

# EQUALITY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Equality: Key Concepts**

#### *Chapter 2: Prohibited conduct*

#### *Section 13: Direct discrimination*

#### **Effect**

58. This section defines direct discrimination for the purposes of the Act.
59. Direct discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).
60. However, a different approach applies where the reason for the treatment is marriage or civil partnership, in which case only less favourable treatment because of the victim's status amounts to discrimination. It must be the victim, rather than anybody else, who is married or a civil partner.
61. This section uses the words "because of" where the previous legislation contains various definitions using the words "on grounds of". This change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act.
62. The section also provides that:
  - for age, different treatment that is justified as a proportionate means of meeting a legitimate aim is not direct discrimination;
  - in relation to disability it is not discrimination to treat a disabled person more favourably than a person who is not disabled;
  - racial segregation is always discriminatory;
  - in non-work cases, treating a woman less favourably because she is breast-feeding a baby who is more than six months old amounts to direct sex discrimination; and
  - men cannot claim privileges for women connected with pregnancy or childbirth.

#### **Background**

63. The section replaces the definitions of direct discrimination in previous legislation and is designed to provide a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings

the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation.

### **Examples**

- If an employer recruits a man rather than a woman because she assumes that women do not have the strength to do the job, this would be direct sex discrimination.
- If a Muslim shopkeeper refuses to serve a Muslim woman because she is married to a Christian, this would be direct religious or belief-related discrimination on the basis of her association with her husband.
- If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.
- If an employer advertising a vacancy makes it clear in the advert that Roma need not apply, this would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement.
- If the manager of a nightclub is disciplined for refusing to carry out an instruction to exclude older customers from the club, this would be direct age discrimination against the manager unless the instruction could be justified.

### **Section 14: Combined discrimination: dual characteristics**

#### **Effect**

64. This section provides for the discrimination prohibited by the Act to include direct discrimination because of a combination of two protected characteristics ("dual discrimination"). The protected characteristics which may be combined are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.
65. For a claim to be successful, the claimant must show that the less favourable treatment was because of the combination alleged, as compared with how a person who does not share either of the characteristics in the combination is or would be treated. A dual discrimination claim will not succeed where an exception or justification applies to the treatment in respect of either of the relevant protected characteristics - for example, where an occupational requirement in Schedule 9 (Work: exceptions) renders direct discrimination lawful.
66. The claimant does not have to show that a claim of direct discrimination in respect of each protected characteristic would have been successful if brought separately. A claimant is not prevented from bringing direct discrimination claims because of individual protected characteristics and a dual discrimination claim simultaneously (or more than one dual discrimination claim). Excluded from the scope of this section are circumstances involving disability discrimination in schools (claims in respect of which are heard by the Special Educational Needs and Disability Tribunals or equivalent specialist tribunals). This section enables a Minister of the Crown to make orders specifying further what a claimant does or does not need to show to prove dual discrimination or further restricting the circumstances in which dual discrimination is prohibited by the Act.
67. As with any other type of prohibited conduct under the Act, proceedings or allegations (among other activities) relating to dual discrimination will constitute a "protected act" for purposes of victimisation (section 27). Moreover, public bodies must have due regard to the need to eliminate unlawful dual discrimination as part of the public sector equality duty (section 149).

## **Background**

68. Previous legislation only allowed for claims alleging discrimination because of a single protected characteristic. This section allows those who have experienced less favourable treatment because of a combination of two relevant protected characteristics to bring a direct discrimination claim, such as where the single-strand approach may not succeed.

## **Examples**

- A black woman has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in question, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex combined to demonstrate that she has been subjected to less favourable treatment because of her employer's prejudice against black women.
- A bus driver does not allow a Muslim man onto her bus, claiming that he could be a "terrorist". While it might not be possible for the man to demonstrate less favourable treatment because of either protected characteristic if considered separately, a dual discrimination claim will succeed if the reason for his treatment was the specific combination of sex and religion or belief, which resulted in him being stereotyped as a potential terrorist.
- A black woman is charged £100 for insurance. As white men are only charged £50 for the same insurance, she alleges this is dual discrimination because of the combination of sex and race. By comparing the claimant's treatment with a white woman who also pays £100, or a black man who pays £50, the insurance company is able to demonstrate that the difference in premium is entirely due to sex, not race. The insurance exception in Schedule 3 means that insurance companies can lawfully set different premiums for women and men in certain circumstances so provided the exception applies in this case, the treatment does not constitute dual discrimination. The less favourable treatment is because of sex and an exception makes the sex discrimination lawful.

## ***Section 15: Discrimination arising from disability***

### **Effect**

69. This section provides that it is discrimination to treat a disabled person unfavourably not because of the person's disability itself but because of something arising from, or in consequence of, his or her disability, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.

### **Background**

70. This section is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.

## **Examples**

- An employee with a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim.
- The licensee of a pub refuses to serve a person who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of his impairment. If the licensee is able to show that she did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to discrimination arising from his disability.
- However, in the example above, if a reasonable person would have known that the behaviour was due to a disability, the licensee would have subjected the customer to discrimination arising from his disability, unless she could show that ejecting him was a proportionate means of achieving a legitimate aim.

## ***Section 16: Gender reassignment discrimination: cases of absence from work***

### **Effect**

71. This section provides that it is discrimination against transsexual people to treat them less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured. Transsexual people are also discriminated against in relation to absences relating to their gender reassignment if they are treated less favourably than they would be treated for absence for reasons other than sickness or injury and it is unreasonable to treat them less favourably.

### **Background**

72. This section is designed to replicate the effect of a similar provision in the Sex Discrimination Act 1975.

### **Example**

- A female to male transsexual person takes time off work to receive hormone treatment as part of his gender reassignment. His employer cannot discriminate against him because of his absence from work for this purpose.

## ***Section 17: Pregnancy and maternity discrimination: non-work cases***

### **Effect**

73. This section defines what it means to discriminate because of a woman's pregnancy or maternity, as distinct from her sex, in specified situations outside work. It protects a woman from discrimination because of her current or a previous pregnancy. It also protects her from maternity discrimination, which includes treating her unfavourably because she is breast-feeding, for 26 weeks after giving birth and provides that pregnancy or maternity discrimination as defined cannot be treated as sex discrimination.

### **Background**

74. This section is designed to replicate the effect of similar provisions in the Sex Discrimination Act 1975 and extends the protection to cover discrimination in relation to public functions, education, and to associations, where no such protection previously existed.

## **Examples**

- A café owner must not ask a woman to leave his café because she is breast-feeding her baby.
- A shopkeeper must not refuse to sell cigarettes to a woman because she is pregnant.
- A school must not prevent a pupil taking an exam because she is pregnant.

## **Section 18: Pregnancy and maternity discrimination: work cases**

### **Effect**

75. This section defines what it means to discriminate in the workplace because of a woman's pregnancy or pregnancy-related illness, or because she takes or tries to take maternity leave. The period during which protection from these types of discrimination is provided is the period of the pregnancy and any statutory maternity leave to which she is entitled. During this period, these types of discrimination cannot be treated as sex discrimination.

### **Background**

76. This section is designed to replicate the effect of similar provisions in the Sex Discrimination Act 1975.

### **Examples**

- An employer must not demote or dismiss an employee, or deny her training or promotion opportunities, because she is pregnant or on maternity leave.
- An employer must not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment.

## **Section 19: Indirect discrimination**

### **Effect**

77. This section defines indirect discrimination for the purposes of the Act.
78. Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it.
79. Indirect discrimination can also occur when a policy would put a person at a disadvantage if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage, this may also be indirect discrimination.
80. Indirect discrimination applies to all the protected characteristics, apart from pregnancy and maternity.

### **Background**

81. This section largely replaces similar provisions in previous legislation. It applies the EU definition of indirect discrimination, replacing pre-existing domestic definitions in the Sex Discrimination Act 1975 and the Race Relations Act 1976, to ensure uniformity of protection across all the protected characteristics in all areas where it applies. However, the extension of indirect discrimination to disability is new, coming after consultation following the judgment of the House of Lords in the case of *London Borough of*

*These notes refer to the Equality Act 2010 (c.15)  
which received Royal Assent on 8 April 2010*

*Lewisham v Malcolm* [2008] UKHL 43, which concerned the interpretation of the provision on disability-related discrimination in the Disability Discrimination Act 1995.

## **Examples**

- A woman is forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs. This would put women (who are shown to be more likely to be responsible for childcare) at a disadvantage, and the employer will have indirectly discriminated against the woman unless the practice can be justified.
- An observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on Saturdays. The company will have indirectly discriminated against the engineer unless the practice can be justified.

## **Section 20: Duty to make adjustments**

### **Effect**

82. This section defines what is meant by the duty to make reasonable adjustments for the purposes of the Act and lists the Parts of the Act which impose the duty and the related Schedules which stipulate how the duty will apply in relation to each Part. The duty comprises three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison with non-disabled people. The first requirement covers changing the way things are done (such as changing a practice), the second covers making changes to the built environment (such as providing access to a building), and the third covers providing auxiliary aids and services (such as providing special computer software or providing a different service).
83. The section makes clear that where the first or third requirements involves the way in which information is provided, a reasonable step includes providing that information in an accessible format.
84. It sets out that under the second requirement, taking steps to avoid the disadvantage will include removing, altering or providing a reasonable means of avoiding the physical feature, where it would be reasonable to do so.
85. It also makes clear that, except where the Act states otherwise, it would never be reasonable for a person bound by the duty to pass on the costs of complying with it to an individual disabled person.

### **Background**

86. This section replaces similar provisions in the Disability Discrimination Act 1995. However, the Act makes some changes to provide consistency across the reasonable adjustment provisions. It contains only one threshold for the reasonable adjustment duty – “substantial disadvantage” – in place of the two thresholds in the Disability Discrimination Act 1995. It also reflects current practice by applying the third requirement explicitly to employment. And it introduces consistency of language by referring to “provision, criterion or practice” rather than “practice, policy or procedure” used in some provisions in the Disability Discrimination Act 1995. It also introduces greater transparency with the express references to providing information in accessible formats and to not passing on the costs of an adjustment which are explained above.

## **Examples**

- A utility company knows that significant numbers of its customers have a sight impairment and will have difficulty reading invoices and other customer communications in standard print, so must consider how to make its communications more accessible. As a result, it might provide communications in large print to customers who require this.
- A bank is obliged to consider reasonable adjustments for a newly recruited financial adviser who is a wheelchair user and who would have difficulty negotiating her way around the customer area. In consultation with the new adviser, the bank rearranges the layout of furniture in the customer area and installs a new desk. These changes result in the new adviser being able to work alongside her colleagues.
- The organiser of a large public conference knows that hearing-impaired delegates are likely to attend. She must therefore consider how to make the conference accessible to them. Having asked delegates what adjustments they need, she decides to engage BSL/English interpreters, have a palantypist and an induction loop to make sure that the hearing-impaired delegates are not substantially disadvantaged.

## **Section 21: Failure to comply with duty**

### **Effect**

87. This section has the effect that a failure to comply with any one of the reasonable adjustment requirements amounts to discrimination against a disabled person to whom the duty is owed. It also provides that, apart from under this Act, no other action can be taken for failure to comply with the duty.

### **Background**

88. This section replaces similar provisions in the Disability Discrimination Act 1995.

### **Examples**

- An employee develops carpal tunnel syndrome which makes it difficult for him to use a standard keyboard. The employer refuses to provide a modified keyboard or voice-activated software which would overcome the disadvantage. This could be an unlawful failure to make a reasonable adjustment which would constitute discrimination.
- A private club has a policy of refusing entry to male members not wearing a collar and tie for evening events. A member with psoriasis (a severe skin condition which can make the wearing of a collar and tie extremely painful) could bring a discrimination claim if the club refused to consider waiving this policy for him.
- A visually-impaired prospective tenant asks a letting agent to provide a copy of a tenancy agreement in large print. The agent refuses even though the document is held on computer and could easily be printed in a larger font. This is likely to be an unlawful failure to make a reasonable adjustment which would constitute discrimination.

## **Section 22: Regulations**

### **Effect**

89. This section provides a power for a Minister of the Crown to make regulations about a range of issues relating to the reasonable adjustment duty, such as the circumstances in which a particular step will be regarded as reasonable. This power also allows amendment of the Schedules referred to in section 20(13).

### **Background**

90. This section replaces similar provisions in the Disability Discrimination Act 1995.

## **Example**

- Regulations could be made about what is and what is not included within the meaning of a “provision, criterion or practice” if, for example, research indicated that despite statutory codes of practice there was quite a high level of uncertainty among employers and service providers about the extent of the duty and how it applied.

## **Section 23: Comparison by reference to circumstances**

### **Effect**

91. This section provides that like must be compared with like in cases of direct, dual or indirect discrimination. The treatment of the claimant must be compared with that of an actual or a hypothetical person – the comparator – who does not share the same protected characteristic as the claimant (or, in the case of dual discrimination, either of the protected characteristics in the combination) but who is (or is assumed to be) in not materially different circumstances from the claimant. In cases of direct or dual discrimination, those circumstances can include their respective abilities where the claimant is a disabled person.
92. The section also enables a civil partner who is treated less favourably than a married person in similar circumstances to bring a claim for sexual orientation discrimination.

### **Background**

93. The section replicates similar provisions in previous legislation but also accommodates the new concept of dual discrimination.

### **Examples**

- A blind woman claims she was not shortlisted for a job involving computers because the employer wrongly assumed that blind people cannot use them. An appropriate comparator is a person who is not blind – it could be a non-disabled person or someone with a different disability – but who has the same ability to do the job as the claimant.
- A Muslim employee is put at a disadvantage by his employer’s practice of not allowing requests for time off work on Fridays. The comparison that must be made is in terms of the impact of that practice on non-Muslim employees in similar circumstances to whom it is (or might be) applied.

## **Section 24: Irrelevance of alleged discriminator's characteristics**

### **Effect**

94. This section provides that it is no defence to a claim of direct or dual discrimination that the alleged discriminator shares the protected characteristic (or one or both of the protected characteristics in a dual discrimination claim) with the victim. The discriminator will still be liable for any unlawful discrimination. The wording of the section is broad enough to cover cases of discrimination based on association or perception.

### **Background**

95. Previous legislation only expressly provided that it was no defence to a claim of direct discrimination that the alleged discriminator shared the same religion or belief as the victim. This section makes clear that the same principle applies, as at present, for other protected characteristics and makes similar provision in relation to the new concept of dual discrimination.



### **Example**

- An employer cannot argue that because he is a gay man he is not liable for unlawful discrimination for rejecting a job application from another gay man because of the applicant's sexual orientation.

### **Section 25: References to particular strands of discrimination**

#### **Effect**

96. This section sets out what is meant by references to the types of discrimination referred to in the Act, so that references elsewhere in the Act to age, marriage and civil partnership, race, religious or belief-related, sex or sexual orientation discrimination, include references to both direct and indirect discrimination because of each of those characteristics respectively.
97. As well as direct and indirect discrimination, references to disability discrimination also include references to discrimination arising from disability and to a failure to comply with a duty to make reasonable adjustments; and references to gender reassignment discrimination also include discrimination within section 16 (gender reassignment discrimination: cases of absence from work). Finally, references to pregnancy and maternity discrimination have the meanings derived from sections 17 and 18.

### **Section 26: Harassment**

#### **Effect**

98. This section defines what is meant by harassment for the purposes of the Act. There are three types of harassment. The first type, which applies to all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership, involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity. The second type is sexual harassment which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment. The third type is treating someone less favourably because he or she has either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.

#### **Background**

99. Previous legislation provided freestanding protection against harassment, but the first type of harassment described above was not defined in the same way for all the different protected characteristics to which it applied. In determining the effect of the unwanted conduct, courts and tribunals will continue to be required to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

#### **Examples**

- A white worker who sees a black colleague being subjected to racially abusive language could have a case of harassment if the language also causes an offensive environment for her.
- An employer who displays any material of a sexual nature, such as a topless calendar, may be harassing her employees where this makes the workplace an offensive place to work for any employee, female or male.

- A shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for promotion which she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim of harassment.

### **Section 27: Victimisation**

#### **Effect**

100. This section defines what conduct amounts to victimisation under the Act. It provides that victimisation takes place where one person treats another badly because he or she in good faith has done a "protected act", for example taken or supported any action taken for the purpose of the Act, including in relation to any alleged breach of its provisions. It also provides that victimisation takes place where one person treats another badly because he or she is suspected of having done this or of intending to do this.
101. A person is not protected from victimisation where he or she maliciously makes or supports an untrue complaint.
102. Only an individual can bring a claim for victimisation.

#### **Background**

103. This section replaces similar provisions in previous legislation. However, under the Act victimisation is technically no longer treated as a form of discrimination, so there is no longer a need to compare treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act.

#### **Examples**

- A woman makes a complaint of sex discrimination against her employer. As a result, she is denied promotion. The denial of promotion would amount to victimisation.
- A gay man sues a publican for persistently treating him less well than heterosexual customers. Because of this, the publican bars him from the pub altogether. This would be victimisation.
- An employer threatens to dismiss a staff member because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation.
- A man with a grudge against his employer knowingly gives false evidence in a colleague's discrimination claim against the employer. He is subsequently dismissed for supporting the claim. His dismissal would not amount to victimisation because of his untrue and malicious evidence.