

## 9. Equality considerations and duties for governors

### Background

1. This chapter is intended to operate as a general guide to the law and not as a comprehensive legal guide for governors. Governing bodies should ensure that schools comply with all aspects of discrimination and equalities law. The best way to do this is to ensure that principles of fairness and equality are applied in everything that the school does.
2. The Equality Act 2010 (the 2010 Act) consolidates and replaces the previous discrimination legislation for Wales, England and Scotland. It also strengthens the law to support progress on equality. Detailed guidance has been made available for schools.

### The protected characteristics

3. The 2010 Act protects people from discrimination based on protected characteristics. The protected characteristics are as follows:
  - Age
  - Disability
  - Gender reassignment
  - Marriage and civil partnership
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex
  - Sexual orientation.

### General prohibitions

4. The governing body of a school must not discriminate in their roles as educators or employers against any person, including:
  - job applicants
  - existing members of staff
  - a child/young person seeking admission to the school
  - existing pupils
  - applicants for the role of governor
  - applicants for a position on a committee convened by the governing body
5. It must not discriminate either directly or indirectly, harass or victimise, on the grounds of any of the protected characteristics.

## Definitions of discrimination

6. Under the law, there are different categories of discrimination, with differences in the legal framework surrounding them.
7. Direct discrimination happens when a person is treated less favourably than others are or would be treated in comparable circumstances because of a protected characteristic. Direct discrimination is generally unlawful. However, the 2010 Act sets out certain circumstances where it is not discriminatory to treat individuals with a protected characteristic differently to those who do not hold such a characteristic. For example, where the protected characteristic is age, a person does not discriminate against an individual if they can show their treatment of that individual is a proportionate means of achieving a legitimate aim. Or where the protected characteristic is disability, a person does not discriminate against an individual who does not have a disability only because they treat or would treat disabled persons more favourably than they treat that individual.
8. Discrimination by association is a form of discrimination or harassment that occurs if a person treats an individual who does not have a protected characteristic less favourably because of that individual's association with another person who does have a protected characteristic.
9. Discrimination by perception is a form of direct discrimination where an individual who is wrongly thought to have a protected characteristic is treated less favourably because they are thought to hold that characteristic.
10. Indirect discrimination occurs when a provision, criterion or practice is applied equally to all but has the effect, or would have the effect, of placing members of one or more protected groups at a particular disadvantage as a result, when compared to those who do not hold the protected characteristic. Indirect discrimination is unlawful unless it can be shown to be a proportionate means of achieving a legitimate aim. An example might be a physical strength test, which is likely to unlawfully discriminate against women in relation to a job that involves teaching, but might be justified in relation to a non-teaching job that involves substantial heavy lifting.
11. Combined discrimination takes place when a person is treated less favourably than others are or would be treated because they have a combination of two of the specified protected characteristics.
12. Discrimination arising from disability occurs when a disabled person is treated unfavourably not because of the person's disability but because of something arising from, or in consequence of, the person's disability, such as the need to take a period of disability related absence, and the person who subjects them to the unfavourable treatment cannot show that it is a proportionate means of achieving a legitimate aim.

13. Victimisation is the practice of subjecting a person to a detriment because they have taken action in respect of discrimination which amounts to a protected act, for example by bringing a complaint of discrimination or giving evidence for a colleague who has done so. Victimisation is also unlawful.
14. Harassment is any unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

### **Discrimination against job applicants or existing members of staff**

15. The governing body must not discriminate against an applicant for a post at a school, or against an existing member of staff, on grounds of any of the protected characteristics, whether directly or indirectly. In relation to disability, there is also an obligation to make reasonable adjustments in order to remove the substantial disadvantage created by the disability.
16. Governors need to ensure that there is no unlawful discrimination when carrying out their duties, including in relation to matters such as:
  - recruitment procedures and selection standards
  - conditions of employment or appointment
  - opportunities for promotion
  - transfer
  - training or other benefits
  - discipline and grievance procedures
  - dismissals
  - appeals

### **Occupational requirements**

17. There are specific legal provisions which recognise that there may be some limited, narrow circumstances where employers will be entitled to defend a claim of less favourable treatment in connection with a protected characteristic on the basis that the treatment was a proportionate means of achieving a legitimate aim. The burden of establishing such defence rests with the employer.
18. The governing body of a school must not discriminate against a person in the arrangements it makes for appointing governors, or in its conduct with governors once appointed.
19. Governing bodies should ensure vacancies are publicised in a way which will reach under-represented groups, and be explicit that the governing body welcomes applicants with particular characteristics (e.g., from an ethnic minority, the LGBTQ+ community, of a particular gender, with a disability, from young people).

## **Discrimination against a child seeking admission or an existing pupil**

20. Part 6 of the 2010 Act deals specifically with education. Chapter 1 relates to schools. For the purposes of that chapter only, the protected characteristics of age, marriage and civil partnership do not apply.

21. The governing body of a school must not discriminate against a person:

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

22. The governing body must not discriminate against a pupil:

- in the way in which 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 allowing the pupil access to a benefit, facility or service
- by excluding the pupil from school
- by subjecting the pupil to any other detriment.

23. The governing body must not harass a pupil or a person who has applied for admission as a pupil. A pupil's gender reassignment, religion or belief, or sexual orientation will not be a relevant protected characteristic for the purpose of claims of harassment in a school setting.

24. The governing body must not victimise a pupil.

25. The above matters cover all activities covering school life and mean that everything a school does must be non-discriminatory and requires schools to review their practices and procedures to ensure that they do not discriminate against pupils.

26. The governing body also has a duty to take such steps, as it is reasonable to take, to avoid as far as possible by reasonable means, the substantial disadvantage which a disabled pupil experiences, or may experience, because of disability. This is known as the reasonable adjustment duty. It means that schools must anticipate where barriers to learning lie and take action to remove them as far as they are able. Schools should not wait until a disabled pupil has arrived or been disadvantaged before making reasonable adjustments.

27. The duty to make reasonable adjustment in relation to pupils may not require major alterations to the physical features of the school to be made, but this is a matter which must nonetheless be considered as part of the school's planning duties under the 2010 Act.

## The public sector equality duty

### The general duty

28. Section 149 of the 2010 Act imposes a general duty on the governing body of a school to have due regard to the need to:
- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the 2010 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.
29. Having due regard means consciously thinking about the three aims of the general duty as part of the process of decision making. This means that consideration of equality issues must be taken into account by governing bodies when making decisions or carrying out any other functions.
30. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
  - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
  - encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
31. The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
32. Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and those who do not share it involves having due regard, in particular, to the need to tackle prejudice, and to promote understanding.
33. The 2010 Act expressly states that this duty may involve treating some persons more favourably than others, but that is not to be taken as permitting conduct that would otherwise be prohibited under the Act.

## Specific duties

34. The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (the 2011 Regulations) impose specific duties on governing bodies to enable better performance of the general public sector equality duty.

35. The 2011 Regulations place the following requirements upon governing bodies:

- to publish its equality objectives. The objectives must be designed to enable the governing body to better perform the general duty. If an equality objective is not published in respect of one or more of the protected characteristics, the governing body must publish its decision not to do so. The governing body must review its equality objectives within four years of their initial publication and at least once every four years subsequently. The equality objectives may be revised or remade by the governing body at any time. If the governing body revises an objective without remaking it, then the revision must be published as soon as possible
- to publish a statement which sets out the steps it has taken or intends to take in order to achieve each equality objective and the anticipated timescales involved. If an equality objective is revised or remade by the governing body, it must either amend the statement or publish a new one
- to make appropriate arrangements to monitor its progress in order to fulfil each objective and to monitor the effectiveness of the steps it has taken to fulfil each objective
- to give due regard to relevant information that it holds when considering and designing its equality objectives
- to seek the involvement of those persons that it considers represent the interests of persons who share one or more of the protected characteristics and who have an interest in the way the governing body carries out its functions. This requirement applies to the following activities:
  - considering and designing equality objectives
  - carrying out an assessment of whether there are things or that could be done that contribute or would be likely to contribute to a governing body's compliance with the general duty
  - carrying out an assessment of the likely impact of the proposed policies and practices, of policies or practices that it has decided to review and any proposed revisions to those policies and practices on compliance with the general duty
  - publishing or reviewing a Strategic Equality Plan.

The governing body may also involve or consult such other persons as it considers appropriate.

- to take all reasonable steps to ensure that any documents or information that the governing body is required to publish are accessible by persons who share one or more of the protected characteristics. This means that a

governing body must take into account all of a person's protected characteristics, and if there is a range of steps that it would be reasonable for the governing body to take to make the documents or information accessible then it must take all of those steps

- to make appropriate arrangements to ensure that it identifies the relevant information that it holds and identifies and subsequently collects the relevant information that it does not hold
- to carry out an assessment in order to identify relevant information which identifies whether there are things being done by the governing body that contribute to its compliance (or otherwise) with the general duty and things that could be done to contribute to its compliance. In carrying out such an assessment, the governing body must have due regard to any relevant information that it has already identified, or collected and holds. The governing body should look for evidence (relevant information) both internally and externally which may be used, for example, in equality impact assessments
- to make arrangements in order to assess the likely impact of proposed policies and practices on its ability to comply with the general duty, as well as the impact of any policy or practice that it has decided to review or any proposed revision to a policy or practice. There must be arrangements in place for the publication of reports regarding these assessments where they demonstrate that there is likely to be a substantial impact on an authority's ability to comply with the general duty. Also, the governing body must monitor the impact of its policies and practices on its ability to comply with the general duty
- in each year, to collect specified employment information related to the school's employees and publish that information. This information may be set out in the governing body's annual report
- to make such arrangements as it considers appropriate for promoting amongst the school's employees knowledge and understanding of the general duties and the additional duties which flow from it
- when considering what its equality objectives should be, the governing body must have due regard to the needs in respect of the school's employees to have equality objectives which address the causes of any pay differences. Those pay differences are between those that do share a protected characteristic and those that do not
- to publish an action plan which sets out any policy it has relating to the need to address the causes of any gender pay difference and any gender pay equality objective that has been published by the governing body
- to make a Strategic Equality Plan (SEP). The SEP is intended to be a central vehicle for the various matters required by the 2011 Regulations so that there can be a single point of access for the public. The SEP must contain a

statement setting out a description of the governing body, its equality objectives, details of the steps it has taken or intends to take in order to fulfil those objectives, the timescale for the fulfilment of the objectives, and details of arrangements it has made or intends to make to comply with the 2011 Regulations. The SEP can be revised or remade at any time, though it must be published as soon as possible after it has been made or remade. If the SEP has been revised but not remade, the governing body must publish its revisions. The SEP itself may form part of another published document. The governing body is under an obligation to keep its SEP under review

- to publish a report in respect of each reporting period (1 April to 31 March). The report must not be published later than 31 March in the reporting period in question. This report may form part of another published document.

### **Compliance with the public sector equality duty**

36. The Equality and Human Rights Commission (EHRC) has powers to enforce the general and specific duties imposed on governing bodies by issuing a compliance notice to order the governing body to discharge its duties within a certain timescale.

### **Complaints**

#### **Employment**

37. The local authority or the governing body (whichever is treated as the employer for the purposes of Act) may be legally responsible for discriminatory acts against employees or applicants for jobs, including acts carried out by the headteacher or other members of staff. Complaints about discrimination should be taken up first with the employer. If the matter is not resolved through the employer's complaints procedures the complainant may decide to make a legal claim to an employment tribunal.

#### **School pupils**

38. Complaints about discrimination against pupils should also be taken up first with the headteacher. If the issue is not resolved, it may then be referred to the governing body and/or the local authority. The governing body of a maintained school is required to have a complaints procedure to deal with all complaints relating to the school. If the school or LA cannot resolve the problem, a parent or pupil may refer the complaint to an equalities mediation service or take legal action.

39. The Welsh Ministers can give directions, using powers under the School Standards and Organisation (Wales) Act 2013, to require a maintained school in Wales to comply with its obligations under the Equality Act 2010. This enables the Welsh Ministers to require a school to stop a discriminatory practice or policy even if no complaint has been made.



## Legal proceedings – alleged discrimination in schools

40. If a complaint is not resolved through internal complaints procedures or mediation, a pupil or their parent may decide to make a legal claim against the school. Where the pupil or parent makes a claim depends on the type of discrimination they allege has taken place:

- claims about discrimination other than disability are made to a county court
- disability discrimination claims about admissions to, or permanent exclusion from, a maintained school, are made to an independent education appeal panel
- all other disability discrimination claims, including all claims against independent schools, in Wales are made to the Special Educational Needs Tribunal for Wales (SENTW).

### Who is the employer?

41. Where the school is a community school or a community special school, the LA is the employer of all staff.

42. However, even if the local authority is technically the employer of the school staff, the governing body of a school with a delegated budget has powers over the appointment, suspension, discipline and dismissal of staff. Accordingly, where complaints are made about any discrimination concerning the exercise of those powers, it will normally be the governing body that is treated as the employer.

43. It follows that the governing body of a school with a delegated budget will generally be the respondent in employment tribunal discrimination cases brought by members of staff or job applicants. However, any award of compensation or costs made by a tribunal would have to be paid by the LA where it is the actual employer of the school staff. See the [Education \(Modification of Enactments Relating to Employment\) \(Wales\) Order 2006](#) for further detail.

## Guidance

The Equality and Human Rights Commission ([EHRC](#)) has responsibilities in relation to the entire body of discrimination law.

The Codes of Practice that are referred to in this chapter are all statutory Codes of Practice. While the Codes do not in themselves impose legal obligations, they will be admissible as evidence in any proceedings brought under the relevant Acts. If any provision of a Code appears to the court or tribunal to be relevant to any question arising in the proceedings, it must be taken into account in determining that question. The Codes are not an authoritative statement of the law, but following the guidance in a Code may help to avoid adverse judgement in any proceedings.

Other guidance available is not statutory but has been provided (some specifically for schools) to aid understanding of the relevant legislation.

[ACAS](#) is one of the organisations that offers advice to employers on complying with anti-discrimination legislation. As it points out, where effective systems are in place to ensure that an organisation's staff are treated fairly and with consideration, it is likely to encounter few problems in complying with anti-discrimination legislation. The same applies to the treatment of all members of the school community.

## The Law

[Equality Act 2010](#)

[The Equality Act 2010 \(Statutory Duties\) \(Wales\) Regulations 2011](#)