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

### **Statutory defence**

#### **Liability of employers and principals**

- 8.24 Employers and principals (as schools) can avoid liability for harassment carried out by their employees or agents if they take all reasonable steps to prevent harassment occurring. See paragraphs 3.26 and 3.27 for further details. **s109(4)**



## Chapter 9

### Victimisation

#### Introduction

- 9.1 This Chapter explains what the Act says about the unlawful act of victimisation.

#### What the Act says

- 9.2 The Act prohibits victimisation. It is victimisation for a school to subject a pupil to a detriment because the pupil has done a 'protected act' (see 9.7) or because the school believes that the pupil has done or may do a protected act in the future. **s. 27(1)**

**Example:** A pupil who made an internal complaint that she was subjected to sex discrimination at school, is labelled as a 'trouble-maker' and for this reason is not allowed to join a school club. This amounts to unlawful victimisation under the Act.

- 9.3 Victimisation also arises when a school subjects a pupil to a detriment because their parent or sibling has done a protected act (or because the school believes that the pupil's parent or sibling has done or may do a protected act in the future. **s.86 (2)**

**Example:** The parent of a Muslim pupil at a secondary school demands that the school provide assemblies which develop an understanding of other faiths for pupils in the school, in particular Islam. The pupil is reprimanded and the parent complains that this is discriminatory on grounds of the child's religion. The pupil then receives a detention and is told that they are no longer allowed to attend assembly. This amounts to unlawful victimisation under the Act.

Please note: this is a first draft text for consultation

9.4 In the case of a parent carrying out a protected act, victimisation also arises if the school subjects the parent to a detriment as a result of a protected act or because the school believes that the parent has done or may do a protected act in the future. However, this is covered by Part 3 of the Act which covers the provision of services rather than Part 6 which covers the schools provisions (see Chapter 9 in the separate Services Code - download from: [www.equalityhumanrights.com/equalityact-codes](http://www.equalityhumanrights.com/equalityact-codes) )

**Example:** A parent has complained about the homophobic bullying at school experienced by her child, and the lack of sufficient action taken by the school to deal with it effectively. The same school then refuses to allow the parent to hire its sports facilities, which are available to the general public, believing the parent, because of the previous complaints, will only attempt to find further fault with the school's policies, practices or facilities. This would constitute unlawful victimisation under the access to services provisions of the Act.

9.5 An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to a 'protected act'. Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation.

9.6 In the above example at paragraph 9.2, if another pupil complains to the school about the unfair treatment of the pupil because of her sex and the school then stops the pupil making the complaint from joining school clubs, this would also be victimisation and the sex of the pupil making the complaint would be irrelevant.

### What is a 'protected act'?

- 9.7 A protected act is any of the following:
- bringing proceedings under the Act s.27(2)
  - giving evidence or information in connection with proceedings brought under the Act s.27(2)(a)
  - doing anything which is related to the provisions of the Act s.27(2)(b)
  - making an allegation (whether or not express) that another person has done something in breach of the Act. s.27(2)(c)
  - making an allegation (whether or not express) that another person has done something in breach of the Act. s.27(2)(d)

*Please note: this is a first draft text for consultation*

**Example:** A child hears through a friend of theirs that a member of staff made offensive comments about individuals of her faith while she was absent. She decides to complain about this, and her friend gives evidence in support of her complaint. Giving evidence is a protected act.

- 9.8 Protected acts can occur in any field covered by the Act and in relation to any part of the Act. A school must therefore not victimise a person who has done a protected act in relation to employment, for example. This includes protected acts relating to age and marriage and civil partnership. Nor may it victimise people to whom the school owes a duty under other parts of the Act, such as parents of pupils or members of the public to whom it provides a service. **s. 27(2)(c), (d)**

**Example:** The mother of a school pupil criticises the school's recruitment practices, complaining in particular about the racial composition of the school's teachers not reflecting that of the local community. She subsequently applies for her child to go on a trip organised by the school but is turned down. She believes that her child has been victimised because of her complaint about the recruitment practices of the school. Although she did not refer explicitly to the Act when she complained, she was making a complaint in connection with the Act. 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 the racial composition of the school's teachers (for example, if she complained that the rooms were dirty or that the food for the children contained too much sugar), that would not be a protected act because the less favourable treatment complained of was not related to the provisions of the Act.

### **What is a 'detriment'?**

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

9.10 In the context of schools, detriment might include:

- being given lower marks
- disciplinary action
- being denied opportunities
- being excluded.

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

**Example:** A parent claims her child has been subjected to disability discrimination when the school doesn't provide her child with her first choice of work experience placement. She loses the case as the tribunal accepts the school's explanation that the placement was not provided for her child because of a valid reason unconnected to disability. At a parents meeting after this ruling, she again asserts that her child was not provided with the work experience placement she requested due to disability discrimination. She is upset when people point out that she lost her case and the matter is over. Her grievance does not constitute a detriment and this response is not victimisation.

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

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

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

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

**Example:** Three years ago a pupil gave evidence supporting another pupil in a religious discrimination claim against the local school they both attend. Last week, the pupil who gave evidence was not selected to play for the school hockey team by the teacher involved who says that he will never forget that court case. The pupil can claim victimisation despite the fact that the protected act (giving evidence which was used in a discrimination claim) took place three years ago.

- 9.15 An individual cannot claim victimisation where they have acted in bad faith such as maliciously giving false evidence or information or making a false allegation. Any such action would not be a protected act.

**s.27 (3)**

**Example:** A black pupil assaulted the head teacher of the school he attends in an unprovoked attack and is excluded for a fixed term from the school. In the Sheriff Court, the pupil falsely claimed that the head teacher would not have excluded him if he had been white. He is convicted of assault and the Sheriff remarked that he was an unreliable witness who had fabricated an allegation of race discrimination to try to avoid conviction. After the court case he is told that he has been permanently excluded from school. As the allegations were false and made in bad faith, he cannot claim that this is victimisation because of a protected act.

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

**Example:** A pupil with a hearing impairment who uses an induction loop complains that she has been denied access to school facilities because the responsible body did not make a mobile induction loop immediately available on request. She brings a discrimination case, for failure to make reasonable adjustments, which she loses. Her good faith in bringing the claim is accepted by everyone. A few weeks later the pupil visits the same facilities and tries to book a room but is told that there are no rooms available. As she leaves, she notices another booking being made. Clearly rooms are available. She believes she is being victimised because of her complaint of disability discrimination. Although she lost her discrimination claim she would be able to make a claim of victimisation.

## **Victimisation of pupils for actions of their parents or siblings**

### **What the Act says**

- 9.17 As explained above victimisation also arises when a school subjects a pupil to a detriment because their parent or sibling has done a protected act (see paragraph 9.7 above) or because the school believes that the pupil's parent or sibling has done or may do a protected act in the future. Again, the pupil does not have to have a protected characteristic to be protected from victimisation but to be unlawful, the victimisation must be linked to an unlawful act. **s.86 (2)**
- 9.18 In this context, sibling means a brother or sister, a half-brother or half-sister or a stepbrother or stepsister. For the purposes of the Act 'parent' has the meaning as defined in s135(1) of the Education (Scotland) Act 1980. This definition includes a guardian and any person who is liable to maintain or has parental responsibilities in relation to, or has care of a child or young person. **s. 86(5)**
- 9.19 The good faith provisions apply (see paragraphs 9.15 and 9.16 above). However, a pupil will still be protected from victimisation even if the parent or sibling who carried out the protected act has not acted in good faith provided the pupil themselves was acting in good faith. **s. 86 (3) and (4)**

**Example:** The step-brother of a pupil, who is a wheelchair user, has made a complaint to his school governing body about the school not fulfilling its duty to improve the physical environment of the school for physically disabled

*Please note: this is a first draft text for consultation*

pupils. As a result of this, the non-disabled step-sister of the pupil is not admitted into the school. This amounts to unlawful victimisation.

## Chapter 10 – Admissions

### **Introduction**

- 10.1 This Chapter explains in depth what is unlawful under the Act in relation to school admissions. This Chapter covers all schools in Scotland.

### **Admissions legislation**

- 10.2 Public schools managed by education authorities are subject to the Education (Scotland) Act 1980 which sets out a statutory regime for placing children in schools. The legislation provides that the parents of a child can make a written request for their child to be placed at a specified school; and the education authority may only refuse a placing request on certain prescribed grounds.
- 10.3 Education authorities must also comply with the Equality Act in relation to admissions. Nothing in the Equality Act conflicts with these other legal obligations of schools in relation to admissions.
- 10.4 Independent and grant aided schools are not subject to the Education (Scotland) Act 1980: but they are obliged to comply with the Equality Act.
- 10.5 The Act does not prohibit schools or education authorities from setting and applying admissions criteria. However, the criteria must not directly or indirectly discriminate against applicants with a particular protected characteristic and if necessary reasonable adjustments should be made for disabled applicants.



## **The equality duty**

10.6

Education authorities are public authorities for the purposes of the equality duty, contained in the Equality Act. (see PSD Code). This means that they must in exercising their functions, including dealing with admissions, have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Admissions criteria and policies should be subject to an assessment of their impact upon equality.

## **Examples and terminology in this Chapter**

10.7

The examples used in this Chapter are intended to illustrate solely how the Equality Act applies in relation to admissions. They do not deal with any other admissions legislation, which may also affect the situation portrayed in the example. In some situations, the treatment may be both a breach of both admissions legislation and the Equality Act.

10.8

In this Chapter the term 'school' includes the admissions authority for a school. The term 'pupil' is used to refer to all who are protected by these provisions including applicants for admission to a school. Unless otherwise stated, 'school' is used to refer to public schools, independent and grant maintained schools.

## **Who is the responsible body?**

10.9

The Act imposes obligations on 'responsible bodies' in relation to admissions. The responsible body in relation to admissions varies depending on the type of school.

*Please note: this is a first draft text for consultation*

10.10 The responsible body for admissions decisions and the allocation of pupil places in public schools is the education authority which manages the school.

10.11 The responsible body for admissions is the proprietor in respect of an independent school, and the managers in respect of a grant-aided school. Independent schools and grant-aided schools are not subject to education authority admissions and placing arrangements (though education authorities can arrange for a child to be placed in a special school which is an independent or grant-aided school if a placing request is made for a child with additional support needs – see paragraph 10.24 below).

### **What the Act says**

10.12 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a person – s85(1) and (4)

- a. in the arrangements it makes for deciding who is offered admission as a pupil
- b. as to the terms on which it offers to admit the person as a pupil
- c. by not admitting the person as a pupil.

10.13 The Act also says that it is unlawful for a school to harass a person who has applied for admission as a pupil. Harassment is explained in Chapter 8.

### **Arrangements for deciding who is offered admission**

10.14 Arrangements, in this context, mean all the policies, criteria and practices used in all the stages of the admissions process and all admissions decisions. s85(1)(a)

Arrangements include:

- the admissions policy
- drawing up of admissions criteria
- application of admissions criteria
- the delineation of catchment area
- the formulation of guidelines for the determination of

*Please note: this is a first draft text for consultation*

placing requests where a school has a limited number of places available

- the consideration of placing requests
- information about the school including marketing material
- open events and schools visits
- application forms
- interviews
- tests
- decision-making process.

### **Information about the school and about the application process**

10.15 As explained at paragraph 4.33 any information which an education authority or school provides including prescribed information which education authorities are obliged to publish under the Education (School and Placing Information) (Scotland ) Regulations 1982, advertisements, prospectuses, emails and information on notice boards and websites are covered by the Act. Any advertisements which suggest that a school might discriminate could amount to direct discrimination.

**Example:** An independent religious school has information on its website indicating that it does not tolerate homosexuality. This could constitute direct discrimination.

### **Open events and school visits**

10.16 Schools can hold open days and offer school visits but where these are offered they should be without discrimination. So they should be offered to all applicants irrespective of protected characteristic and if necessary reasonable adjustments should be made for disabled applicants or disabled parents (provision for disabled parents is required under Part 3 rather than Part 6 of the Act).

### Application forms

10.17 Application forms which ask questions that are not relevant to the admission application including questions about an applicant's protected characteristics could lead to discrimination.

**Example:** An application form for a school, which is not a school designated as having a religious character or ethos, asks for details of the child's religion and parent's religion. If this information is then used in the selection process this could be unlawful discrimination because of religion or belief (see paragraphs 10.28 and 10.29).

### Interviews

10.18 Independent and grant-aided schools are permitted to carry out interviews as part of the admissions process but must ensure that they are conducted in a way that does not unlawfully discriminate against applicants. Asking questions about an applicant's background and family which are not necessary may result in irrelevant information being taken into account and this may lead to unlawful discrimination.

10.19 **Example:** A black applicant is asked during his interview when his family moved to Britain. This is not a relevant question and therefore could constitute unlawful direct race discrimination if the information is used in the decision-making.

### The terms on which it offers to admit the person as a pupil

10.20 Terms of admission should not discriminate against a person with a protected characteristic. In general a school should not offer admission to a person with a protected characteristic on terms which are less favourable than those which are or would be offered to someone without the protected characteristic.

**Example:** A selective school requires girls to achieve a higher pass mark than boys. This is unlawful sex discrimination.

10.21 Where fees are charged, requiring different fees for pupils with different characteristics is also likely to be unlawful.

## Not admitting the person as a pupil

10.22 It is unlawful for a school to reject an applicant because of a protected characteristic, for example, because they are gay, or because a parent is gay.

If a person is refused a place at a school because they do not meet the admissions criteria this could amount to indirect discrimination and in the case of a disabled applicant, discrimination arising from disability, unless this is a proportionate means of achieving a legitimate aim. A school must also consider its duty to make reasonable adjustments for disabled applicants before rejecting a disabled applicant.

**Example:** An independent secondary school requires applicants to demonstrate that they played sport for their primary school. This is likely to be indirect discrimination against applicants with a physical disability who are less likely to have played competitive sport.

## Selective schools and academic ability

10.23 Some public schools are permitted under the Standards in Scotland's Schools Act to select pupils based on ability aptitude or banding. Independent schools are also permitted to select pupils on academic ability. Provided that the way that ability is assessed is not discriminatory, this is not unlawful under the Act. The means of assessing academic ability should be the same irrespective of any protected characteristic the applicant may have and the standard required should also be the same. So if applicants are required to sit an entrance exam then this should be the same exam for all applicants and the pass mark required should be the same for all applicants.

It is not unlawful disability discrimination to apply such selection processes to a person with a disability. However, there is a duty to make reasonable adjustments during the assessment process for disabled applicants. A school is not required to offer a lower pass mark to applicants with learning difficulties. If an independent school refuses to admit a disabled applicant because the applicant fails the selection test for a reason connected with his disability this

is not unlawful.

**Example:** An independent school assesses applicants' academic ability by setting an exam. An applicant with a visual impairment requests the paper in a large font size. This is not provided and as a consequence he fails the exam and is not offered a place at the school. This would be a failure to make reasonable adjustments.

### **Additional support needs**

- 10.24 The admission of children with additional support needs to public schools is subject to the general duty of education authorities to provide education to children in a mainstream school (being a school other than a school which provides education specially suited to additional support needs) unless exceptional circumstances apply.

### **Disabled applicants and reasonable adjustments**

- 10.25 Schools have a duty to make reasonable adjustments for disabled applicants in the admissions process. This might include providing information and application forms in accessible formats, accepting applications in alternative formats, and making reasonable adjustments during tests and interviews.
- 10.26 A school is required to make changes in anticipation of applications from disabled people in general. When a school becomes aware of an individual disabled applicant's need for reasonable adjustments, these should be put in place in the admissions process. More detail about the reasonable adjustment duty is contained in Chapter 7.

### **Exceptions**

- 10.27 Chapter 14 sets out in detail the exceptions which apply to the school provisions, including in relation to admissions. The following paragraphs highlight the exceptions which are of particular significance.

### Schools with a religious character

- 10.28 Schools which are conducted in the interest of a denominational body are permitted under the Act to give preference to members of their own religion when deciding who to admit to the school, although in the case of public schools and grant-aided schools this is subject to the terms of section 9 of the Education (Scotland) Act 1980 which require all such schools to be open to pupils of all denominations and faiths and pupils of no denomination or faith. The only area where education authorities can discriminate on religious grounds in relation to pupil admission is in their criteria for accepting placing requests. Education authorities can choose to give preference to children of a particular religious belief as part of their criteria for assessing whether to grant a placing request.

**Example:** A Catholic school has an over-subscription criterion that states that preference will be given to applicants who had been confirmed in the church. This would be lawful.

**Example:** Another Catholic school has an over-subscription criterion that states that preference will be given to applicants who had been confirmed and whose parents had been confirmed. This would be unlawful.

- 10.29 For independent schools conducted in the interests of a church or denominational body, or which admit only pupils who belong, or whose parents belong to one or more particular denominations, this means that if they refuse to admit a pupil because of religion or belief this would not be unlawful discrimination.

### Single-sex schools

- 10.30 The Act permits single-sex schools to admit pupils of only one sex without this being unlawful sex discrimination. This is explained in more detail in Chapter 14.

## Chapter 11 - Education

### Introduction

- 11.1 This Chapter explains in detail what is unlawful under the Act in relation to schools providing education and access to any benefit, facility or service to pupils.

### Who is the responsible body?

- 11.2 Those responsible for a school's obligations under the Act are set out in paragraph 3.7.

### What the Act says?

- 11.3 The Act says that it is unlawful for a school to discriminate against or victimise a pupil:

- in the way it provides education for the pupil
- in the way it affords the pupil access to a benefit, facility or service
- by not providing education for the pupil
- by not affording the pupil access to a benefit, facility or service
- by subjecting the pupil to any other detriment.

These concepts are explained in more detail below.

### Harassment

- 11.4 The Act says that it is unlawful for a school to harass a pupil. Harassment is explained in Chapter 8.

### Other prohibited conduct

- 11.5 Chapter 3 sets out other prohibited conduct, such as aiding an act of discrimination, which applies to schools.



### **Provision of education and access to a benefit, facility or service**

- 11.6 The duties in relation to the provision of education and access to a benefit, facility or service cover all the services, facilities and benefits, both education and non-educational, that a school provides or offers to provide to pupils. Such services will vary from one school to another and may vary over time. Most discrimination in schools is unintentional and may come about because of rigid policies or practices. Reviewing all practices and policies will assist a school in ensuring that they do not discriminate as well as assisting them in complying with the public sector equality duty. The following paragraphs highlight some of the activities covered by the schools provisions but are not intended as an exhaustive list.

#### **Policies and procedures, such as those covering timetabling, school uniform and behaviour and discipline**

- 11.7 Schools must ensure that all policies and procedures do not unlawfully discriminate against pupils. Policies which indirectly discriminate against pupils with a particular protected characteristic can only be justified if they are a proportionate means of achieving a legitimate aim as explained in Chapter 5.

**Example:** A school uniform policy states that girls are permitted to wear small stud earrings but boys cannot wear earrings at all. This may be unlawful discrimination because of sex.

**Example:** A school introduces a blanket ban on parents dropping pupils off at the school gates. This may be unlawful indirect disability discrimination.

#### **All teaching including curriculum delivery, classes, practical sessions, field trips and outings and homework**

- 11.8 The way in which the curriculum is delivered must not discriminate against a pupil with a protected characteristic. A school has a duty to make reasonable

adjustments in the way that it delivers its curriculum to ensure that disabled pupils are not placed at a substantial disadvantage. The way in which the curriculum is delivered can tackle stereotyping and inequality in education.

**Example:** A lesbian pupil undertakes a project charting the history of the gay and lesbian movement as part of her Standard Grade coursework. Her teacher tells her that her topic is inappropriate and she should keep her personal life to herself. As a result the pupil is subsequently given low marks for her project. This is likely to be direct discrimination because of sexual orientation.

**Example:** A teacher doesn't allow black pupils to use certain equipment in a woodwork class because he believes they are more likely to misbehave and misuse the equipment. This is likely to be unlawful direct discrimination because of race.

### **School trips – educational and non-educational**

- 11.9 The nature and timing of trips can lead to discrimination if this results in certain pupils with a protected characteristic being unable to participate for example running trips which clash with Eid, but not Easter. Also the way in which a trip is organised can lead to discrimination if, for example, the necessary reasonable adjustments are not made for a disabled pupil. A school is less likely to discriminate if it plans a trip taking into account the need to include all pupils irrespective of their protected characteristics rather than arranging a trip and then trying to adapt it to make it inclusive.

**Example:** A pupil is told he will not be able to attend a school camping trip because he will be unable to take part in many of the activities. This is as a result of the fact that he has a visual impairment. The school does not make any attempt to make the activities accessible. This is likely to be unlawful discrimination because of disability due to a failure to make reasonable adjustments.

**Example:** A school with a number of Jewish pupils ensures that any residential trips it arranges are at venues that can provide kosher food. If they did not do this then religiously observant Jewish pupils might not be

able to participate in the trip which could constitute indirect discrimination unless the policy can be objectively justified.

**Example:** A school arranges a trip to an international rugby match which is available only to male pupils. This would be unlawful direct sex discrimination even if a trip to an international netball match was arranged for female pupils.

## **Tests, assessments and exams**

- 11.10 A school must ensure that any test, assessments or examinations arranged by the school do not unlawfully discriminate against a pupil. Assessment questions which assume uniformity in pupils' cultural, linguistic, religious or lifestyle experiences could lead to unlawful indirect discrimination as pupils with certain protected characteristics may be disproportionately disadvantaged by such questions. A school must make the necessary reasonable adjustments for disabled pupils in relation to tests and assessments. Whilst other bodies, such as general qualifications bodies (GQBs), may be responsible for external examinations and assessments, a school will still be responsible for ensuring that the school does not discriminate when conducting these examinations and assessments. The duties of GQBs are set out in Appendix 1.

**Example:** A pupil with Tourette's Syndrome is excluded from an exam for 'disturbing' other pupils with involuntary jerking movements and yelling, which are connected to his disability. The school does not make an alternative arrangement for him to sit the exam, such as taking the exam in a separate room. The exclusion from the exam is likely to be unlawful discrimination arising from disability which the school is unlikely to be able to justify as it has failed to make reasonable adjustments.

**Example:** A school uses a question in a maths test that requires an understanding of cricket scoring. This could result in indirect sex discrimination as female pupils are less likely than male pupils to understand cricket scoring as overall, more males than females watch and play

cricket.

### **Academic and vocational options offered to pupils such as Standard Grade choices and extra-curricular options**

- 11.11 Generally, pupils should be offered the same opportunities irrespective of their protected characteristics. There are however exceptions where a school is carrying out activities under the positive action provisions which are explained in detail in Chapter 13. Limiting options to pupils with certain protected characteristics can lead to unlawful discrimination.

**Example:** Certain subjects are promoted by a school to male pupils such as engineering and others are promoted to female pupils such as health and social care. This would be unlawful direct sex discrimination.

### **Careers education and information**

A school must not unlawfully discriminate in the way in which it provides careers education, information, advice or guidance. Making assumptions about the types of careers pupils with particular protected characteristics would be interested in could lead to unlawful discrimination.

**Example:** To assist pupils in making choices for higher and further education, a secondary school sets up information sessions for pupils on the different academic and non-academic options. A pupil from a Gypsy and Traveller background is assigned a session on vocational courses but is denied the opportunity to attend a session on academic options because it is assumed her way of life would make these inappropriate for her. This would be direct discrimination because of race.

## Work experience and work placements

11.12 The allocation of pupils to different types of work placement based on protected characteristics could constitute unlawful discrimination. Pupils' choice of and opportunity for work experience or work placements should not be restricted because of a protected characteristic. Whilst a school will not normally be responsible for any discrimination which occurs when a pupil is on work placement, the school will be responsible for ensuring that there is no unlawful discrimination in the way that work experience and work placement opportunities are offered. Effective communication between a school and work placement providers will enable schools to minimise the chances of unlawful discrimination and ensure that the school is not liable for aiding discrimination (see Chapter 3).

Employers providing work opportunities will be subject to the provisions of Part 5 of the Act in relation to their treatment of pupils seeking or undertaking placements.

**Example:** A male pupil expresses an interest in a work experience placement at a children's nursery. A teacher tells him that he will be unable to put him forward for the placement because he believes the employer would prefer a female pupil. This would be direct discrimination because of sex.

## After schools clubs, extra-curricular, leisure and sporting activities provided by the school

11.13 Where a school provides services or activities to its pupils which are not strictly educational and may in some circumstances take place outside of the traditional school day, these are still covered by the schools' provisions of the Act. This would include afterschool activities such as sporting clubs, drama and musical productions. The range of activities offered and the way in which they are offered must not unlawfully discriminate.

**Example:** A secondary school pupil who is undergoing gender re-assignment is told the school won't put him forward for a volunteering opportunity at a local community centre because staff at the centre may be

*Please note: this is a first draft text for consultation*

‘uncomfortable’ with his transitioning. This is likely to be direct discrimination because of gender re-assignment.

**Example:** A school distributes cut-price tickets to rugby matches to pupils but does not offer the tickets to a pupil who is a wheelchair user. This is likely to be direct discrimination because of disability.

**School facilities such as classrooms, laboratories, libraries, IT facilities, school hall and dining hall, playgrounds, sporting facilities and residential accommodation for boarders.**

The way in which school facilities are provided can lead to unlawful discrimination.

**Example:** A school fails to provide appropriate changing facilities for a transsexual pupil, this could be unlawful indirect discrimination because of gender reassignment unless it can be objectively justified.

**Example:** A school fails to provide prayer facilities for those pupils whose religion requires them to pray during school hours, this could be unlawful indirect discrimination because of religion or belief unless the policy can be objectively justified.

- 11.14 In addition the way in which the school buildings are utilised may lead to indirect discrimination against disabled pupils with mobility difficulties.
- 11.15 There are some exceptions to the duties on schools in relation to providing education and access to any benefit, facility or service to pupils. These are explained in paragraphs 11.23 to 11.30 below.

**Subjecting a pupil to any other detriment**

- 11.16 The Act says that a school must not discriminate by subjecting a pupil to ‘any other detriment’. Detriment is not

*Please note: this is a first draft text for consultation*

defined by the Act but is a very broad term, taking many forms. It means some disadvantage, and can include denial of an opportunity or choice, or anything that a reasonable pupil would consider altered their position for the worse. The detriment need not be physical, academic or disciplinary for example, but the fact that the pupil has an unjustified sense of grievance alone would not be enough.

11.17 Even if a school thinks that they are acting in the best interests of a pupil that may still amount to a detriment.

**Example:** A school careers coordinator decides not to offer a placement at a construction firm to a Muslim pupil because he is worried the pupil will find it too hard to 'fit in'. He decides instead to send the pupil for a placement in retail which he feels is more appropriate for the pupil, despite the pupil expressing an interest in working in the built environment. This is likely to be discrimination because of religion or belief.

### **Pregnancy and maternity discrimination**

11.18 As explained in Chapter 4 a school must not discriminate against a pupil because of her pregnancy or maternity or because she is breastfeeding. This means that it is unlawful for a school to restrict the education, benefits, facilities or services available to pregnant or breastfeeding pupils or to restrict the options available to them. However, it is not unlawful to treat a female pupil more favourably because of her pregnancy or maternity, or because she is breastfeeding. So a school can offer pregnant or breastfeeding pupils additional education, benefits, facilities or services or in a more flexible or favourable way than offered to other pupils. Schools should avoid making assumptions about the educational and career aspirations of teenage mothers.

**Example:** A school tells a pregnant school pupil that she won't be able to continue with practical science lessons as it is a health risk. The pupil and her parents complain to the school because there is no demonstrable health risk in the activities being carried out. This is likely to be unlawful direct discrimination because of pregnancy.

### **Disabled pupils and reasonable adjustments**

- 11.19 As explained in Chapter 7, the Act makes it unlawful for a school to fail to comply with a duty to make reasonable adjustments.
- 11.20 This duty is anticipatory. This means that schools are required to consider and take action in relation to barriers that impede disabled people generally prior to an individual disabled person seeking to become a pupil.
- 11.21 A school will be acting unlawfully if they fail to comply with a duty to make reasonable adjustments in relation to:
- the provision of education;
  - access to a benefit, facility or service.
- 11.22 The reasonable adjustment requirements of disabled pupils are wide-ranging and include changes to provisions, criteria or practices and the provision of auxiliary aids and services. The duty to provide auxiliary aids and services will not come into force before September 2011.
- Reasonable adjustments are explained in detail in Chapter 7.

### **Exceptions**

- 11.23 Chapter 14 sets out in detail the exceptions which apply to the school provisions. The following paragraphs highlight the exceptions which are of particular significance.

### **Content of curriculum**

- 11.24 These obligations do not apply to anything done in connection with the content of the curriculum. Schools are not restricted in the range of issues, ideas and materials they use and have the academic freedom to expose pupils to a range of thoughts and ideas, however controversial. Even if the content of the curriculum causes offence to pupils with certain protected characteristics this will not make it unlawful unless it is delivered in a way which results in harassment or subjects pupils to



discrimination or other detriment.

**Example:** A school science curriculum covers evolution and this would not be discrimination on the basis of religion and belief against a pupil whose religious beliefs include creationism.

**Example:** A school teaches 'The Merchant of Venice'. This would not be unlawful race or religion or belief discrimination even though the play itself could be viewed as being hostile towards Jewish people.

**Example:** In the above example, whilst teaching 'The Merchant of Venice' a teacher says that Jews are unethical money-lenders who only have themselves to blame for the resentment they experience. This could amount to unlawful racial or religious discrimination or race harassment against a Jewish pupil because the comments relate to how education is delivered, not the content of the curriculum.

### **Collective worship**

- 11.25 The Act says that acts of worship or other religious observance organised by or on behalf of a school are not covered by the provisions prohibiting religion or belief discrimination, whether or not they are part of the curriculum.
- 11.26 Any school can carry out collective worship of a broadly Christian nature (as public schools are obliged to do under section 8 of the Education (Scotland) Act 1980 and Scottish Government policy guidance) or in line with any other religion without this being unlawful discrimination. The school will also not be required to provide opportunities for separate worship for the different religions and beliefs represented amongst their pupils in order to avoid discrimination.
- 11.27 Schools are not prohibited from organising or participating in acts of worship or religious observance celebrating any faith. This would not amount to unlawful religion or belief discrimination against pupils of other religions or of no religion.

**Example:** A school organises an annual nativity play for pupils and a carol concert to celebrate Christmas. It would not be unlawful discrimination if the school does not hold events to celebrate Diwali for Hindu pupils.

### Schools with religious character

11.28 A school with religious character or denominational school is:

- a public school which is associated with a particular church or denominational body and run in accordance with the religious beliefs and character of that church or denomination
- a grant-aided school conducted in the interest of a church or denominational body
- an independent school which only admits pupils who belong, or whose parents belong, to a particular denomination or religion
- an independent school conducted in the interest of a particular church or denominational body.

11.29 The Act permits such schools to discriminate in the provision of education and access to a benefit, facility or service on the grounds of religion or belief. Such schools are thus permitted to conduct themselves in a way that discriminates against pupils on the grounds of religion or belief. This exemption does not cover exclusions or subjecting a pupil to any other detriment, so a pupil cannot be punished or penalised for things which relate to religion or belief.

**Example:** A denominational school which provides pastoral care from a priest, is not discriminating unlawfully by not making equivalent provision for pupils from other faiths.

**Example:** A pupil at a denominational secondary school tells his class during an RE lesson that he has decided to become a humanist. The pupil is told to leave the class and is given a detention for being insubordinate by telling the class he has renounced the school's faith. This is

*Please note: this is a first draft text for consultation*

likely to be unlawful discrimination because of religion or belief.

11.30 This exception only covers religion and belief discrimination and not any other protected characteristics.

**Example:** A teacher at a Jewish school tells pupils that homosexuality is ‘wrong and disgusting’ and that gay and lesbian people only ‘have themselves to blame’ if they face bullying and harassment. A lesbian pupil in the class is very offended and upset by this hostile and degrading language. This is likely to be unlawful direct discrimination because of sexual orientation. It is not covered by the exception for the school’s religious ethos.

## Chapter 12 - Exclusions

### Introduction

- 12.1 This Chapter explains in detail what is unlawful under the Act in relation to school exclusions.
- 12.2 The terms 'school' and 'pupil' 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.

### Exclusions legislation

- 12.3 Public schools managed by education authorities are subject to Regulations 4 and 4A of The Schools (General) (Scotland) Regulations 1975 and section 28H of the Education (Scotland) Act 1980 which sets out a statutory regime for exclusions. Nothing in the Equality Act conflicts with the other legal obligations of schools in relation to exclusions.
- 12.4 Independent and grant-aided schools are not subject to the legal framework for exclusions: but they are obliged to comply with the Equality Act.
- 12.5 The Act does not prohibit schools from excluding pupils with a protected characteristic but does prohibit schools from excluding pupils **because of** their protected characteristic or discriminating unlawfully by excluding a

*Please note: this is a first draft text for consultation*

pupil or in the exclusions process. Schools also have a duty to make reasonable adjustments to the exclusions process for disabled pupils.

### Examples and terminology in this Chapter

- 12.6 The examples used in this Chapter are intended to illustrate solely how the Equality Act applies in relation to exclusions. They do not deal with any other exclusions legislation, which may also affect the situation portrayed in the example. In some situations, the treatment may be a breach both of exclusions legislation and the Equality Act.

### Who is the responsible body?

- 12.7 Those responsible for a school's obligations under the Act are set out in paragraph 3.7. **s85(9)**

### What the Act says

- 12.8 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a person by excluding them from the school. **s85(2) and (5)**

### What is unlawful under the Act?

- 12.9 It is unlawful to exclude a pupil because of a protected characteristic. This covers both temporary and permanent exclusions (i.e. removal from the register of a school) as the law does not make any distinction between the two.
- 12.10 Excluding a pupil because of their protected characteristic would be unlawful direct discrimination

**Example:** An independent school excludes a pupil because they are transsexual. This would be unlawful direct gender re-assignment discrimination.

- 12.11 It is also unlawful direct discrimination to exclude a pupil because they are perceived to have a protected characteristic or because they are associated with someone with a protected characteristic.

**Example:** A school excludes a pupil for two days because he organises a boycott of a class after a teacher made derogatory comments about his father, who is gay. This would be unlawful direct sexual orientation discrimination even though the pupil himself is not gay.

- 12.12 It is unlawful to exclude a pupil with a protected characteristic for behaviour that a pupil without a protected characteristic would not be excluded for.

**Example:** On a school trip several pupils are abusive to the coach driver and swear at him. The boys were given detentions and not allowed to go on the next school trip, but they were not excluded. However, the girls who swore were excluded and told that their behaviour was not appropriate behaviour for 'young ladies'. This would be unlawful direct sex discrimination as the female pupils were excluded for behaviour that the male pupils were not excluded for.

- 12.13 Behaviour and exclusions policies which result in a higher proportion of pupils with a particular protected characteristic being excluded will result in unlawful indirect discrimination unless their application can be justified as being a proportionate means of achieving a legitimate aim.

**Example:** An independent school requires all pupils to wear school uniform hats when arriving at school and leaving school. Male Sikh pupils are unable to comply with this requirement because they are required to wear a turban as part of their religious beliefs. A male Sikh pupil is excluded for not complying. This would be unlawful indirect religion and belief discrimination and race discrimination as the school is not able to justify the application of the rule as a proportionate means of achieving a legitimate aim.

## Disabled pupils

- 12.14 If a disabled pupil is excluded for behaviour connected to his or her disability this could be unlawful discrimination arising from disability unless the school can justify the exclusion as being a proportionate means of achieving a legitimate aim. Whether or not the school has complied with its duty to make reasonable adjustments for that pupil will have an impact on whether or not the exclusion can be justified.

**Example:** A pupil with autism is excluded for lashing out at a supply teacher. The reason the pupil lashed out was because the supply teacher told him that he could not sit in his normal seat as it wasn't appropriate for the activity they were doing. The pupil always sat in the same seat in the classroom, and this was recognised as a reasonable adjustment for his autism by his class teacher. The supply teacher approached the pupil and told him sternly that he must move. The pupil's reaction of lashing out was connected to his disability and so the exclusion would be discrimination arising from disability. As the school had not advised the supply teacher of the reasonable adjustment, the school is unlikely to be able to justify the discrimination and therefore it would be unlawful.

- 12.15 The Act requires schools to make reasonable adjustments for disabled pupils both to the exclusions process and to the disciplinary sanctions. This might mean punishing a disabled pupil in a different way to avoid the substantial disadvantage caused by excluding them.

**Example:** A pupil with learning difficulties is excluded for repeatedly getting up from his seat during lessons and disrupting other pupils. It is the school's policy that repeated disruptive behaviour is punished by exclusion. The school is under a duty to make reasonable adjustments to its policy which might mean disregarding some of the disruptive behaviour and working with the pupil to explain the consequences of his behaviour and to help him to remain at his seat during lessons.

### **Pregnancy and maternity discrimination**

- 12.16 It is unlawful to exclude a pupil because of her pregnancy or maternity. Pregnancy and maternity discrimination is explained in more detail in paragraphs 4.35 to 4.49.

**Example:** A pregnant pupil is excluded from an independent school. The school claims that pregnant pupils will give the school a bad name and she no longer fits the image of the school. This would be unlawful direct pregnancy and maternity discrimination.

**Example:** A pupil is excluded from school for breastfeeding in the school canteen and told that this is not appropriate behaviour as other pupils are present. This would be unlawful direct pregnancy and maternity discrimination.



## Chapter 13

### Positive action

#### Introduction

13.1 This Chapter explains the positive action provisions in the Act. **s.158**

13.2 **What is positive action?**  
Pupils who share a protected characteristic may be socially or economically disadvantaged, or may be affected by the consequences of past or present discrimination or disadvantage. Certain groups of pupils may experience institutional or systemic discrimination or be prevented from pursuing educational opportunities as a result of their protected characteristic – for example:

- Low participation of girls in certain subjects resulting in future economic disadvantage
- Low achievement of Gypsy and Traveller pupils
- High numbers of exclusions of pupils with disabilities
- High levels of bullying of Lesbian Gay and Bisexual (LGB) pupils. Bullying is known to affect academic performance and increase likelihood of disengaging from education.

13.3 The Act contains provisions which enable schools to take proportionate action to achieve fuller and more effective equality outcomes for members of pupil groups that are socially or economically disadvantaged or excluded as a result of being in a protected group or who otherwise face the consequences of past or present discrimination or disadvantage. These are known as the positive action provisions and are lawful even where these actions involve discrimination against members of other groups which might otherwise be unlawful.

- 13.4 Positive action may involve treating members of a group who share a particular protected characteristic more favourably than other groups, and will be lawful if:
- one or more of the preconditions of recognising the disadvantage, meeting the particular needs or increasing the participation of a particular group is met (see paragraphs 13.10 and 13.11); and
  - the proposed action is a proportionate means of achieving one of the stated aims (see paragraphs 13.20 to 13.22).
- 13.5 Positive action can include providing additional or personalised education, benefits, facilities or services, separate facilities, targeting resources or opportunities to benefit a particular disadvantaged group. Provided action is within the parameters laid down in the Act and meets the test of proportionality, it will not amount to discrimination under the Act.
- 13.6 Schools will often wish to take positive action to improve their education and services for pupils and to overcome barriers for particular groups of pupils, including actions to widen participation.

### **Distinguishing positive action and ‘positive discrimination’**

- 13.7 Positive action is not the same as positive discrimination, which is unlawful. It may be helpful to consider the Act’s positive action provisions within the continuum of actions to improve the education, benefits, facilities and services to people who share a protected characteristic.
- First, action taken to benefit those from one particular protected group that does not involve less favourable treatment of those from another protected group, or to eradicate discriminatory policies or practices will normally be lawful. For schools this may include steps to improve awareness of and access to education, adjusting the benefits, facilities and services to meet the particular needs of a protected group, or training staff to recognise such needs. However, such actions would not be classed as ‘positive action’.
  - Second, there are actions that fall within the framework of the Act’s positive action provisions. These actions are only lawful if they meet the

statutory conditions for positive action measures and do not exceed the limitations set out in the Act.

- Third, there are actions – often referred to as ‘positive discrimination’ – which involve preferential treatment to benefit members of a disadvantaged or under-represented group who share a protected characteristic, in order to address inequality. However, these actions do not meet the statutory requirements for positive action and will be unlawful unless a statutory exception applies. (Exceptions are discussed in Chapter 14.)
- It is important to note that it is not unlawful to treat a disabled pupil more favourably compared to a non-disabled pupil because of their disability. (See paragraphs 13.25 and 13.26 below.)

**Example:** In monitoring the gender breakdown of Higher Grade Design and Technology, a school notes the low number of girls choosing to study the subject. The school considers the following actions to improve girls’ participation in the subject:

- Inviting a female designer to come and speak to students at an assembly and asking female students studying design and technology at a local university to run some activities at the school design and technology club to try and encourage more girls to get involved in the subject. None of these steps are likely to involve less favourable treatment of any other group sharing another protected characteristic and so such actions would be lawful without having to rely on the positive action provisions of the Act.
- Arranging girls’ only sessions in design and technology and opportunities for the female pupils to shadow a female designer in the workplace. While these steps involve more favourable treatment of female pupils, the disadvantage to other groups of pupils is likely to be outweighed by the benefit of increasing participation of female pupils. As these steps are proportionate ways of achieving the school’s aim, they would be lawful under the Act’s positive action provisions.
- Setting different entry requirements for female and male pupils onto Higher Grade courses. Boys are required to have studied design and technology at Standard Grade whereas girls do not have to have studied design and technology at Standard Grade to get onto the Higher Grade course. While these steps could increase participation by female pupils

they involve preferential treatment of female pupils and less favourable treatment of male pupils who have different entry requirements placed on them. As there are less discriminatory steps the school could take to increase participation by female pupils these steps are unlikely to be a proportionate means of achieving this aim and therefore are likely to be unlawful.

### Voluntary nature of positive action

- 13.8 Positive action is optional, not a requirement. However, by taking positive action, schools will often derive broader benefits including improved outcomes for pupils, increased take up of courses, decreased drop-out, raised standards and a more diverse pupil body whose engagement and collective wealth of experience contributes to the growth and reputation of the school on both an academic and a wider level.

### What the Act says

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

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

- 13.10 The 'stated aims' are:
- a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage, (referred to in this Chapter as 'action to remedy disadvantage') **s.158(2)(a)**
  - b) meeting those needs, ('action to meet needs'); or **s.158(2)(b)**
  - c) enabling or encouraging persons who share the

protected characteristic to participate in that activity ('action to encourage participation in activities').

s.158(2)(c)

- 13.11 Action may be taken when any one or all of these conditions exist. Sometimes the conditions will overlap – for example, pupils sharing a protected characteristic may be at a disadvantage which may also give rise to a different need or may be reflected in their low level of participation in particular activities.

**Example:** A primary school is aware that pupils from Gypsy and Traveller backgrounds have very low levels of achievement in comparison to other groups of pupils at the school. A key contributing factor is the low levels of literacy of Gypsy and Traveller pupils when they enter the school. The school decides to set up some additional classes in literacy for Gypsy and Traveller pupils and to provide a support worker with links to the community to help them with other aspects of school life. These will help to raise Gypsy and Traveller pupils' achievement and levels of well-being and are positive action measures as they are a proportionate means of achieving the school's aims of overcoming the disadvantage of a particular pupil group, and meeting their needs.

**Example:** A school is aware that only a small number of male pupils choose to study a modern foreign language at Standard and Higher Grade level. In order to increase the numbers of male pupils on these courses, the school runs a language careers day for male pupils, which includes a visit to a university's language faculty and a talk from business people in the region, who actively use one or more languages on a daily basis in their work. This would be a positive action measure as it is proportionate means of achieving the school's aim of encouraging participation of a particular pupil group, namely male pupils, on language courses.

### What does 'reasonably think' mean?

- 13.12 In order to take positive action, a school must reasonably think that one of the above conditions applies – that is, disadvantage, different need or disproportionately low participation. This means that some indication or evidence will be required to show that one of these statutory

conditions applies. It does not, however, have to be sophisticated statistical data or research. It may simply involve looking at the profiles of pupils and/or making inquiries of other schools in the area. Schools have a wealth of data that can be used as a basis for action, as well as relevant external research. A decision to take positive action could be based on qualitative evidence such as consultations or focus group work with pupils and staff, equality impact assessments, surveys showing poor experience of an area of provision related to a protected characteristic, complaints and discrimination claims or evidence of similar problems gathered by other schools.

**Example:** A school reviews its data on exclusions and finds that a disproportionate number of pupils who have been either temporarily or permanently excluded are Black Caribbean boys. The school also looks at data held at the local and national level which supports the school's own evidence. The school then runs some focus groups with pupils and parents from Black Caribbean backgrounds to understand the reasons behind why these pupils are facing higher levels of exclusions. Following the consultation, the school implements a whole school policy on tackling race equality and a programme of positive action that specifically addresses these boys' needs. This includes parent/pupil workshops, visits from Black role models, learning mentors and classes on emotional literacy, assertiveness, socialisation and anger management skills.

This would be a lawful positive action measure.

## **Action to remedy disadvantage**

### **What is a disadvantage for these purposes?**

- 13.13 'Disadvantage' is not defined in the Act. It may, for example, include exclusion, rejection, lack of opportunity, lack of choice, or barriers to accessing provision, (see paragraph 5.10). Disadvantage may be obvious from statistical sources, such as national data, but in other cases may be shown by qualitative evidence, by equality 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?

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

s.158(2)(a)

- targeting provision at specific disadvantaged groups, for example through advertisements, outreach programmes, special arrangements to encourage increased take-up
- aiming provision specifically at a disadvantaged group; or
- making provision in a different way, at different times, at different locations
- making specific provision for that group only.

The action can be both enabling, such as providing a group with specific provision; and/or encouraging, such as advertising a provision in a publication aimed at a particular group.

**Example:** A school is aware from monitoring data and observations that few Asian parents attend Parent Teachers meetings and so they are missing valuable opportunities to discuss their children's education. A focus group identifies that the issue is a lack of interpretation services. The school arranges for a series of specific Asian Parents meetings where interpreting is provided if required.

This would be a lawful positive action taken to minimise disadvantage.

## Action to meet needs

### What are 'different' or 'particular' needs?

- 13.15 A group of pupils who share a particular protected characteristic have 'different needs' if, due to past or present discrimination or disadvantage or due to factors that especially apply to pupils who share that characteristic, they have needs that are different from the needs of others. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered 'different'. Needs may also be different because, disproportionately, compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

For example, girls may need specific interventions to encourage them to study a non-traditional subject, and there is evidence that Muslim girls may need additional support to address certain cultural issues.

### What action might be taken to meet those needs?

- 13.16 The Act does not limit the action that schools can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving the aim of meeting genuinely different needs (more detail on what proportionate means can be found in paragraphs 5.31 to 5.35). Such action could include:
- s.158(2)(b)**
- providing education at a particular time
  - developing different ways of making provision more suited to the needs of particular groups, such as girl –only swimming lessons for Muslim girls taught by a female teacher
  - making additional provision specifically aimed to meet particular needs, for example additional English language classes for pupils whose first language is not English



**Example:** A school analyses its pupil destination data and is aware that Pakistani boys are disproportionately more likely to leave school at 16 and not continue in education or training. The school is aware of gradual disengagement from education by these pupils from the age of 14. The school decides to run activities for Pakistani boys from 14 to try and raise aspirations and prevent this disengagement. These activities include targeted careers education, giving the pupils the opportunity to visit local employers and training providers and being assigned a mentor from the same background studying at university.

## Action to encourage participation in activities

### What activities does this apply to?

- 13.17 This provision applies to participation in any activity where the participation of those who share a protected characteristic is disproportionately low. It covers not just access to the activity but also experiences of undertaking the activity and completion of it. It includes activities undertaken or organised or facilitated by a school and might include school trips abroad or careers events for example. It may also involve addressing low take-up of particular courses by a particular pupil group, such as low numbers of female pupils studying science

### What does 'disproportionately low' mean?

- 13.18 The Act says that action can only be taken where the school reasonably thinks that participation in an activity by pupils sharing a particular protected characteristic is 'disproportionately low'. This means that the school will need to have some reliable indication or evidence that participation by that protected group is low compared with that of other groups or compared with the level of participation that could reasonably be expected for people from that protected group given certain relevant factors such as type and locality of school. The school may base their opinion on empirical evidence including statistical data or, where this is not available, more qualitative forms of evidence derived from, for example, consultations, surveys or reviews. **s.158(2)(c)**

**Example:** A school analyses its data on the types of work experience placements taken by its pupils and finds that girls are far less likely to undertake a placement with science, engineering and technology employers compared to boys. The school carries out some additional evidence gathering and finds that that this under-representation extends to further and higher education and wider employment, and that gender segregation in the workplace is one of the main causes of the gender pay gap.

### What action could be taken?

13.19 The Act permits action to be taken to enable or encourage pupils who share the protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit what action could be taken. It could include:

- providing training targeted at pupils with the protected characteristic
- extending or changing locations or times for activities to take place
- making the provision in different ways
- targeting contents of information such as advertisements and prospectuses and methods of advice
- improving careers advice and providing mentoring for pupils with the protected characteristic
- using outreach and monitoring.

**Example:** Taking the above example, the school decides to implement a programme to increase the numbers of female pupils undertaking placements in science, engineering and technology. They run a construction and engineering industry awareness day for female pupils. The day starts with a visit to two local employers where pupils are encouraged to try out the equipment. This is followed by a tour of the local Further Education college to meet apprentices and hear from women working in construction

and engineering. The school follows up on this initial taster event by working with the local Education Business Partnership to find work placements with local employers.

### **What does 'proportionate' mean?**

To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' described in paragraph 13.10.

- 13.20 'Proportionate' refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action – whether it is to overcome a disadvantage, meet different needs or address under-representation of a particular pupil group. Other relevant factors will include the objective of the action taken, or to be taken, including the cost of the action.
- 13.21 The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.
- 13.22 Schools need to consider:
- Is the action an appropriate way to achieve the stated aim?
  - If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?

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

**Example:** A primary school analyses its data and finds out that boys' literacy levels are lower compared to girls overall. The school decides to meet its aim of increasing boys' literacy by running additional literacy classes for all boys, adopting different learning styles and more intensive support for pupils. This is unlikely to be a proportionate means of achieving a legitimate aim. Whilst improving literacy levels of underachieving boys may be a legitimate

aim, providing additional help to all boys may not be a proportionate means of achieving that aim.

**Example:** A secondary school reviews its data on participation in PE and uncovers that female Muslim pupils are far less likely to take part in swimming lessons than other groups of pupils. After speaking with pupils and parents it is found that the mixed sex swimming classes and the type of swimming costume are key barriers preventing these pupils from participating.

The school decides to run separate swimming lessons for female Muslim pupils run by a female swimming instructor, and makes a change to the PE uniform to allow a full body swimming costume to be worn, as opposed to a regular one piece costume. This is likely to be a proportionate means of achieving a legitimate aim. Although this would involve less favourable treatment of other pupils who will not have access to these lessons, the action could meet the appropriate and necessary test since it is likely to be effective in increasing participation of female Muslim pupils in swimming classes and there is no obvious alternative approach that would meet this aim. The less favourable treatment would be balanced by the fact that other female and male pupils have similar amounts of access to swimming classes and female pupils are permitted to wear a similar style of swimming costume if requested.

### **Time-limited positive action**

- 13.23 If positive action continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been a precondition for positive action. This could make it unlawful to continue to take the action.
- 13.24 Therefore, when undertaking measures under the positive action provisions, it would be advisable for schools to indicate that they intend to take the action only so long as the relevant conditions apply, rather than indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.

**Example:** A school has a large intake of refugee pupils from Afghanistan. The school decides to employ a support worker to work with the pupils to help them settle in at the school. The school monitors the pupils' integration into the school and decides after one year that the pupils have integrated well into school life. At this time it is decided that the support worker is no longer needed.

### Positive action and disability

- 13.25 As indicated above at paragraph 13.7, it is not unlawful direct disability discrimination to treat a disabled person more favourably than a non-disabled person because of disability. This means that a school can, if they wish, provide education, benefits, facilities and services to disabled pupils, or offer them on more favourable terms, and this will be lawful. **s.13(3)**
- 13.26 However, the positive action provisions may still be appropriate to achieve equality of opportunity between disabled people with different impairments. This means that a school can implement positive action measures to overcome disadvantage, meet different needs or increase participation of people with one impairment but not those with other impairments.

**Example:** A school has carried out a pupil satisfaction survey of extra-curricular activities and finds that deaf pupils are less likely to participate in these activities and can feel excluded when they do take part. As part of the reasonable adjustments duty, the school improves accessibility for the existing activities such as providing a British Sign Language signer and ensures that venues used for the activities have hearing loops installed. The school also offers deaf pupils the opportunity to attend a camp set up specifically to give deaf pupils the opportunity to meet and socialise with other deaf pupils. The trip is only open to deaf pupils and not for pupils with other disabilities. This would be lawful under the positive action provisions.

## Positive action and the public sector equality duties

- 13.27 Education Authorities are subject to the public sector equality duty and may wish to consider using positive action to help them comply with the duty. **s.149(1) and (3)**

**Example:** When deciding on what action to take under the public sector equality duty, an Education Authority gathers and considers evidence on attainment at the end of the year and finds that Bangladeshi pupils are underachieving compared to other pupils when previous attainment is taken into account.

The Education Authority prepares and publishes an outcome under the duty to tackle the underachievement of Bangladeshi pupils. In order to achieve this they plan to undertake a range of activities including mentoring, and additional classes. These activities act as positive action measures and also contribute to meeting the duty to advance equality of opportunity.

## Implementing positive action lawfully

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

### Example:

A secondary school has a number of LGB pupils and pupils whose parents are LGB. The school wants to ensure that any barriers these pupils are facing are addressed through appropriate measures. The school decides to run a small consultation group with the pupils, which is facilitated with the help of a local LGB charity to understand their needs better.

The group report several barriers affecting their school experience including homophobic bullying which is contributing to underachievement and putting some pupils at the risk of disengaging.

The group make several suggestions for positive action activities to address these barriers alongside a whole school approach to tackling homophobic bullying. These include setting up a mentor programme for LGB pupils, offering LGB pupils a chance to attend a school trip to meet with other pupils who are tackling homophobia in their schools, and running various activities for LGBT history month.

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

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

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

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

**Example:** A school sets up a 'computer club for girls' to try and address the low numbers of female pupils studying IT. Other schools have found that the clubs encourage girls to get involved with IT who may be discouraged by the all male environment common in many school computer labs. The clubs allow girls to explore things at their own pace and follow their interests in a supportive environment. The aims of the club are explained to staff and a newsletter is sent to all parents to explain the aims of the club and that it

*Please note: this is a first draft text for consultation*

is going to run for just one year initially to see if it addresses the issue.



## Chapter 14

### Exceptions

#### Introduction

- 14.1 This Chapter gives an overview of the exceptions to the schools' provisions of the Act. This Chapter explains exceptions that apply generally to the schools' provisions, as well as exceptions that may apply only to certain types of schools and to certain activities.
- 14.2 The terms 'school' and 'pupil' 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.
- 14.3 The basic presumption under the Act is that discrimination is unlawful unless any exception applies and any exception to the prohibition of discrimination should generally be interpreted restrictively.
- 14.4 Where an exception permits discrimination in relation to one protected characteristic, schools must ensure that they do not discriminate in relation to any of the other protected characteristics.

#### References to 'discrimination'

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

*Please note: this is a first draft text for consultation*

In addition 'disability discrimination' also includes:

- discrimination arising from disability, and
- failure to make a reasonable adjustment.

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

### **Admission to single-sex schools**

14.6 The Act permits single-sex schools to admit pupils of only one sex without this being unlawful sex discrimination.

14.7 A single-sex school is a school which:

- admits pupils of one sex only, or
- admits pupils of the opposite sex but their admission to the school is exceptional or their numbers are comparatively small and their admission is confined to particular courses or classes.

**Example:** Sons of teachers at a girls' school are permitted to attend the school. It is still regarded as a single sex school.

14.8 Where a school admits pupils of the opposite sex as described it is permitted to confine those pupils to particular courses or classes.

**Example:** A boys' school allows female pupils to attend design and technology courses which are not being offered at their own school. The school is not discriminating unlawfully by refusing to admit female pupils on to other courses.

*Please note: this is a first draft text for consultation*

- 14.9 This exception applies only to admissions and does not apply to the provision of education or access to any benefit, facility or service, or to exclusions.

**Example:** In the example above the school would be acting unlawfully if it did not allow the female pupils access to the school library.

### **Single-sex boarding at schools**

- 14.10 The Act permits schools to restrict admission as boarders to pupils of only one sex without this being unlawful sex discrimination.
- 14.11 Where a school restricts admission as a boarder to only one sex it is then permitted to discriminate against pupils of the opposite sex in relation to boarding facilities.

**Example:** A mixed-sex school has facilities for female boarders and can advertise in its prospectus that males cannot be accepted as boarders.

- 14.12 These exceptions apply to schools which have some pupils who are boarders and some who are non-boarders and either:
- admit pupils of one sex only as boarders, or
  - admit pupils of the opposite sex as boarders but in a small number compared with the number of other pupils admitted as boarders.

### **Single-sex schools turning co-educational**

- 14.13 If a single-sex school decides to alter its admissions arrangements so that the school will cease to be a single-sex school, it may apply for a transitional exemption order.

*Please note: this is a first draft text for consultation*

- 14.14 A transitional exemption order authorises a school, for the period specified in the order, to discriminate in relation to sex in the arrangements it makes for deciding who is offered admission as a pupil in relation to sex and in refusing to admit a person as a pupil because of their sex.
- 14.15 A school is not acting unlawfully in relation to sex discrimination if in accordance with a transitional exemption order, or pending the determination of an application for a transitional exemption order, it does not admit a person as a pupil because of the person's sex.

### **Schools with a religious character**

- 14.16 The Act permits schools with religious character (defined in paragraph 11.29) to discriminate on the grounds of religion or belief in relation to admissions and in the provision of education and access to a benefit, facility or service. The provisions in relation to admission to school are explained in more detail in Chapter 10 and in relation to the provision of education and access to a benefit, facility or service in Chapter 11. This exemption does not cover exclusions or subjecting a pupil to any other detriment.

### **Religion and belief exceptions**

- 14.17 Acts of worship of other religious observance organised by a school are not covered by the provisions prohibiting religion or belief discrimination, whether or not they are part of the curriculum. This is explained in more detail in Chapter 11.

### **Permitted form of selection**

- 14.18 The Act says that a school that is using a permitted form of selection is not discriminating by applying this form of selection to disabled children who apply for admission.

*Please note: this is a first draft text for consultation*

- 14.19 Independent schools are permitted to select some or all of their pupils by reference to general or special ability or aptitude, with a view to admitting only pupils of high ability or aptitude.
- 14.20 Public schools can operate selective admissions arrangements where these are approved by the Scottish Ministers.
- 14.21 Where the application of a permitted form of selection results in a disabled person being refused admission this would not be unlawful indirect discrimination or discrimination arising from a disability. However, schools have a duty to make reasonable adjustments to the assessment process they use to select pupils.

**Example:** A girl with learning difficulties applies to go to a school that selects its intake on the basis of academic ability. She is provided with reasonable adjustments but fails the entrance test. She is refused admission. Although her poor performance in the entrance test was as a direct consequence of her disability and would appear to be 'discrimination arising from a disability' the refusal to admit her would not be unlawful as it is a result of a permitted form of selection.

A boy who is visually-impaired applies to go to the same school and also fails the entrance test. However, the school had failed to give the boy an exam paper in large font. This would be a failure to make reasonable adjustments and direct disability discrimination.

The parents of a twelve-year-old boy apply for him to go to an independent school. He passes the entrance test, but when the school hears that he has learning and behaviour difficulties they refuse him admission. His treatment is not as a result of a permitted form of selection and therefore is likely to be unlawful.

## **Statutory authority**

- 14.23 Nothing is made unlawful by the Act if it is required by an express statutory requirement. However, it is only in cases where a statutory requirement is specific, leaving a school with no choice other than to act in a particular way, that the provisions of the Act may be overridden. This exception is thus of narrow application, and it is likely to permit discrimination only in rare circumstances.
- s.191 and sch 22.1**

This provision applies to the following protected characteristics for schools (and mirrors the provisions in previous equality legislation):

- Disability
- Religion or belief
- Sex
- Sexual orientation.

### **What is a statutory requirement?**

- 14.24 Anything that is required under:
- an Act of Parliament;
  - an Act of the Scottish Parliament;
  - subordinate legislation of such Acts (such as regulations).

For the protected characteristics of age, disability, religion or belief and sexual orientation a statutory requirement also includes any requirement or condition imposed pursuant to such an Act by:

- a Minister of the Crown;
- a member of the Scottish Executive.

## Nationality discrimination authorised by statute or the executive

14.25 The Act provides that: **Sch 23.1**

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

is lawful in relation to the schools' provisions if it is done to comply with another law, Ministerial arrangement or condition.

14.26 As for the wider statutory authority exception discussed above (in paragraph 14.5), it is only where an obligation under the law, Ministerial arrangement or condition leaves a school with no choice other than to act in a particular way – in relation to a person's nationality or residence in the UK – that the Act's prohibition of discrimination may be overridden. This exception is thus of narrow application, and it is likely to permit discrimination only in rare circumstances.

## Communal accommodation

14.27 A school does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting pupils to communal accommodation, or providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied. **Sch.23.3(1)**

14.28 '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. **Sch.23.3(5)**

*Please note: this is a first draft text for consultation*

- 14.29 A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation. **Sch.23.3(7)**
- 14.30 Restricting admission to communal accommodation for one sex under this exception will only be lawful if accommodation is managed as fairly as possible for both sexes. It is also permitted in relation to single-sex boarding school as explained in paragraph 14.11. **Sch.23.3(2)**
- 14.31 In refusing to admit a pupil to communal accommodation because of sex or gender reassignment, the school must take account of: **Sch.23.3(3)**
- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
  - the relative frequency of demand or need for the accommodation by persons of each sex.
- 14.32 In addition, in refusing to admit a pupil to communal accommodation because of gender reassignment, the school must also take account of whether this is a proportionate means of achieving a legitimate aim. **Sch.23.3(4)**

### **National security**

- 14.33 A school does not breach the Act by doing anything it is proportionate to do for the purpose of safeguarding national security. This exception would only apply to schools in very rare circumstances. To be lawful the particular discriminatory act must be justified as proportionate which means that the action taken must be appropriate and necessary for national security. **s.192**

### **Charities**

- 14.34 A school which is a charity will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charitable instrument that establishes or governs the charity and is either: **s.193 and s.194**



- a proportionate means of achieving a legitimate aim, or
- for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic.

**Example:** It is lawful for Capability Scotland to run a school for pupils with severe and complex physical disabilities and not for other disabled pupils or non-disabled pupils.

- 14.35 This exception does not apply if the group of people who are to receive benefits under the charitable instrument is defined by their colour. If the charitable instrument enables benefits to be provided to a group of persons defined by their colour then it has effect as if it enabled benefits to be provided: **s.194(2)**
- to other groups of persons if the group defined by colour is ignored; or
  - to all persons generally, if the group of people to receive benefits is defined only by colour.

#### **Activity to support a charity**

- 14.36 In relation to activities promoting or supporting a charity, the Act permits the restriction of participation in such an activity to persons of one sex, for example a female pupil only sponsored swim to raise money for charity. **s.193(7)**

#### **Competitive sport**

- 14.37 The Act includes two types of exceptions that may apply in relation to a competitive sport, game or other competitive activity. **s.195**

### **Competitive sport – sex and gender reassignment**

- 14.38 For sporting competitions where physical strength, stamina or physique are significant factors in determining success or failure, the Act permits separate events to be organised for boys and girls. **s.195(1)-(4)**
- 14.39 If the physical strength, stamina or physique of the average person of one sex would put them at a disadvantage compared to the average person of the other sex as competitors in a sport, game or other competitive activity, it is not unlawful for those arranging the event to restrict participation to persons of one sex.

**Example:** A secondary school holds an athletics day and male and female pupils compete in separate races. This is not unlawful sex discrimination.

- 14.40 In considering whether separate events should be organised for boys and girls, the age and stage of development of the children competing in the activity should be taken into account. **s.195(4)**

### **Competitive sport – nationality, birthplace etc**

- 14.41 In selecting one or more persons to represent a country, place or area or a related association in a sport, game or other competitive activity, or in complying with eligibility rules for participation in that activity, it is lawful to do anything which is because of a person's nationality or place of birth or how long that person has lived in a particular area or place. **s.195(5)-(6)**

## Chapter 15

### Enforcement

Please note that information regarding the Additional Support Needs Tribunal will be added when the Scottish Government publish their regulations.

#### Introduction

15.1

This Chapter gives an overview of the role of the Sheriff Court in Scotland and of the Additional Support Needs Tribunal for Scotland (referred to in this Chapter as 'the Tribunal') in relation to the schools provisions in Part 6 of the Act.

**s113-119  
and s136-  
141**

**Schedule  
17**

This Chapter is not intended to be a procedural guide to presenting a claim to the Sheriff Court or the Tribunal.

15.2

The civil courts procedure is contained in the Sheriff Court Ordinary Cause, Summary Cause and Small Claim Rules.

**the Sheriff  
Courts  
(Scotland)  
Act 1907  
Schedule 1  
Ordinary  
Cause  
Rules 1993**

Under the Act the Scottish Ministers have the power to make rules governing the procedure of the Tribunal.

15.3

'School' and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Code. 'Pupil' and the terms which flow from this are used generically to mean all who are protected by the areas covered by this Code and in this Chapter includes parent and/or legal representative.

In addition for the purposes of this Chapter, a person who brings proceedings in the Sheriff Court or Tribunal is referred to as the pursuer while a person (which may be an organisation such as a school) against whom proceedings are brought is referred to as the defender.

## **Where are claims brought?**

15.4

All claims in relation to protected characteristics other than disability are brought in the Sheriff Court.

15.5

All disability discrimination claims are made to the Tribunal.

## **Who can bring a claim in the Sheriff Court?**

15.6

A parent may make a claim on behalf of their child up to the age of 16. A parent may also have the right to make a claim on behalf of a child over the age of 16 where the child lacks the legal capacity to make a claim.

Pupils over the age of 16 may make a claim in their own right.

Below the age of 16, a child has the right to make a claim in their own right if the child has sufficient understanding and maturity to do so. A child over the age of 12 is presumed to have sufficient understanding and maturity to instruct a solicitor in such proceedings. A child under the age of 12 is also able to make a claim in their own right, provided that they have the requisite maturity and understanding to do so.

Where both child and parent have rights to make a claim, either may do so.

## Who can bring a claim in the tribunal?

- 15.7 Where a child or young person has legal capacity to do so, the child or young person may make a claim to the Tribunal in their own right. Where both child and parent have rights to make a claim, either may do so. Where a child or young person does not have legal capacity, a claim may be made by the child or young person's parent.

**Schedule  
17(8)**

## What can claims be brought for?

- 15.8 The sheriff court hears claims relating to all the protected characteristics covered by this code with the exception of disability based on all forms of discrimination, harassment, victimisation and other unlawful acts (as set out in Chapter 3).

The Tribunal hears claims relating to all forms of disability discrimination and harassment, victimisation and other unlawful acts.

- 15.9 The provisions relating to the different types of unlawful act are explained in Chapters 4, 5, 6, 7, 8 and 9. Also, claims brought against those who cause, induce or aid these unlawful acts may be brought in the Sheriff Court or Tribunal. These terms are explained in Chapter 3. For brevity these will all be referred to as 'unlawful acts'.

## The procedure for obtaining information

- 15.10 Before starting proceedings, it may be helpful to the person considering bringing proceedings to obtain information from the school, to help them decide if they have a valid claim or not. Any pupil (or their parent on their behalf) who thinks that they were the subject of an unlawful act may request information relevant to their claim from the school they think is responsible. This is known as the procedure for obtaining information and it is additional to other means of obtaining information under the courts or tribunal rules.

**s138**

*Please note: this is a first draft text for consultation*

15.11

There are standard forms for asking and answering questions as well as guidance which explains how the process works. However, the standard forms do not have to be used to present questions or answers.

15.12

The questions procedure is a way for pupils to obtain information when they believe they have been subjected to conduct which is unlawful under the Act but do not have sufficient evidence to be sure. It should also assist the school in their decision about how to proceed with the complaint.

15.13

The questions and answers are admissible in evidence in court and tribunal proceedings.

15.14

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 or tribunal may draw an inference from that, which could be an inference of discrimination. A court or tribunal cannot however draw an inference from a failure to answer questions if the answers might prejudice a criminal matter or in other circumstances as specified in the legislation.

### **Conciliation**

15.15

Where a pupil thinks that a school has acted unlawfully towards them, before taking the complaint further it may be appropriate to see whether it can be resolved directly with the school, for example by using a complaints procedure. However, if that does not succeed in dealing with the problem, then it may be sensible to see whether the dispute can be resolved without recourse to the courts or the tribunal.

15.16

The Commission has power to make arrangements to assist with this process by providing conciliation services. The Commission does not have powers to organise other forms of alternative dispute resolution.

**Equality  
Act 2006  
s.27**

### **Legal action**

15.17

Where conciliation is used, if a dispute cannot be resolved by conciliation or agreement, the matter will have to be decided by a court or tribunal.

### **Time limits**

15.18

Legal action in the Sheriff Court must be started within six months (minus a day) of the unlawful act.

**s118**

15.19

If the proceedings are not brought within that period the court still has discretion to hear the proceedings, if it thinks it is just and equitable to do so.

**s118  
(1)(b)**

15.20

Where the Commission uses its powers to make arrangements for conciliation of a dispute, the period within which the claim may be brought is extended by three months in the Sheriff Court.

**s118(4)**

### **When does the period for bringing a claim in the Sheriff Court start?**

15.21

The Act says that the period starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred or in some circumstances, the date on which the pursuer becomes aware, for example the date when a pupil was excluded.

15.22

Sometimes, however, the unlawful act is the school's failure to do something. The Act says that a failure to do a thing occurs when the school decided not to do it. In the absence of evidence to the contrary, a school is treated as deciding not to do a thing:

**s118(6)  
and (7)**

- a) when it performs an act that is inconsistent with doing the thing, or
- b) if it does not carry out an inconsistent act, on the expiry of the period in which it might reasonably have been expected to do the thing.

15.23

In addition, the Act recognises that where conduct extends over a period it should be treated as being done at the end of that period for the purposes of calculating when the act of discrimination occurred.

**s118(6)(a)**

15.24

If a school has a policy, rule or practice, in accordance with which decisions are taken from time to time, this might constitute an 'act extended over a period'. So if a school maintains an unlawful policy which results in a pupil being discriminated against on a continuing basis or on many occasions, the period for bringing a claim starts when the last act of discrimination occurred, or when the policy, rule or practice is removed.

15.25

For these purposes, a continuing state of affairs may constitute an act extended over a period. This means that even if the individual acts relied upon are done by different persons and are done at different places, they may be treated as a single act extending over a period. However, a single unlawful act which has continuing consequences will not extend the time period.

**What happens if the claim is presented outside the correct time limit?**

15.26

Where the claim is brought outside these time limits, the court has a discretion whether to hear the case if satisfied that it is just and equitable to do so.

**s.118(1) (b)**



*Please note: this is a first draft text for consultation*

15.27

In exercising its discretion, a court will consider the prejudice which each party would suffer as the result of the decision to extend the time limit. This means that the court will consider what impact hearing the case out of time would have on the defender and on the pursuer.

15.28

When a court considers whether to exercise its 'just and equitable' discretion, it will have regard to all the circumstances of the case including in particular:

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected;
- the extent to which the defendant had cooperated with any requests for information;
- the promptness with which the claimant acted once they knew of the facts giving rise to the claim, and
- the steps taken by that person to obtain appropriate professional advice once they knew of the possibility of taking action.

## **Burden of proof**

15.29

A pursuer alleging that they have experienced an unlawful act must prove their claim. However, there is a special rule for claims under the Act which means that in certain circumstances the burden of proof will shift to the defender to show that they have not discriminated.

**s136**

15.30

A court or tribunal will hear all of the evidence from the pursuer and the defender before deciding whether the burden of proof has shifted to the defender.

15.31

If a pursuer has proved facts from which a court or tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the defender to prove that the act was not an unlawful one. To successfully defend a claim, the defender will have to prove, on the balance of probabilities that it did not act unlawfully. If the defender's explanation is inadequate or unsatisfactory, the court or tribunal will find that the act was unlawful.

15.32

**Example:** A Bangladeshi pupil is not placed in the top set for maths, despite getting consistently high marks throughout the year comparable to an Indian pupil, who is in the top set. This could be sufficient for the court to conclude that an unlawful act has occurred, and the school would have to provide the reasons why the child in question has not gone into the top set.

15.33

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. This can happen when a person knowingly makes a false or misleading statement to persuade someone else to contravene the Act.

#### **Settling complaints without recourse to the court or tribunal**

15.34

Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the court or tribunal. An agreement of this nature can include any terms the parties agree to and can cover compensation (where appropriate), future actions by the defender, costs and other lawful matters.

## Assessors in Sheriff Court cases under the Act

15.35

In cases about unlawful acts a Sheriff will usually have to appoint an 'assessor' to assist him or her. These are persons of skill and experience in discrimination issues who help to evaluate the evidence. The Act says that unless the Sheriff is satisfied that there are good reasons for not doing so they must appoint an assessor.

**s114 (8)  
and the  
Sheriff  
Courts  
(Scotland  
) Act 1907  
Schedule  
1  
Ordinary  
Cause  
Rules  
1993 Part  
44.3**

15.36

It would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings. A party to proceedings can object in writing to the court about the appointment of an assessor.

## Remedies in the Sheriff Court

15.37

When it finds that the defender has committed an unlawful act, the Sheriff Court has the power to award all the remedies which the Court of Session can grant in proceedings in reparation or in a petition for judicial review.

**s.119(3)**

These remedies include:

- a finding of the rights and responsibilities of the parties to the claim
- an interdict to prevent the person defending the claim from repeating the unlawful act in the future
- quashing orders by which the court can set aside an administrative decision or action of a public authority
- damages to compensate for any loss suffered by

*Please note: this is a first draft text for consultation*

the person bringing the claim

- interest on damages; and

expenses

15.38

Special rules apply where it is alleged that an interdict might prejudice a criminal case (see paragraph 15.47).

## **Damages in the Sheriff Court**

15.39

Damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

**s119(4)**

### **Damages for complaints of indirect discrimination in the Sheriff Court**

15.40

Where the court makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the pursuer, it must not award damages unless it first considers whether to dispose of the case by providing an alternative remedy, such as a declaration or interdict. If the court considers that another remedy is not appropriate in the circumstances, it may make an award of damages.

**s119(5)  
and (6)**

15.41

Indirect discrimination will be intentional where the defendant knew that certain consequences would follow from their actions and they wanted those consequences to follow.

### **Effect on criminal matters**

15.42

The court must not grant an interdict or interim interdict unless satisfied that no criminal matter would be prejudiced by doing so.

## Remedies in the Tribunal

- 15.43 Where a Tribunal finds that the school has committed an unlawful act, it can make any order it considers appropriate in the circumstances of the case, other than an order for financial compensation.

**Schedule  
17 (9)**

The Tribunal will consider how best to alleviate the effects of the discrimination that has occurred and reduce any future disadvantage. The types of order the Tribunal may make include an order to carry out staff training, change policies and procedures, provide extra tuition and /or apologise to a disabled pupil.

## Use of Judicial Review

- 15.44 If the complaint under the Act is about the lawfulness of a decision, an action or a failure to act of a public authority or a person carrying out a public function, the person complaining may bring proceedings for judicial review.

- 15.45 A claim for judicial review will be appropriate where the person bringing it wants to quash (remove) an administrative decision of the public authority.

- 15.46 A petition for judicial review must be made promptly and without undue delay after the grounds to for judicial review first arose. The court will expect any appeal mechanisms against the decision to have been exhausted before granting permission for judicial review, which is a remedy of last resort.

## National Security in Sheriff Court cases

- 15.47 The Sheriff Court rules have been amended to allow the court to exclude from all or part of the proceedings the pursuer, where the court considers it expedient in the interests of national security. Their representative may be excluded, and the court may also exclude the

**s117**

**Sheriff  
Courts  
(Scotland)**

assessor in the case.

**Act 1907  
Schedule 1  
Ordinary  
Cause  
Rules 1993  
Part 44.5**

15.48

The 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.

15.49

The Advocate General for Scotland may appoint a person to represent the interests of a pursuer in these proceedings. However, that representative is not responsible to the person whose interests they are appointed to represent.

## **The Commission**

15.50

In addition to the rights given to an individual under the Act, the Commission has a power to apply to the court if it thinks that a person is likely to commit an unlawful act, for an interdict to prohibit them from committing that act.

**Equality  
Act 2006  
s.24**

15.51

The Commission has power to take action even if no identifiable individual has been (or may be) affected by the unlawful act. It can take action in respect of arrangements which would, if they were ever applied to an individual, amount to an unlawful act. This power could also be used to challenge a provision, criterion or practice that indirectly discriminates, even if it has not yet put any particular pupil at a disadvantage.

**Equality  
Act 2006  
s. 24A**

15.52

If the Commission suspects that a school has committed an unlawful act, it can conduct an investigation. If it finds that the school has done so, it can serve a notice requiring it to prepare an action plan to avoid repetition or continuation of that act or recommend that it takes action for that purpose.

**Equality  
Act 2006, s  
34, s.20, 21,  
22 sch 2**

*Please note: this is a first draft text for consultation*

15.53

The Commission may also in addition, if it suspects that a school is committing an unlawful act, enter into a binding agreement with the school to avoid such contraventions.

**Equality  
Act 2006 s.  
23**

15.54

The Commission also has a power to assist a pupil who is taking enforcement action against a school.

**Equality  
Act 2006 s.  
28**

## Appendix 1

### General Qualification Bodies

This Appendix gives an overview of how Part 6 of the Act applies to General Qualification Bodies. These duties are explained in detail in a separate Code.

#### General Qualification Bodies

A general qualifications body is an authority or body which can confer a relevant qualification. **97 (2)**

A body is not a general qualifications body, in so far as it is: **97 (4)**

the responsible body of a school (as described in Chapter 3 of the Schools Codes) **97 (5)**

the governing body of a further or higher education institution (as described in Chapter 3)

a body in Scotland that exercises functions under the Education (Scotland) Act 1980, such as an education authority.

Regulations may prescribe other bodies which are not general qualifications bodies.

**Relevant qualification** **97 (3)**

A relevant qualification is an authorisation, qualification, approval or certification of such a description as is prescribed in regulations. These are the types of qualifications which pupils at school and students in FE may be studying for such as:

- 14-19 Diploma Principal Learning



*Please note: this is a first draft text for consultation*

- Advance Extension Awards
- Cambridge International Certificate
- Cambridge pre-University qualification
- Certificates in Adult Literacy and Numeracy
- Entry level certificates in GCSE subjects
- Extended projects
- Foundation Projects
- Free Standing Maths Qualifications
- Functional Skills qualifications
- CE Advanced level (A and AS levels)
- GNVQs
- Higher projects
- The International Baccalaureate
- Key Skills
- Principal Learning and Project Qualifications
- Vocational Certificate of Education
- The National Qualifications in Scotland

A qualification which is not prescribed by regulations as being a relevant qualification may be a 'professional or trade' qualification. A description of what constitutes a professional or trade qualification and the duties of professional or trade qualifications bodies are explained in detail in the Qualifications Bodies Code.

### **Conferring qualifications**

**97 (6)**

The Act says that conferring a relevant qualification includes renewing or extending the conferment of a relevant qualification and authenticating a relevant qualification conferred by another person.

## **Discrimination**

The different forms of discrimination relevant to the general qualifications bodies provisions of the Act are:

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

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.

## **What is unlawful?**

The Act makes it unlawful for a general qualifications body to discriminate against a person:

- in the arrangements it makes for deciding upon whom to confer a relevant qualification
- as to the terms on which it is prepared to confer a relevant qualification
- by not conferring a relevant qualification on that person.

It is also unlawful for a general qualifications body to discriminate against a person on whom it has conferred a relevant qualification by:

- withdrawing the qualification

- varying the terms on which the qualification is held
- subjecting the person to any other detriment.

The Act also makes it unlawful for a general qualifications body to harass or victimise a person who applies for or holds a relevant qualification.

These provisions are explained in Chapters 8 and 9 respectively.

### **The role of the regulator**

**96 (7)**

A general qualifications body does not have to make reasonable adjustments to provisions, criteria or practices which the appropriate regulator specifies are not subject to the reasonable adjustments duty.

A general qualifications body is not required to make reasonable adjustments which the appropriate regulator specifies should not be made.

The regulator must consult with such persons as it thinks appropriate before it specifies that a provision, criterion or practice is not subject to the reasonable adjustments duty or that an adjustment should not be made.

The regulator must have regard to:

- the need to minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities
- the need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of a

*Please note: this is a first draft text for consultation*

person upon whom it is conferred

- the need to maintain public confidence in the qualification.

The appropriate regulator for a general qualifications body that confers qualifications in Scotland is the Scottish Qualifications Authority.

### **Overlap with other duties**

There will be situations where other people or bodies also have duties under the Act towards people who apply for or hold a relevant qualification. The education providers covered in this Code may have duties to such people and these duties are explained in more detail in Chapters 10, 11 and 12.

## Appendix 2

### The meaning of disability

This Appendix is included to aid understanding about who is covered by the Act. Government Guidance is also available from the GEO website (Government Equalities Office)

[http://www.equalities.gov.uk/equality\\_bill.aspx](http://www.equalities.gov.uk/equality_bill.aspx)

#### **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.

However special rules apply to people with some conditions such as progressive conditions and some people are automatically deemed disabled for the purposes of the Act (see below).

#### **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 190 (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 the impairment not the 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 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

*Please note: this is a first draft text for consultation*

professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialized way but is also affected in normal day-to-day activities would be covered by this part of the definition.

Day to day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. They also encompass the activities which are relevant to working 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. However, they do need to meet the long-term requirement.

### **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. In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act.

**What about people who know their condition is going to get worse over time?**

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition.