

# Technical Guidance for Schools in Scotland

This Technical Guidance applies to the provisions in the Equality Act 2010 that were brought into force on 1 October 2010, and the extension of reasonable adjustments to include auxiliary aids and services that was brought into force on 1 September 2012.

# Contents

<b>Foreword .....</b>	<b>5</b>
<b>Background.....</b>	<b>6</b>
Status of the Technical Guidance .....	6
Scope of the Technical Guidance .....	7
Role of the Commission.....	7
Human rights .....	8
What is this Technical Guidance about?.....	8
Who is this Technical Guidance for? .....	9
How to read this Guidance .....	9
<b>Chapter 1: Overview of the schools provisions of the Act .....</b>	<b>11</b>
Who has legal obligations?.....	11
Who is responsible for ensuring that a school does not breach the Act?.....	12
Who is protected?.....	12
What is unlawful?.....	13
What is unlawful discrimination?.....	13
What else is unlawful? .....	14
Are there any exceptions to the schools provisions?.....	15
Positive action .....	16
Interaction with other legislation and responsibilities .....	16
Frequently asked questions (FAQs) .....	17
<b>Chapter 2: Admissions.....</b>	<b>19</b>
How do the Act’s provisions fit in with admissions requirements? .....	19
Who is the responsible body?.....	20
What does the Act say about admissions? .....	20

Arrangements for deciding who is offered admission .....	21
Terms on which the school offers to admit the person as a pupil .....	23
Not admitting the person as a pupil .....	23
Selective schools and academic ability.....	24
Schools conducted in the interest of a denominational body .....	26
Single-sex schools.....	27
Single-sex boarding at schools.....	27
Frequently asked questions (FAQs) .....	28
<b>Chapter 3: Providing education and access to benefits, facilities and services for pupils .....</b>	<b>29</b>
What does the Act say? .....	29
What is covered? .....	29
Provision of education and access to a benefit, facility or service .....	30
What is not covered? .....	37
Subjecting a pupil to any other detriment.....	39
Pregnancy and maternity discrimination .....	40
Frequently asked questions (FAQs) .....	41
<b>Chapter 4: Exclusions from school.....</b>	<b>43</b>
How do the Act’s requirements fit in with exclusions legislation? .....	43
What does the Act say about exclusions? .....	43
What is unlawful under the Act? .....	44
Disabled pupils .....	45
Pregnancy and maternity discrimination .....	46
Frequently asked questions (FAQs) .....	47
<b>Chapter 5: Key concepts.....</b>	<b>48</b>
What is discrimination?.....	48
Harassment .....	63
Victimisation .....	67
Obligations to former pupils .....	69

Liability for employees, agents and others.....	70
Personal liability of employees and agents.....	71
Instructing and causing discrimination.....	72
Aiding contraventions .....	72
Protected characteristics .....	73
Frequently asked questions (FAQs) .....	78
<b>Chapter 6: Reasonable adjustments for disabled pupils .....</b>	<b>80</b>
What is the reasonable adjustments duty? .....	80
To whom does the duty apply? .....	82
What is meant by ‘substantial disadvantage’? .....	83
What does the duty cover? .....	84
What is meant by ‘reasonable’ steps .....	84
Frequently asked questions (FAQs) .....	95
Case studies.....	100
<b>Chapter 7: Positive action.....</b>	<b>103</b>
What is ‘positive action’? .....	103
What does the Act say? .....	104
Basic requirements for taking positive action.....	105
Implementing and monitoring positive action.....	110
Positive action and the public sector equality duty.....	112
Frequently asked questions (FAQs) .....	112
<b>Chapter 8: Dispute resolution and enforcement.....</b>	<b>114</b>
Resolving disputes.....	114
Obtaining information (‘the questions procedure’) .....	115
Time limits .....	116
Where claims are made.....	117
Claims presented in the Sheriff court.....	117
Additional Support Needs Tribunal claims.....	118

The Commission.....	119
<b>Chapter 9: Exceptions.....</b>	<b>120</b>
Residential schools.....	120
Schools that are charities .....	121
General exceptions that apply across the Act.....	122
Statutory authority.....	123
<b>Contacts .....</b>	<b>125</b>

# Foreword

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

The Equality and Human Rights Commission has a key role to play in bringing the Act to life. It is committed to a vision of a modern Britain in which everyone is treated with dignity and respect, and all have an equal chance to succeed.

This is why the Commission is publishing a range of guidance that will give individuals, businesses, employers and public authorities the information that they need to understand the Act, to exercise their rights and to meet their responsibilities in the most straightforward way.

This Technical Guidance outlines the requirements of the Equality Act 2010 for schools in relation to the provision of education and access to benefits, facilities or services, both educational and non-educational. It provides an authoritative, comprehensive and technical guide to the detail of the law.

The Guidance will be invaluable to all those working in schools, to lawyers, advocates, courts and tribunals, and to everyone who needs to understand the law in depth or to apply it in practice.

This Guidance is the result of extensive consultation and discussions with colleagues from across the education sector, including providers and other stakeholders, government departments and trade unions. Their contributions have enriched and improved the text immeasurably, and the Commission is grateful for their help.

More information about the full range of Equality Act guidance can be found online at: [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

# Background

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

An important purpose of the Act is to 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 Technical Guidance explains.

As well as consolidating existing law, the Act makes discrimination unlawful in some 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.

Different areas of activity are covered under different parts of the Act. An education provider will have duties under more than one Part of the Act, where, for example, it employs people or provides services, as well as in relation to its role in providing education to students.

## Status of the Technical Guidance

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The Equality and Human Rights Commission ('the Commission') has prepared and issued this Technical Guidance on the basis of its powers to provide information and advice under s13 of the Equality Act 2006 (EA 2006).

This Guidance is not a statutory code issued under EA 2006, s14, but it may be used as evidence in legal proceedings. If education providers follow this Guidance, it may help them to avoid the court making an adverse decision in such proceedings.

## Scope of the Technical Guidance

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This Technical Guidance covers discrimination in schools, as set out in Chapter 1 of Part 6 of the Act.

Chapter 1 of Part 6 is based on the principle that people should not be discriminated against in schools provision on the basis of any of the protected characteristics set out in the Act, when seeking admission to schools, when accessing the education and benefits provided, or by being excluded from school. This does not necessarily mean that education providers should treat everybody in exactly the same way: in some circumstances, an education provider will need to deliver in a range of ways to meet the differing needs of people so that all receive the same standard of education as others as far as this is possible. This Technical Guidance explains the steps that education providers should take to ensure that they do not discriminate.

The Guidance sets out the Act's requirements of 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 the school provides, or offers to provide, for pupils.

Guidance available online at the Commission website explains the operation of the public sector equality duty as it applies to schools for Scotland:

[www.equalityhumanrights.com/uploaded\\_files/PSD/technical\\_guidance\\_on\\_the\\_public\\_sector\\_equality\\_duty\\_scotland.pdf](http://www.equalityhumanrights.com/uploaded_files/PSD/technical_guidance_on_the_public_sector_equality_duty_scotland.pdf)

The duties of schools as employers, bodies that carry out public functions and service providers are not covered by Part 6 of the Act. They are set out in the separate Employment Code of Practice and the Code of Practice on Services, Public Functions and Associations, available online at:

[www.equalityhumanrights.com/uploaded\\_files/EqualityAct/servicescode.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf)

This Technical Guidance applies to Scotland. There is separate technical guidance that applies to schools in England and Wales. Education provided outside Britain may be covered by the Act.

## Role of the Commission

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



The Commission has duties to promote human rights and equality, and to provide advice about the law, so that discrimination is avoided. It also has powers to enforce discrimination law in some circumstances.

## Human rights

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Public authorities, and other organisations when they are carrying out ‘functions of a public nature’, 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’).

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 or not a public authority is involved in the case. So, in any discrimination claim or any claim relating to the public sector equality duty arising under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.

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.

## What is this Technical Guidance about?

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This Technical Guidance explains the legal obligations set out in Chapter 1 of Part 6 of the Equality Act 2010. The provisions in Chapter 1 and explained in this Guidance apply to all schools in Scotland, irrespective of how they are managed or funded.

Schools have legal obligations under the Act not to discriminate against, harass or victimise pupils. Schools had legal obligations under previous equality legislation. The Act provides a modern, single legal framework and a clearer, more streamlined law that will be more effective at tackling disadvantage and discrimination. Because the Act harmonises the previous equality legislation, schools are already carrying out much of what is required of them.

The main changes for schools are:

- new protected characteristics, including:
  - gender reassignment; and
  - pregnancy and maternity;
- new positive action provisions;
- new provisions protecting pupils from victimisation for action taken by their parent or sibling;

- a new form of disability discrimination – ‘discrimination arising from disability’; and
- extension of the reasonable adjustment duty to include auxiliary aids and services (effective from September 2012).

This Technical Guidance provides an overview of the obligations that the Act places on schools in relation to pupils and the provision of education, referred to throughout as the ‘schools provisions’. It will help school leaders to understand and comply with the Act, and it suggests steps that schools may wish to take to ensure they are meeting their obligations under the Act. It will help pupils and their parents to understand obligations under the Act. It will also be useful to others who work with the Act such as lawyers, other advisers, courts and tribunals.

The focus of this Technical Guidance is on the practical implementation of the Act in schools. It includes examples showing how the Act applies in contexts that will be familiar to schools. It also gives answers to frequently asked questions (FAQs).

## Who is this Technical Guidance for?

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This Technical Guidance is for education authorities, head teachers and staff at all schools (including publicly funded schools, grant-aided schools, independent schools, special schools, and preschools and nursery schools), as well as for parents and pupils.

## How to read this Guidance

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Chapter 1 gives an overview of the schools provisions of the Act.

Chapter 2 explains the Act’s provisions in relation to schools admissions.

Chapter 3 explains the Act’s provisions in relation to schools providing education and access to benefits, facilities and services for pupils.

Chapter 4 explains the Act’s provisions in relation to exclusions from school.

Chapter 5 explains the key concepts in the Act, including different forms of discrimination, harassment and victimisation.

Chapter 6 explains the duty to make reasonable adjustments for disabled pupils.

Chapter 7 explains the positive action provisions of the Act.

Chapter 8 deals with dispute resolution and enforcement of the Act.

Chapter 9 explains exceptions that apply generally across the Act and how they apply specifically to schools.



# Chapter 1: Overview of the schools provisions of the Act

## Who has legal obligations?

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- |     |  |                        |
|-----|--|------------------------|
| 1.1 | All schools in Scotland, irrespective of how they are funded or managed, have obligations under the Act. This includes:  | <b>ss85(7),<br/>89</b> |
|     | <ul style="list-style-type: none"><li>• Public schools – that is, schools under the management of an education authority</li><li>• Grant-aided schools</li><li>• Independent schools</li><li>• Special schools</li><li>• Nursery schools</li></ul>   |                        |
| 1.2 | Education authorities have obligations under the schools provisions where they are the responsible body for the school.  |                        |
| 1.3 | Although education authorities carry out many education-related functions, most of these are not covered by the education provisions of the Act in Part 6, but by Part 3, which places obligations on service providers and those carrying out public functions.   |                        |
| 1.4 | Nursery schools managed by an education authority and nursery classes provided within a school have the same obligations as schools. Independent nurseries are covered by Part 3 of the Act as service providers.  | <b>ss85(7),<br/>89</b> |
| 1.5 | The duties of education authorities and nursery schools as providers are set out in the separate Code of Practice on Services, Public Functions and Associations, available online at:<br><a href="http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf">www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf</a> |                        |

## Who is responsible for ensuring that a school does not breach the Act?

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- 1.6 It is the responsible body of a school that is liable for any breaches of the Act. **s85(9)**
- The responsible body for a public school is the education authority.
  - The responsible body for a grant-aided school is its managers.
  - The responsible body for an independent school is the proprietor.
- 1.7 The responsible body for a school is liable for the actions of its employees and agents of the school unless it can show that it took 'all reasonable steps' to prevent the discrimination, harassment or victimisation from taking place. This responsibility does not extend to cover the actions of pupils beyond the responsibility that a school already has for the actions of its pupils. In some circumstances, an employee or agent of the school may be personally liable for acts of discrimination, harassment or victimisation.
- This is explained in more detail in [Chapter 5](#).
- 1.8 Throughout this Technical Guidance, the term 'school' is used for ease to refer to anyone who has duties under the schools provisions of the Act.

## Who is protected?

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- 1.9 The Act protects pupils from discrimination and harassment based on 'protected characteristics'. **ss85, 89**
- 1.10 The protected characteristics under the schools provisions are:
- Disability
  - Gender reassignment
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex
  - Sexual orientation

Protected characteristics are explained in more detail in [Chapter 5](#).

- 1.11 The Act protects a person applying for admission to a school, a pupil at a school and, in limited circumstances, a former pupil of a school.

## What is unlawful?

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- 1.12 It is unlawful for a school to discriminate against an applicant or pupil in relation to:

- Admissions
- The provision of education
- Access to any benefit, facility or service
- Exclusions
- Any other detriment

- 1.13 It is also unlawful for a school to harass or victimise an applicant or pupil.

Schools' obligations in relation to each of these areas are explained in more detail in later chapters of this Technical Guidance.

## What is unlawful discrimination?

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- 1.14 The forms of discrimination that are unlawful under the school provisions are:

- Direct discrimination (including discrimination based on perception or association)
- Indirect discrimination
- Discrimination arising from disability
- Failure to make reasonable adjustments (for disabled people)
- Pregnancy and maternity discrimination

Unlawful discrimination is explained in more detail in [Chapter 5](#).

- 1.15 Any reference to 'discrimination' in this Technical Guidance is a reference to all of these forms of discrimination unless specifically indicated otherwise.

## What else is unlawful?

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### Harassment

- 1.16 A school must not harass a pupil or applicant. There are three different types of harassment that are unlawful under the Act:
- 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.
- 1.17 The harassment provisions of the Act do not protect pupils from harassment by other pupils. However, the provisions on discrimination mean that schools have an obligation to ensure that bullying by pupils that is related to a protected characteristic is treated with the same level of seriousness as any other form of bullying. **s26**
- 1.18 Harassment is explained in more detail in [Chapter 5](#).

### Victimisation

- 1.19 A school must not victimise a pupil or applicant. It is unlawful victimisation for a school to subject a pupil, or an applicant for admission as a pupil, to a detriment because he or she has carried out a 'protected act' (see paragraph 1.23) or because the school believes that he or she has carried out a protected act or may do so in the future. **s27**
- 1.20 It is also unlawful victimisation for a school to subject a parent, or other member of the public, to a detriment because he or she has carried out a protected act or the school believes that he or she has done or may do so in the future, but this is covered by Part 3 rather than Part 6 of the Act. **s27**
- 1.21 It is also unlawful victimisation for a school to subject a pupil to a detriment because his or her parent or sibling has carried out a 'protected act', or because the school believes that he or she has done or may do so in the future. **s86**

1.22 A 'protected act' is any of the following:

- Bringing proceedings under the Act
- Giving evidence or information in connection with proceedings brought under the Act
- Doing anything else for the purposes of, or in connection with, the Act
- 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)

## Are there any exceptions to the schools provisions?

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1.23 The Act contains exceptions that apply across the Act and therefore apply to schools, exceptions that apply only to schools and exceptions that apply only to certain types of school.

1.24 Exceptions that apply across the Act and are not specific to schools are explained in [Chapter 9](#).

1.25 The exceptions that apply only to schools are explained in [Chapter 3](#) and relate to:

- Curriculum content
- Collective worship

1.26 Exceptions that apply to certain types of school can be summarised as follows and are explained in detail in later chapters.

- Single-sex schools are allowed to admit pupils of only one sex (see [Chapter 2](#)).
- Mixed schools with single-sex boarding are allowed to offer boarding to only one sex (see [Chapter 2](#)).
- Certain schools with a religious character are allowed to discriminate on the grounds of religion or belief in admissions, and in the provision of education or access to any benefit, facility or service (see [Chapters 2](#) and [3](#)).
- Selective schools are permitted to refuse admission to disabled applicants who fail the admissions process even if the failure is as a consequence of something arising from their disability (see [Chapter 2](#)).



- Residential schools are permitted, in some circumstances, to restrict access to communal accommodation based on sex or gender reassignment (see [Chapter 9](#)).
- Schools that are charities are permitted to provide benefits only to people with a particular protected characteristic (see [Chapter 9](#)).

## Positive action

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- 1.27 The positive action provisions of the Act permit schools to take proportionate steps to help particular groups of pupils to overcome disadvantages that are linked to a protected characteristic. Where this results in more favourable treatment of pupils with a particular protected characteristic, this is lawful provided that 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 with a particular protected characteristic.
- 1.28 Positive action is explained in detail in [Chapter 7](#).

## Interaction with other legislation and responsibilities

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- 1.29 Nothing in the Act takes precedence over any other statutory duties that schools may have. In carrying out their obligations under the Act, schools must ensure that they comply with all other legal requirements placed upon them. However, the existence of other legislative provisions and responsibilities does not necessarily provide a defence in a claim under the Act. Schools are expected to take whatever action is necessary to ensure that they fulfil their responsibilities both under the Act and under any other legislation that applies to them.

## Frequently asked questions (FAQs)

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- 1.30 **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. Is the school responsible for the actions of the youth club and its volunteers?**

It is the youth club that is responsible, not the school. The youth club would have duties under the 'services provider provisions' of the Act. It is immaterial that the school staff are volunteers rather than paid by the club; what is relevant is that it is the youth club providing the service, not the school.

- 1.31 **While on a work placement, a pupil is discriminated against by her placement provider. Is the school responsible?**

It is the work placement provider that would be responsible for this. The work placement provider has duties under the 'work provisions' of the Act. The school is responsible only for finding and offering work placement opportunities, and for not discriminating in doing so. However, a school may be legally responsible for discrimination, harassment or victimisation by a placement provider where they could have taken steps to prevent it and have not done so. This is addressed in [Chapter 5](#).

- 1.32 **Does a school have obligations under the Act to parents?**

Services that a school provides to people other than pupils are 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 it 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 by the schools provisions of Part 6 of the Act. His parents would also be covered by Part 3 of the Act.

**Example:** A deaf parent who communicates through British Sign Language (BSL) attends a parent's evening. The school is under a duty (under Part 3 of the Act) to make reasonable adjustments to enable the parent to communicate with school staff and therefore to benefit from the parent's evening. This might include the school arranging and paying for a BSL interpreter.

1.33 **Does a school have obligations under the Act to pupils from outside of Britain?**

The Act places legal obligations on all schools in Scotland, and it is immaterial where the pupils are from and how long they are at the school.

1.34 **Does the Act cover education or school activities that take place outside of Britain?**

If a school provides education or school activities for its own pupils that take place abroad, then this would be covered by the Act.

**Example:** A pupil is discriminated against by a member of school staff whilst on a school trip to France. In this case, the Act is likely still to apply even though the discrimination took place in another country.

# Chapter 2: Admissions

## How do the Act's provisions fit in with admissions requirements?

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- 2.1 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.
- 2.2 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 that the education authority may refuse a placing request only on certain prescribed grounds.
- 2.3 Education authorities must also comply with the Equality Act in relation to admissions.
- 2.4 Independent schools are not subject to the Education (Scotland) Act 1980, but they must comply with the Equality Act.
- 2.5 The Act does not prohibit schools from setting and applying admissions criteria. However, admissions criteria must not discriminate against applicants with a particular protected characteristic and, if necessary, reasonable adjustments should be made for disabled applicants.

### Examples and terminology used in this section

- 2.6 The examples and case studies used in this section are intended to illustrate solely how the Act applies in relation to admissions.
- 2.7 In this section, the term 'school' includes the education authority for a school when it is the responsible body. 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 all types of school, including public schools, grant-aided schools and independent schools.

## Who is the responsible body?

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- 2.8 The responsible body in relation to admissions varies depending on the type of school. **s85(9)**
- 2.9 The responsible body for admissions decisions and the allocation of pupil places in public schools is the education authority that manages the school.
- 2.10 The responsible body for admissions in respect of an independent school is the proprietor and in respect of a grant-aided school, its managers.
- Independent schools and grant-aided schools are not subject to education authority admissions and placing arrangements.

## What does the Act say about admissions?

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- 2.11 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a person:
- 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, or
  - c) by not admitting the person as a pupil.
- 2.12 The Act also provides that it is unlawful for a school to harass a person who has applied for admission as a pupil. **s85(1), (4)**
- 2.13 For single-sex schools, there are exceptions for admissions to enable them to restrict admission to pupils of only one sex. **Sch 11, para 1**
- 2.14 Public schools and grant-aided schools are subject to the terms of section 9 of the Education (Scotland) Act 1980, which requires all such schools to be open to pupils of all denominations and faiths, and pupils of no denomination or faith. **Sch 11, para 5**
- Independent schools that either admit only pupils who belong, or pupils with parents who belong, to one or more denomination or which are conducted in the interest of a denominational body are permitted, under the Act, to give preference to members of that denomination when deciding who to admit to the school.

## Arrangements for deciding who is offered admission

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- 2.15 'Arrangements' in this context mean all of the policies, criteria and practices used in all of the stages of the admissions process and all admissions decisions.
- 2.16 'Arrangements' include:
- Admissions policies
  - Drawing up of admissions criteria
  - Application of admissions criteria
  - Information about the school, including marketing material
  - Delineating catchment areas
  - Formulating guidelines for the determination of placement requests where a school has only a limited number of places available
  - Considering placing requests
  - Open events and schools visits
  - Application forms
  - Decision-making processes
  - Interviews (where permitted)
  - Tests (where permitted)

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

- 2.17 Information that a school provides to pupils or prospective pupils, including advertisements, prospectuses, emails, and information on notice boards and websites, should not suggest that a school might discriminate or that applications from people with certain protected characteristics would not be welcome. If they do so, this will be direct discrimination.

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

- 2.18 In relation to disabled people, schools should ensure that the information and application process is accessible, and should make reasonable adjustments as necessary.

## Open events and school visits

- 2.19 When schools hold open events and offer school visits, they should offer them to all potential applicants irrespective of any protected characteristics; if necessary, they should make reasonable adjustments for disabled applicants or disabled parents.

**Example:** A secondary school will allow visits to be made to it only by parents of pupils from the nearest primary school even though there are several primary schools in the catchment area. This primary school is attended by mainly white British pupils, whereas the other primary schools in the area have a higher proportion of eastern European pupils. This requirement of attendance at the nearest primary school is likely to amount to indirect race discrimination unless it can be objectively justified.

**Example:** A school offers school visits to parents interested in applying to the school. A parent with a strong foreign accent and poor English telephones the school, asking for an appointment for a school visit. He is told that school visits are not available, because the school secretary has been asked to offer appointments only to British parents. This would be direct race discrimination against the parent under Part 3 of the Act, because he is member of the public rather than a pupil.

- 2.20 Justification is explained in [Chapter 5](#).

## Admissions criteria

- 2.21 Although the use of admissions criteria is permitted, a school must not discriminate, either directly or indirectly, against anyone with a protected characteristic.
- 2.22 Having criteria that exclude people with a particular protected characteristic will be direct discrimination, which is always unlawful.

2.23 Indirect discrimination may occur if admissions criteria exclude a greater proportion of pupils with particular protected characteristics, unless the criteria can be shown to be a proportionate means of achieving a legitimate aim.

This concept is explained in [Chapter 5](#).

2.24 Admissions criteria must not discriminate against disabled people because of something arising as a consequence of their disability, unless the criteria can be shown to be a proportionate means of achieving a legitimate aim.

This is explained further in [Chapter 5](#).

## Terms on which the school offers to admit the person as a pupil

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

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

**Example:** A disabled pupil is allowed to attend school only on a part-time basis because the school does not have the resources to provide the pupil with the support he requires on a full-time basis. This would be discrimination arising from disability, unless it can be justified.

## Not admitting the person as a pupil

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2.26 It is unlawful for a school to reject an applicant because of a protected characteristic, for example because he or she is gay or because his or her parent is gay. As explained, single-sex schools are allowed to restrict admission to pupils of only one sex (see paragraph 2.13) and independent schools with a religious character are allowed to have admissions criteria that give preference to members of their own religion (see paragraph 2.14).



2.27 If a person is refused a place at a school because he or she does not meet the admissions criteria as a result of a protected characteristic, this could amount to indirect discrimination. In the case of a disabled applicant who does not meet the admissions criteria because of something arising as a consequence of his or her disability, then this could amount to discrimination arising from disability. In both cases, the school would need to be able to justify the application of the criteria as a proportionate means of achieving a legitimate aim.

This is explained further in [Chapter 5](#).

2.28 A school must also consider its duty to make reasonable adjustments for disabled applicants before rejecting a disabled applicant.

**Example:** A school requires the applicant's family to have lived in the catchment area for at least three years. Unless the policy can be 'objectively justified', this could be indirect discrimination against children from a Gypsy Traveller family because they are less likely to have lived in the same area for a period of three years. The school could operate some flexibility in relation to this requirement to ensure that such discrimination does not occur.

**Example:** The admissions tutor for an independent school interviews an applicant who has cerebral palsy, which makes her speech unclear. The tutor assumes that the applicant also has learning difficulties and refuses to admit her, because he thinks she will be unable to cope with the highly academic environment of the school. This would be direct disability discrimination.

## Selective schools and academic ability

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2.29 Some public schools are permitted under the Standards in Scotland's Schools etc Act 2000 to select pupils based on ability, aptitude or banding.

2.30 Independent schools are also permitted to select pupils on the basis of academic ability.

2.31 Provided that the way in which 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 that 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. Assessment questions that assume uniformity in pupils' cultural, linguistic, religious or lifestyle experiences could amount to unlawful indirect discrimination, because pupils with certain protected characteristics may be disproportionately disadvantaged by such questions.

2.32 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, provided that it complies with its duty to make reasonable adjustments for disabled applicants during the assessment process. The reasonable adjustments duty does not require a school to offer a lower pass mark to applicants with learning difficulties.

**Sch 11,  
para 8**

**Example:** A selective 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 and discrimination.

**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 still 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, because it is a result of a permitted form of selection.

**Example:** The parents of a 12-year-old boy apply for him to go a selective school. He passes the entrance test, but when the school hears that he has learning and behaviour difficulties, it refuses him admission. This refusal is not based on a permitted form of selection and therefore is likely to be unlawful.

## Schools conducted in the interest of a denominational body

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- 2.33 Schools that 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. However, 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 requires all such schools to be open to pupils of all denominations and faiths, and to pupils of no denomination or faith. The only area in which 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. **Sch 11, para 5**
- 2.34 Where an independent school admits only pupils who belong, or whose parents belong, to one or more denominations, or where the school is conducted in the interests of a church or denominational body, that school is allowed to discriminate on the grounds of religion or belief in admissions.

**Example:** A Roman Catholic school has an oversubscription criterion that states that preference will be given to applicants who have been confirmed in the church. This is lawful under the Act.

## Single-sex schools

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- 2.35 Single-sex schools are allowed to admit pupils of only one sex without this being unlawful sex discrimination. In this context, a single-sex school includes those schools that admit pupils of the opposite sex, but the admission of whom to the school is exceptional or whose numbers are comparatively small and their admission is confined to particular courses or classes. **Sch 11, para 1**

**Example:** A girls' school admits boys to study Highers. It is still regarded as a single-sex school.

- 2.36 Where a school admits pupils of the opposite sex, it is permitted to confine those pupils to particular courses or classes. So, in the example above, it would not be unlawful for the school to confine the boys to certain subjects.

- 2.37 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 male pupils access to the school library on the same terms as it did the female pupils.

## Single-sex boarding at schools

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- 2.38 Mixed-sex boarding schools are allowed to restrict admission as a boarder to pupils of only one sex without this being unlawful sex discrimination. Schools that offer boarding to only one sex are also allowed to discriminate against pupils of the opposite sex in relation to boarding facilities. This exception applies to schools that offer boarding only to one sex and also to schools that admit as boarders only a small number of pupils of the opposite sex, as compared with the number of other pupils admitted as boarders. **Sch 11, para 2**

## Frequently asked questions (FAQs)

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**2.39 Are independent schools that interview prospective pupils and their parents allowed to ask questions about family background?**

Asking questions about an applicant's background and family that are not justified may result in irrelevant information being obtained. If this information is then taken into account in the selection process, this could lead to discrimination.

**Example:** A school asks a black applicant when his family moved to Britain. This is not a relevant question and, if the information is used in the decision-making, this could constitute race discrimination.

**2.40 Can a school that wants to know the religion of all of its pupils, so that it can ensure that it includes all relevant religious events and festivals in the school calendar, ask for details of a person's religion on the admissions application form?**

Asking questions that are not relevant to the admissions application, such as questions about an applicant's religion, could lead to discrimination if this information is then used in the selection process. It is probably more appropriate to ask for this information once pupils have been offered a place, so that there is no way that the information could influence the admissions decision-making. Independent schools with a religious character are able to ask for information on an admissions application form because they are allowed to give preference to members of their own religion.

**2.41 Can an independent school charge different rates of fees for home pupils and overseas pupils?**

If a school charges different rates for the same service, then this would be indirect race discrimination. However, if the school is offering a different service, for example longer terms for overseas students, then this could be justified.

**2.42 Can a coeducational selective school keep the ratio of boys to girls to 50:50?**

Setting fixed proportions of boys or girls in a coeducational school is sex discrimination.

# Chapter 3: Providing education and access to benefits, facilities and services for pupils

## What does the Act say?

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- 3.1 The Act says that it is unlawful for a school to discriminate against or victimise a pupil: **s85(2), (3), (5)**
- in the way in which it provides education for the pupil;
  - in the way in which 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; or
  - by subjecting the pupil to any other detriment.

The Act also provides that it is unlawful for a school to harass a pupil.

- 3.2 There are exceptions to these provisions that cover the content of the curriculum, collective worship and certain exceptions for schools with a religious character or ethos. These are explained in paragraphs 3.22–3.30.

## What is covered?

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- 3.3 A school's obligation to pupils covers everything that a school provides for pupils and goes beyond just the formal education it provides. It covers all school activities such as extracurricular and leisure activities, afterschool and homework clubs, sports activities and school trips, as well as school facilities such as libraries and IT facilities.

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

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- 3.4 Most discrimination in schools is unintentional and may come about because of rigid policies or practices. Reviewing all practices and policies will help a school to ensure that it does not discriminate, as well as help it to comply with the public sector equality duty. See: [www.equalityhumanrights.com/uploaded\\_files/PSD/technical\\_guidance\\_on\\_the\\_public\\_sector\\_equality\\_duty\\_scotland.pdf](http://www.equalityhumanrights.com/uploaded_files/PSD/technical_guidance_on_the_public_sector_equality_duty_scotland.pdf)
- 3.5 The following paragraphs highlight some of the activities covered by the schools provisions, but are not intended to be an exhaustive list.

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

- 3.6 Schools must ensure that all policies and procedures do not discriminate against pupils. Policies that indirectly discriminate against pupils with a particular protected characteristic can be justified only if they are a proportionate means of achieving a legitimate aim.

This concept is 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 sex discrimination.

**Example:** A school has a policy that if a pupil breaks the school rules on three occasions, he or she will automatically be given a detention. Some disabled pupils, such as those with attention deficit hyperactivity disorder (ADHD), autistic spectrum disorders or learning difficulties, are much more likely to break the school rules than other pupils. Rigid application of this policy is likely to amount to indirect disability discrimination because, where a reasonable adjustment has not been made, a school will find it very difficult to justify the treatment as a proportionate means of achieving a legitimate aim.

- 3.7 Schools must also ensure that any policies that are designed to protect pupils do so without discrimination. The Act does not cover pupil-to-pupil bullying, but a school is required to ensure that it does not discriminate in the way in which it deals with bullying in school. Bullying because of a protected characteristic should be dealt with very seriously and there should be no differentiation between the seriousness with which a school deals with bullying for reasons arising from a protected characteristic and the bullying for reasons not connected with a protected characteristic.

**Example:** A school has a policy covering racial bullying and any pupil who participates in racial bullying is excluded for at least one day. However, the school does not have a policy dealing with homophobic bullying and pupils who participate in such bullying are usually given only a detention. This could lead to direct sexual orientation discrimination unless the bullying of homosexual pupils was not related to their sexual orientation.

**Example:** A pupil who has been bullied by a group of former friends because they have fallen out is given strong support by the school and the bullying is dealt with firmly. Another pupil who has suffered similar treatment because she is from a Roma background is told that she will need to learn to deal with such things in life and has to toughen up. This would be direct race discrimination.

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

- 3.8 The way in which the curriculum is delivered must not discriminate against a pupil with a protected characteristic.

**Example:** A lesbian pupil undertakes a project charting the history of the gay and lesbian movement as part of her coursework. Her teacher tells her that her topic is inappropriate and that 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 does not allow black pupils to use certain equipment in a woodwork class because he believes that they are more likely to misbehave and misuse the equipment. This is likely to be direct racial discrimination.

- 3.9 The way in which the Curriculum for Excellence is delivered can be used to tackle stereotyping and inequality in several curricular areas, including health and wellbeing, mathematics, and social studies. Teaching staff should be encouraged to think about the way in which they deliver their teaching to ensure that they do not inadvertently discriminate against pupils.

### **School trips (educational and non-educational)**

- 3.10 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 if trips clash with Eid, but not with Easter. Further, 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 if it arranges a trip and then tries to adapt it to make it inclusive.

**Example:** A pupil with a visual impairment is told that he will not be able to attend a school camping trip because he will be unable to take part in many of the activities. The school does not make any attempt to make the activities accessible. This is disability discrimination, which the school is unlikely to be able to justify because of its 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 it 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 could be objectively justified.

**Example:** A school arranges a trip to an international rugby match and offers places on the trip only to male pupils. This would be direct sex discrimination even if a similar trip to an international netball match were arranged for female pupils. Restricting the netball trip to female pupils only would also be direct sex discrimination.

**Example:** A school plans a trip to a natural history museum. A pupil with Down's syndrome is excluded from the trip because the school believes that she will not be able to participate in the activities provided by the museum for school groups. This is likely to be direct disability discrimination.

- 3.11 Forward planning will help schools in arranging trips in which all pupils are able to participate. Offering a range of different trips and activities may also help the school to ensure that no pupils are excluded from taking part.

### Tests, assessments and exams

- 3.12 A school must ensure that any tests, assessments or examinations arranged by the school do not discriminate against a pupil. Assessment questions that assume uniformity in pupils' cultural, linguistic, religious or lifestyle experiences could lead to indirect discrimination, because 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) – for example the Scottish Qualifications Authority – 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. GQBs have duties under the Act that are not covered in this Guidance.

**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 discrimination arising from disability, which the school is

unlikely to be able to justify because it has failed to make reasonable adjustments.

### **Academic and vocational options offered to pupils, such as subject choices and extracurricular options**

- 3.13 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 that are explained in detail in [Chapter 7](#). Limiting the options available to pupils with certain protected characteristics can, unless it amounts to such positive action, be unlawful discrimination.

**Example:** Certain subjects, such as technologies, are promoted by a school to male pupils and others, such as health and wellbeing, are promoted to female pupils. This could result in direct sex discrimination.

### **Careers education and information**

- 3.14 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 career in which pupils would be interested on the basis of particular protected characteristics could amount to discrimination.

**Example:** To help pupils in making choices for post-16 study, a secondary school sets up information sessions for pupils on the different academic and non-academic options. A pupil from a Gypsy 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 that her way of life would make these inappropriate for her. This would be direct race discrimination.

## Work experience and work placements

- 3.15 The allocation of pupils to different types of work placement based on protected characteristics could constitute discrimination. Pupils' choices of and opportunities for work experience or work placements should not be restricted because of a protected characteristic.
- 3.16 While a school will not normally be responsible for any discrimination that occurs when a pupil is on work placement, the school will be responsible for ensuring that there is no discrimination in the way in which work experience and work placement opportunities are offered. Effective communication between schools and work placement providers will enable schools to minimise the chances of discrimination, and ensure that the school is not liable for aiding discrimination (see [Chapter 5](#)).
- 3.17 Employers providing work opportunities will be subject to the work provisions 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 that the employer would prefer a female pupil. This would be direct sex discrimination.

## Afterschool clubs, and extracurricular leisure and sporting activities provided by the school

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

**Example:** A school distributes cut-price tickets to rugby matches to male pupils, but does not offer the tickets to female pupils. This is likely to be direct sex discrimination.

- 3.19 Indirect discrimination may occur when pupils with particular protected characteristics are inadvertently prevented or discouraged from taking part in certain activities and opportunities.

**Example:** A school with a significant proportion of Jewish pupils arranges extracurricular drama sessions on a Saturday morning. This is likely to result in indirect religion or belief discrimination unless the school can justify holding the sessions at a time when Jewish pupils may not be able to attend.

If the same school arranges school football matches for Saturday morning, because this is when the local school league matches are played, this is likely to be a proportionate means of achieving a legitimate aim and therefore lawful.

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

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

**Example:** A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys' changing room even though she is now living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space.

**Example:** A school that has a number of Muslim pupils does not provide Halal food in its canteen, which results in the Muslim pupils being unable to eat school lunches. This is likely to be indirect religion or belief discrimination, because the school is unlikely to be able to justify this action.

- 3.21 There are specific exceptions in relation to communal accommodation, which are explained in [Chapter 9](#).

## What is not covered?

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### Content of the curriculum

- 3.22 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 that they use, and they 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.

- 3.23 However, the **way** in which the curriculum is taught is covered by the non-discrimination provisions of the Act. **s89(2)**

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

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

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

### Collective worship

- 3.24 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.

3.25 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 among their pupils in order to avoid discrimination.

3.26 Schools are not prohibited from organising or participating in acts of worship or religious observance celebrating any faith. This would not amount to religion or belief discrimination against pupils of other religions or of no religion.

**Sch 11,  
para 6**

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

**Example:** A school that is attended mainly by Christian pupils arranges special events to celebrate Diwali and Hanukkah. This would be lawful and an example of good practice.

3.27 The Act does not require schools to provide opportunities for separate worship for the different religions and beliefs represented among their pupils.

### **Schools with religious character or ethos**

3.28 The Act permits schools with a religious character or ethos to discriminate in the provision of education and access to a benefit, facility or service on the grounds of religion or belief. This means that such schools are permitted to conduct themselves in a way that discriminates against pupils on the grounds of religion or belief. This means that a school with a religious character does not have to make special provision for pupils of a different faith or incorporate aspects of their faith into its curriculum.

**Sch 11,  
para 5**

**Example:** A Jewish school that provides spiritual instruction or pastoral care from a rabbi is not discriminating by not making equivalent provision for pupils from other religious faiths.

**Example:** A Roman Catholic school that organises a visit for pupils to Lourdes is not discriminating by not arranging a trip to Mecca for two Muslim pupils who attend the school.

- 3.29 This exemption does not cover exclusions or subjecting a pupil to any other detriment, so a pupil cannot be punished or penalised for things that relate to his or her religion or belief.

**Example:** A pupil at an Episcopalian primary school tells his class during a religious education (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 that he has renounced the school's faith. This is likely to be direct discrimination because of religion or belief.

- 3.30 If a member of school staff conveys his or her beliefs in a way that involves haranguing or berating a particular pupil or group of pupils, then this would be unacceptable in any circumstances and would constitute discrimination.

## Subjecting a pupil to any other detriment

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- 3.31 The Act says that a school must not discriminate by subjecting a pupil to 'any other detriment'. 'Detriment' is not legally defined, but is interpreted very broadly. It is generally taken to mean some disadvantage and can include denial of an opportunity or choice, or anything that a reasonable pupil would consider altered his or her 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. **s85(2)  
(f)**
- 3.32 Even if a school thinks that it is acting in the best interests of a pupil, its actions 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 that 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 building environment. This is likely to be direct discrimination because of religion and belief.

## Pregnancy and maternity discrimination

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3.33 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. **s17**

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 offer them in a more flexible or favourable way than they are 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 will not be able to continue with practical science lessons because 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 direct discrimination because of pregnancy.

**Example:** A school offers extra tuition to a pregnant pupil who misses lessons as a result of attending antenatal appointments. This would not enable a pupil who had missed lessons for other reasons to claim discrimination because he or she was required to make up the work in his or her own time.

## Frequently asked questions (FAQs)

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### 3.34 **How can a school ensure that the school uniform policy does not discriminate against any pupils?**

Setting different rules for different categories of pupil might result in discrimination, for example requiring girls to wear clothing that is much more expensive than that required of boys. Also, applying the policy rigidly without allowing flexibility for certain pupils might result in discrimination. Examples of policies that might be discriminatory are:

- a general rule of no headgear in school, which requires a Sikh pupil to remove his turban;
- not making reasonable adjustments to school uniform requirements for disabled pupils who require them, for example not allowing a disabled child who is allergic to the regulation nylon trousers to wear cotton ones; or
- requiring pupils to dress (or not to dress) in a way that conflicts with a genuine religious requirement of their religion or belief.

Being flexible about how such policies are applied is likely to avoid discrimination.

Assessing how the uniform policy affects pupils with different protected characteristics and consulting with parents about the policy will also help a school to avoid discrimination.

### 3.35 **A school arranges for a pregnant pupil to attend parenting classes at a local college, but these clash with her science classes. Can the school insist that she attends the parenting class?**

Preventing a pregnant pupil from attending certain classes would be pregnancy and maternity discrimination. To avoid this, it might be necessary to offer additional science lessons so that the pupil does not miss out.

**3.36 A previously female pupil has started to live as a boy and has adopted a male name. Does the school have to use this name and refer to the pupil as a boy?**

Not using the pupil's chosen name merely because the pupil has changed gender would be direct gender reassignment discrimination. Not referring to this pupil as a boy would also result in direct gender reassignment discrimination.

**3.37 A pupil who gave birth recently wants to stand for the student representative council. Can the school prevent her from standing on the grounds that she is not representative of the student body because she is a teenage mother?**

This would be unfavourable treatment because of her maternity, and therefore pregnancy and maternity discrimination.

# Chapter 4: Exclusions from school

## How do the Act's requirements fit in with exclusions legislation?

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- 4.1 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 Act conflicts with the other legal obligations of schools in relation to exclusions.
- 4.2 Independent and grant-aided schools are not subject to the legal framework for exclusions, but they are obliged to comply with the Act.
- 4.3 The Act does not prohibit schools from excluding pupils with particular protected characteristics, but does prohibit schools from excluding pupils because of their protected characteristics or from discriminating during 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

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

## What does the Act say about exclusions?

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- 4.5 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a person by excluding him or her from the school. **s85(2)(e)**

## What is unlawful under the Act?

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

**Example:** A school excludes a pupil because he has declared his intention to undergo gender reassignment and is beginning to present in the style of the opposite sex. This would be direct gender reassignment discrimination.

- 4.8 It is also direct discrimination to exclude a pupil because he or she is perceived to have a protected characteristic or because he or she is associated with someone with a protected characteristic.

**Example:** The same school excludes the pupil's brother because of his sister's intention to undergo gender reassignment. This would be direct gender reassignment discrimination (by association) even though the pupil himself is not intending to undergo gender reassignment.

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

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

- 4.10 Behaviour and exclusions policies that result in a higher proportion of pupils with a particular protected characteristic being excluded are likely to result in indirect discrimination unless their application can be justified as being a proportionate means of achieving a legitimate aim.

This concept is explained in [Chapter 5](#).

**Example:** A school monitors its exclusion rates and discovers that a much higher proportion of black boys are excluded than any other category of pupil. This suggests that the practice of excluding for certain behaviours, while applied equally to all pupils, might disproportionately disadvantage black boys. The school must ensure that its exclusion policy is a proportionate means of achieving a legitimate aim in order to ensure that it is not indirectly discriminating against black boys.

## Disabled pupils

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- 4.11 If a disabled pupil is excluded for behaviour connected to his or her disability, this could be discrimination arising from disability unless the school can justify the exclusion as being a proportionate means of achieving a legitimate aim. An exclusion is unlikely to be justified in circumstances in which the school has not complied with its duty to make reasonable adjustments for that pupil.

**Example:** A pupil with autism is excluded for flapping his arms at a supply teacher. The supply teacher was alarmed by what she perceived to be threatening behaviour. 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. Since the pupil's reaction of flapping his arms was connected to his disability, the exclusion would be discrimination arising from disability. Because the school had not advised the supply teacher of the reasonable adjustment, the school would be unlikely to be able to justify the discrimination and therefore it would be unlawful.

- 4.12 The Act requires schools to make reasonable adjustments for disabled pupils both to the exclusions process and to the disciplinary sanctions imposed. This might mean applying different sanctions, or applying them in a different way, to avoid putting a disabled pupil at a substantial disadvantage in relation to non-disabled pupils.

**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 find a way in which to help him to remain in his seat during lessons.

## Pregnancy and maternity discrimination

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- 4.13 It is unlawful to exclude a pupil because of her pregnancy or maternity. Pregnancy and maternity discrimination is explained in more detail in Chapter 5.

**Example:** A pupil is excluded from her school when it learns that she is pregnant. The school claims that pregnant pupils will give the school a bad name and that she will be a bad example to other pupils. This would be direct pregnancy and maternity discrimination.

## Frequently asked questions (FAQs)

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- 4.14 **An independent school finds out that a pupil has been diagnosed as autistic. The school did not know that he was autistic when he was offered a place at the school and would not have offered a place if it had been aware of the autism. Can the school exclude him on the basis that he no longer meets the school's admission criteria?**

Excluding a pupil because he is autistic would be direct disability discrimination. The school has a duty to make reasonable adjustments for the pupil. It is also unlawful for the school to have an admissions policy not to admit children with autism.

- 4.15 **An education authority's criteria for accepting placing requests at a Roman Catholic school enable the authority to give priority to Roman Catholic pupils if the school is oversubscribed. A pupil who was Roman Catholic when he was admitted to the school has announced that he has turned away from the Roman Catholic faith and that he is now an atheist. Can the school exclude him on the basis that he no longer meets the admissions criteria?**

Excluding the pupil because of his religion or beliefs would be direct discrimination irrespective of the fact that he would not have been admitted to the school if he had been an atheist at the time of his admissions application. The exception that allows schools with a religious character to give priority to applicants of their own faith does not apply to exclusions.



# Chapter 5: Key concepts

## What is discrimination?

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- 5.1 The Act consolidates existing law into a single legal framework and while many of the concepts of discrimination remain the same as in previous equality legislation, there are some areas that were not previously covered. This section describes the various types of discrimination and other prohibited conduct, and how they apply to the schools provisions.
- 5.2 If a person brings a claim of discrimination, it is unlawful only where the person claims that he or she has been discriminated against in the doing of a particular act. Further information is provided about the unlawful acts in the other sections of this guidance – for example [Chapter 2](#) on admissions, [Chapter 4](#) on exclusions, etc.

### Direct discrimination

- 5.3 Direct discrimination occurs when a school treats a pupil less favourably because of a protected characteristic than it treats, or would treat, another pupil. So a very basic example would be refusing to admit a child to a school as a pupil because of his or her race, for example because he or she is Roma. **s13**
- 5.4 It is not possible to justify direct discrimination, so it will always be unlawful. There are, however, exceptions to the schools provisions that allow, for example, single-sex schools to admit pupils of only one sex without this being unlawful direct discrimination.
- 5.5 In order for someone to show that he or she has been directly discriminated against, he or she must compare what has happened to him or her to the treatment that a person without his or her protected characteristic is receiving, or would receive. So a gay pupil cannot claim that excluding him for fighting is direct discrimination because of sexual orientation unless he can show that a straight or bisexual pupil would not be excluded for fighting.

**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, but does not exclude an Asian boy who was also participating. The teacher cannot provide a reason why the Chinese boys have been excluded when the Asian boy has not. In these circumstances, the treatment is likely to amount to direct race discrimination.

- 5.6 A pupil does not need to find an actual person with whom to compare his or her treatment, but can rely on a 'hypothetical comparator' if he or she can show that there is evidence that such a person would be treated differently. 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 because of a protected characteristic than a hypothetical comparator without that characteristic would have been treated.

**Example:** An Eastern European 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 (that is, another pupil who had also arrived late, but been treated differently), the Eastern European 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, but he was not punished either.
- Elements of the treatment of these two comparators could allow a court to construct a hypothetical comparator showing that the Eastern European pupil had been treated less favourably because of race.

5.7 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 may 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 that other pupils taking part in the debates will make fun of the pupil and cause him distress. Although the teacher may think that he has good intentions, 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 that a pupil with a hearing impairment would receive greater benefit from watching a subtitled film version of the play, so it arranges for her to stay behind at school to watch the film in the audiovisual suite. The pupil, however, would prefer to attend the theatre to see the play with her peers. Although the school may consider its intentions to be good, preventing the pupil from seeing the play at the theatre is likely to be direct disability discrimination.

5.8 There is no need for someone claiming direct discrimination because of racial segregation or pregnancy or maternity to find a person to whom to compare themselves.

- Racial segregation is deliberately separating people by race, or colour, or ethnic or national origin, and will always be unlawful direct discrimination. **s13(5)**
- To claim pregnancy or maternity discrimination, a female pupil must show that she has been treated unfavourably because of her pregnancy or maternity, and she does not have to compare her treatment to the treatment of someone who was not pregnant or a new mother. **s17**

5.9 It is not direct discrimination against a male pupil to offer a female pupil special treatment in connection with her pregnancy or childbirth.

- 5.10 It is not direct discrimination against a non-disabled pupil to treat a disabled pupil more favourably.

**Example:** A pupil with Asperger's syndrome can sometimes act in a disruptive manner in class. The school does not take disciplinary action, but uses agreed strategies to manage his behaviour. A non-disabled pupil who is also disruptive in class is punished for his behaviour. This difference in treatment would not be direct discrimination against the non-disabled pupil.

Gender segregation is permitted for a few specifically defined purposes. For example, there is an exemption permitting gender segregation in certain situations where it is necessary to preserve privacy and decency. However, unless a specific exemption applies, segregation connected to gender will be unlawful.

### **Discrimination based on association**

- 5.11 Direct discrimination also occurs when a pupil is treated less favourably because of his or her association with another person, such as a sibling, parent, carer or friend, who has a protected characteristic (other than pregnancy and maternity). The association with the other person does not have to be permanent.

**Example:** A pupil is refused a place at a Roman 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 Traveller background; one pupil is from the settled community. The pupils in the other group, all of whom are 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 or her association with the pupils from Gypsy Traveller backgrounds. If however, the only reason why the first

group of 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 race discrimination.

### Discrimination based on perception

- 5.12 Direct discrimination also occurs when a pupil is treated less favourably because he or she is mistakenly thought to have a protected characteristic. However, this does not apply to pregnancy and maternity.

**Example:** A straight male pupil at a secondary school, who has long hair and wears eyeliner, is not allowed to take part in rugby trials, because the sports teacher says words to the effect that ‘Gay people can’t play rugby.’ This is likely to be direct discrimination because of sexual orientation, even though the pupil is not gay.

**Example:** An independent school has a rapidly growing number of Polish pupils, about which fact some parents have complained. A pupil is refused admission to the school because the school wrongly assumes from his name that he is Polish. This is likely to be direct race discrimination.

### Discrimination because of pregnancy and maternity

- 5.13 It is discrimination to treat a woman (including a female pupil of any age) less favourably because she is, or has been, pregnant, has given birth in the last 26 weeks, or is breastfeeding a baby who is 26 weeks or younger. **s17**
- 5.14 It is direct sex discrimination to treat a woman (including a female pupil of any age) less favourably because she is breastfeeding a child who is more than 26 weeks old. **s13(6)**

**Example:** A school reduces the number of subjects for which a pregnant pupil is studying because 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 National Qualifications. The pupil does not receive the choices that

would otherwise have been available to her, and therefore this is likely to constitute pregnancy and maternity discrimination.

**Example:** A pregnant pupil applies to do a work placement in a garage. The school will not allow her to undertake this placement, stating 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 her sex, but this is sufficient to amount to pregnancy and maternity discrimination.

- 5.15 The motive of the school is irrelevant and it does not matter if the unfavourable treatment is conscious or unconscious.
- 5.16 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 basis of the stereotypical assumption that she will want to focus on bringing up her baby, rather than make 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.

### Advertising an intention to discriminate

- 5.17 If a school advertises that, in offering education, benefits, facilities or services, it will treat applicants less favourably because of a protected characteristic, this may amount to direct discrimination. An 'advertisement' can include a notice or circular, whether distributed to the public or not, any publication, a radio, television or cinema spot, advertising via the internet or an exhibition.

**Example:** A school's admissions policy published on its website states that it does not wish to receive applications from the Gypsy Traveller community. This will discourage Gypsy Traveller and Roma children from applying, and may amount to direct race discrimination.

## Unwanted conduct related to a protected characteristic

- 5.18 Unwanted conduct by a school towards a pupil that constitutes harassment that is related to the protected characteristics of disability, race or sex is made unlawful under the harassment provisions of the Act. The harassment provisions are explained in detail in paragraphs 5.55–5.70.
- 5.19 Unwanted conduct by a school towards a pupil that is related to the protected characteristics of gender reassignment, religion or belief, or sexual orientation and which results in a pupil suffering a detriment is not covered by the harassment provisions. However, it is unlawful under the direct discrimination provisions of the Act if the pupil suffers a disadvantage.

**Example:** A member of school staff repeatedly tells a transsexual pupil that ‘he’ should not dress like a girl and that ‘he’ looks silly, which causes the pupil great distress. This would not be covered by the harassment provisions, because it is related to gender reassignment, but could constitute direct discrimination on the grounds of gender reassignment.

**Example:** As part of health and wellbeing education, a teacher describes homosexuality as ‘unnatural’ and states that he will be covering only straight relationships in the lesson. A bisexual pupil in the class is upset and offended by these comments. This may be direct discrimination on the grounds of sexual orientation.

## Indirect discrimination

- 5.20 Indirect discrimination occurs when a school applies a provision, criterion or practice in the same way for all pupils or a particular pupil group, such as Higher physics students, but this has the effect of putting pupils sharing a protected characteristic within the general student group at a particular disadvantage. It does not matter that the school did not intend to disadvantage the pupils with a particular protected characteristic in this way; what does matter is whether the provision, criterion or practice does, or would, disadvantage such pupils compared to pupils who do not share that characteristic.

**s19**

- 5.21 'Disadvantage' is not defined in 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 about which a reasonable person would complain – so an unjustified sense of grievance would not amount to a disadvantage. 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 he or she would have preferred to be treated differently.
- 5.22 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.
- 5.23 In other situations, it will be less obvious how pupils sharing a protected characteristic are, or would be, put at a disadvantage. In these cases, statistics, or personal testimony, or evidence including, if appropriate, evidence from an expert, may help to explain the nature of the protected characteristic or the behaviour of the group sharing the characteristic. The evidence might take the form, for example, of evidence about the principles of a particular religious belief. This in turn will help to determine the nature of any disadvantage.

**Example:** A pupil has a belief that pork renders him ritually unclean for the purposes of his religion. He takes part in a school cookery class in which pupils make jelly containing pork gelatine. The pupil's parents claim that the school is indirectly discriminating against him by not providing cooking ingredients that do not contain pork gelatine. Evidence of the importance of this belief in the pupil's religion may help the school to establish whether it amounts to a disadvantage.

- 5.24 'Provision', 'criterion' or 'practice' are also not defined in the Act, but can be interpreted widely and include:
- arrangements (for example for deciding who to admit);
  - the way in which education, or access to any benefit, service or facility is offered or provided;
  - one-off decisions; and
  - proposals or directions to do something in a particular way.



They may be written out formally or they may simply have developed as the school worked out the best way of achieving its aims.

- 5.25 Indirect discrimination will occur if all of the following four conditions are met. **s19(2)**
- a) A school applies (or would apply) the provision, criterion or practice equally to all relevant pupils, including a particular pupil with a protected characteristic.
  - b) The provision, criterion or practice puts, or would put, pupils sharing a protected characteristic at a particular disadvantage compared to relevant pupils who do not share that characteristic.
  - c) The provision, criteria, practice or rule puts, or would put, the particular pupil at that disadvantage.
  - d) The school cannot show that the provision, criteria or practice is justified as a 'proportionate means of achieving a legitimate aim'.

**Example:** A school requires male pupils to wear a cap as part of the school uniform. Although this requirement is applied equally to all pupils, it has the effect of excluding Sikh boys, whose religion requires them to wear a turban. This would be indirect discrimination based on religion and belief, because it is unlikely that the school would be able to justify this action.

**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 indirect discrimination on the grounds of religion and belief.

### The comparative approach

- 5.26 Once it is clear that there is a provision, criterion or practice that puts, or would put, pupils sharing a protected characteristic at a particular disadvantage, the next stage is to consider a comparison between pupils with that protected characteristic and those without. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in **s23(1)**

circumstances.

- 5.27 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, those with an equivalent visual impairment. For race, the comparison group could be all Africans or only Somalis, for example, depending on the circumstances.

**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 for a Friday night is a neutral practice applied equally to all. A Jewish pupil points out that this would prevent him from attending, because he observes Shabbat from dusk on a Friday evening. The pool for comparison could be all pupils in the year group involved. Assuming that 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 choose a different day, or make other days additionally available, to avoid acting unlawfully.

### **Making the comparison**

- 5.28 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.
- 5.29 The way in which 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.

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

- 5.30 A school can undertake a formal comparative exercise to decide if there is indirect discrimination in a number of ways. One established approach involves asking the following questions.
- a) What proportion of the pool has the particular protected characteristic?

- b) Within the pool, does the provision, criterion or practice affect pupils without the protected characteristic?
- c) How many of these pupils are, or would be, disadvantaged by it? How is this expressed as a proportion (x)?
- d) Within the pool, how does the provision, criterion or practice affect pupils who share the protected characteristic?
- e) How many of these pupils are, or would be, put at a disadvantage by it? How is this expressed as a proportion (y)?

5.31 Using this approach, a school can then compare x with y to establish whether the pupil group with the protected characteristic experiences a 'particular disadvantage' in comparison with others – that is, whether there is a disproportionate impact. Whether any difference identified 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, but there must be a statistically significant disproportionate impact in the protected characteristic group.

The position is different where the protected characteristic is religion or belief. When pursuing a claim of indirect religion or belief discrimination, a pupil does not need to establish that others are also put at a particular disadvantage by a provision, criterion or practice; rather the question is whether the interference with the right to manifest their religious beliefs is proportionate given the legitimate aims of the school (see paragraph 5.32). This is because protection of the right to manifest religion under the European Convention on Human Rights does not require 'group disadvantage' to be shown<sup>1</sup>. Therefore, even if only one pupil is disadvantaged by a ban on an item of clothing this may still amount to indirect discrimination if that item is an expression of their genuinely held religious or other belief and the school is unable to show that the ban is a proportionate means of achieving a legitimate aim.

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<sup>1</sup> *Mba v Mayor & Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562, and *Eweida, Chaplin, Ladele & McFarlane v United Kingdom* (2013) applications numbers 48420/10, 59842/10, 51671/10 and 36516/1.

## What is a 'proportionate means of achieving a legitimate aim'?

- 5.32 If a school can show that the provision, criterion or practice is justifiable – that is, that it is 'a proportionate means of achieving a legitimate aim' – then it will not amount to unlawful indirect discrimination. This is often known as the 'objective justification' test. This justification test also applies to other areas of discrimination law, for example discrimination arising from disability.
- 5.33 To be legitimate, the aim of the provision, criterion or practice must be legal and non-discriminatory, and must represent a real objective consideration.
- 5.34 In the context of school education, examples of legitimate aims might include:
- ensuring that education, benefits, facilities and services are targeted at those who most need them;
  - the fair exercise of powers;
  - ensuring the health and safety of pupils and staff, provided that risks are clearly specified;
  - maintaining academic and behaviour standards; and
  - ensuring the wellbeing and dignity of pupils.
- 5.35 Even if the aim is legitimate, the means of achieving it must be proportionate. 'Proportionate' means appropriate and necessary, but 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim.
- 5.36 Although the financial cost of using a less discriminatory approach cannot, by itself, provide a justification, cost can be taken into account as part of the school's justification if there are other good reasons for adopting the chosen practice.
- 5.37 The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the justification must be.

**Example:** A school bans 'cornrow' hairstyles as part of its policies on pupil appearance. These hairstyles are more likely to be adopted by specific racial groups; hence a blanket ban – without the possibility of

any exceptions on, for example, racial grounds – is likely to constitute indirect racial discrimination because it is unlikely to be objectively justified on the basis of proportionality.

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

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

- 5.39 A significant factor in determining whether a public authority (which includes all public schools managed by an education authority) is able to justify what may otherwise be unlawful indirect discrimination is the extent to which the public authority has complied with its public sector equality duty.

**Example:** In the cornrows example in paragraph 5.37, the school would also need to have had due regard to the need to eliminate racial discrimination, and to advance equality of opportunity and good race relations. If the school has not properly complied with its broader public sector equality duty, it is likely to be more difficult for it to justify the criteria objectively in relation to the application of a specific policy.

### **Discrimination arising from disability**

- 5.40 Discrimination arising from disability occurs when a school treats a disabled pupil unfavourably because of something connected with his or her disability and cannot justify such treatment. **s15**
- 5.41 Discrimination arising from disability is different from direct discrimination. Direct discrimination occurs because of the protected characteristic of disability. For discrimination arising from disability to occur, the motive for the treatment does not matter; the question is whether the disabled pupil has been treated unfavourably because of something arising from his or her disability.
- 5.42 Discrimination arising from disability is also different from indirect discrimination. There is no need to show that other people have been affected alongside the individual disabled pupil or for the disabled pupil to compare himself or herself with anyone else.

- 5.43 Discrimination arising from disability will occur if the following three conditions are all met.
- a) A school treats a disabled pupil unfavourably – that is, puts him or her at a disadvantage – even if this was not the school’s intention.
  - b) This treatment is because of something connected with the disabled pupil’s disability (which could be the result, effect or outcome of that disability), such as an inability to walk unaided or disability-related behaviour.
  - c) The treatment cannot be justified by showing that it is ‘a proportionate means of achieving a legitimate aim’. (This is explained at paragraph 5.25 in relation to indirect discrimination.)

### **Unfavourable treatment**

- 5.44 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 5.21). 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 be treating that pupil unfavourably. **s15(1) (a)**
- 5.45 The unfavourable treatment must be because of something that arises as a consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.
- 5.46 The consequences of a disability include anything that 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 his or her 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.

- 5.47 As long as the unfavourable treatment is because of something arising as a consequence of the disability, it will 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 learning difficulties is not allowed to have a school meal because she has become agitated and upset whilst queuing on a number of occasions. She is asked instead to bring in a packed lunch and to eat it separately, away from her friends. Her behaviour in the queue is a result of her learning difficulties. The refusal to allow the pupil to have a school meal is unfavourable treatment that is because of something that arises as a consequence of the pupil's disability.

- 5.48 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 paragraph 5.32 in relation to indirect discrimination.
- 5.49 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 school refuses to allow a pupil with a colostomy bag to take part in swimming lessons, because it assumes that the colostomy bag presents a health and safety risk. Because the reason for the treatment is based on general assumptions rather than a specific risk assessment, the school is unlikely to be able to justify the treatment.

### Knowledge of disability

- 5.50 In addition, if a school can show that it **s15(2)**
- did not know that the disabled pupil had the disability in question, and
  - could not reasonably have been expected to know that the disabled pupil had the disability,
- then the unfavourable treatment would not amount to unlawful

discrimination arising from disability.

- 5.51 The required knowledge is of the facts of the pupil's disability, but the school does not also need to realise that those particular facts meet the legal definition of disability.

If the school's agent (that is, someone who undertakes tasks on the school's behalf) or employee knows of a pupil's disability, the school will not usually be able to claim that it does not know of the disability.

**Example:** A pupil tells the school secretary that she has diabetes and that she needs to carry biscuits to eat when her blood sugar levels fall. A teacher has no information about her disability and refuses to allow the pupil to bring food into the classroom. When the teacher sees the pupil eating, he disciplines her. In this case, the school is unlikely to be able to argue that it did not know about her condition.

- 5.52 A school must do all it that can reasonably be expected to do to find out whether 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.

### Relevance of reasonable adjustments

- 5.53 By acting quickly to identify and put in place reasonable adjustments for disabled pupils, a school can often avoid discrimination arising from disability, although there may be cases in which an adjustment is unrelated to the unfavourable treatment in question.
- 5.54 If a school fails to make an appropriate reasonable adjustment, it is likely to be very difficult for it to argue that unfavourable treatment is justified.

Reasonable adjustments are explained in detail in [Chapter 6](#).

## Harassment

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- 5.55 There are three types of harassment that are unlawful under the Act: **s26**
- Harassment related to a relevant protected characteristic



- Sexual harassment
- Less favourable treatment of a pupil because he or she submits to or rejects sexual harassment or harassment related to sex

5.56 The relevant protected characteristics for the schools provisions are:

- Disability
- Race
- Sex

5.57 Pregnancy and maternity are not protected directly under the harassment provisions, but unwanted behaviour (as described at paragraph 5.59) will amount to harassment related to sex.

5.58 In addition, the harassment provisions do not explicitly apply to the protected characteristics of gender reassignment, sexual orientation, or religion or belief in relation to schools. However, where unwanted conduct related to any of these protected characteristics results in a pupil suffering disadvantage, that would constitute direct discrimination. **s212(5)**

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

5.59 Harassment occurs when a school, through its staff and/or agents, engages in unwanted behaviour that is related to a relevant protected characteristic and which has the purpose or effect of: **s26(1)**

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

5.60 The word 'unwanted' means 'unwelcome' or 'uninvited'. It is not necessary for the pupil to say that he or she objects to the behaviour for it to be unwanted.

5.61 In this context, 'related to' has a broad meaning and includes situations in which the pupil who is on the receiving end of the unwanted behaviour does not have the protected characteristic himself or herself, provided that there is a connection between the behaviour and a protected characteristic. This would also include situations in which the pupil is associated with someone who has a protected characteristic, or is wrongly perceived as having a particular protected characteristic.

## Sexual harassment

- 5.62 Sexual harassment of a pupil is obviously a serious incident that is likely to result in criminal proceedings and raise safeguarding issues for the school. Such proceedings are beyond the scope of this Guidance. The Guidance deals with the sexual harassment under the Act only, which may in practice rarely be relevant in a school context, because other sanctions – possibly including criminal proceedings – will come into play. **s26(2)**
- 5.63 Sexual harassment occurs when a school, through its staff and/or agents, engages in unwanted behaviour that is of a sexual nature and which has the purpose or effect of:
- violating a pupil's dignity, or
  - creating an intimidating, hostile, degrading, humiliating or offensive environment for the pupil.
- 5.64 'Of a sexual nature' can include verbal, non-verbal or physical conduct, including unwelcome sexual advances, inappropriate touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings, or sending emails with material of a sexual nature.

**Example:** A sixth-year female pupil is asked intimate questions about her personal life and subjected to sexual innuendos by her teacher. This would constitute sexual harassment.

### Less favourable treatment of a pupil because he or she submits to or rejects sexual harassment or harassment related to sex

- 5.65 It is unlawful to treat a pupil less favourably because he or she either submits to, or rejects, sexual harassment or harassment related to his or her sex. **s26(3)**

**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 and therefore to sexual harassment.

- 5.66 For all three types of harassment, if the purpose of subjecting the pupil

to the unwanted conduct is to create any of the circumstances set out at paragraph 5.59, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of the conduct on that pupil.

- 5.67 Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the effect of creating any of the circumstances set out.

**Example:** Care staff in a residential special school deliberately make racist remarks on a regular basis in the presence of a pupil of Indian heritage. Their purpose is to create an intimidating environment for him. In these circumstances, it is unnecessary to inquire into the effect of their conduct upon him, because the purpose of their behaviour is to create an intimidating environment.

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

- 5.68 In deciding whether conduct had that effect, each of the following must be taken into account.

**a) The perception of the pupil**

Did he or she regard it as violating his or her dignity, or creating an intimidating (etc.) environment for him or her? This part of the test is a subjective question and depends on how the pupil regards the treatment.

**b) The other circumstances of the case**

Circumstances that may be relevant and therefore need to be taken into account can include:

- the personal circumstances of the pupil experiencing the conduct, for example his or her 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 pupils experiencing the conduct.

**c) Whether it is reasonable for the conduct to have that effect**

This is an objective test.

- 5.69 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 the pupil to be hypersensitive and that another pupil subjected to the same conduct would not have been offended.
- 5.70 Where the school is publicly funded, it may also be relevant in cases of alleged harassment whether the alleged perpetrator was exercising any of her or 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.

## Victimisation

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- 5.71 The Act protects people from being subjected to a detriment (which is, in effect, the same as a disadvantage) because they have carried out what is called a 'protected act', or because the school believes that a person has carried out or is going to carry out a protected act. **ss27, 27(1)**
- 5.72 There are additional victimisation provisions for schools that extend the protection to pupils who are victimised because their parent or sibling has carried out a protected act. **s86(2)**
- 5.73 A 'protected act' is: **s27(2)**
- Making a claim or complaint of discrimination (under the Act)
  - Giving evidence or information in a claim under the Act
  - Making an allegation that the school or someone else has breached the Act
  - Doing anything else in connection with the Act
- 5.74 If a school subjects someone to a detriment because he or she has

carried out such an act, then this will be unlawful victimisation. There must be a link between what the pupil (or parent or sibling) did and the school's treatment of him or her.

5.75 The treatment does not need to be linked to a protected characteristic.

**Example:** A teacher gives a pupil a detention because he thinks that she intends to support another pupil's sexual harassment claim. This would amount to victimisation.

### Who is not protected?

5.76 A pupil who, in bad faith, gives false information or evidence (that is, information or evidence that he or she knew was false), or makes an allegation that was false and given in bad faith, would not be protected against victimisation. The original complaint or claim would not be affected, provided that it was not made in bad faith. **s27(3)**

**Example:** A pupil with a grudge against his teacher knowingly gives false evidence in another pupil's discrimination claim against the school. He is subsequently excluded from the school for supporting the claim. This treatment could not amount to victimisation because his evidence was untrue and given in bad faith.

### Victimisation for actions of parents or siblings

5.77 A school must not subject a pupil to a detriment because of something that his or her parent or sibling has done in relation to the making of a complaint of discrimination. **s86(2)**

**Example:** The stepbrother 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 pupils. As a result of this, the non-disabled stepsister of the pupil is not admitted into the school. This would amount to unlawful victimisation.

5.78 These victimisation provisions apply to a child in relation to whom the parent was (or parents were) making a complaint and also to any other

children who are pupils at the school. This also applies if a parent supports a teacher's complaint against the school under Part 5 (the employment provisions) of the Act.

- 5.79 If the information or evidence was false and given in bad faith (that is, of the parent or sibling knew it to be false), or the allegation was false and given in bad faith, then this protection for the pupil will still apply, provided that the pupil did not act in bad faith.

**Example:** A pupil makes a complaint against his school, claiming that he has suffered discrimination by a member of staff because of his sexual orientation. The pupil's younger brother, at the same school, is protected against any detrimental treatment by the school because of this complaint, even if it is later found out that the older brother was not acting in good faith.

- 5.80 There must be a link between what the parent(s) or the pupil has done and the school's detrimental treatment of the pupil or sibling.
- 5.81 The pupil or sibling who is being treated badly does not need to have any of the protected characteristics.
- 5.82 The fact that a complaint or claim is not upheld does not mean that it was made in bad faith.

## Obligations to former pupils

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- 5.83 Even after a person has left a school, the school must not discriminate against him or her, harass or victimise him or her. This applies only if the discrimination, harassment or victimisation arises out of, and is closely connected with, his or her previous relationship with the school and would have been unlawful if he or she were still a pupil. **s108**

**Example:** An ex-pupil asks for a reference from the school. It would be unlawful for the reference to be unflattering because of a protected characteristic of the ex-pupil, or because he or she at one time brought or supported a discrimination complaint against the school.

- 5.84 This obligation to former pupils would include the duty to make

reasonable adjustments for disabled former pupils if they were to continue to be at a substantial disadvantage in comparison to former pupils without a disability. This obligation applies only if the substantial disadvantage arises out of and is closely connected with the person's having been a pupil.

**Example:** A school librarian sends an annual newsletter to former pupils. One former pupil who has a visual impairment requests that it is sent to him by email rather than in hard copy. The librarian does not provide him with an electronic copy. This is likely to be a failure to make a reasonable adjustment.

## Liability for employees, agents and others

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5.85 As an employer, a school is legally responsible for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment or by people who take action on its behalf (agents). **s109**

5.86 It does not matter whether the school knew about or approved of those acts.

5.87 However, if a school can show that it took all reasonable steps to prevent its employees or agents from acting unlawfully, it will not be held legally responsible.

5.88 It is important that schools take steps to make sure that their employees and agents understand that they must not discriminate against pupils, or harass them or victimise them, and that they understand their duties in relation to making reasonable adjustments for disabled pupils.

Usually, a school will not be responsible for discrimination, harassment or victimisation by someone other than their employee or agent.

However, case law indicates that it is possible that they could be found to be legally responsible for failing to take action where they have some degree of control over a situation where there is a continuing course of offensive conduct, but they do not take action to prevent its recurrence even though they are aware of it happening. For example, if a pupil reports that they have been harassed at a work placement

provider, the school could be responsible if it takes no action to address the problem. Taking reasonable steps to protect pupils against discrimination, harassment or victimisation in such circumstances is likely to ensure that a school will not be held legally responsible if it does happen.

## Personal liability of employees and agents

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- 5.89 An employee (of a school) is personally responsible for his or her own acts of discrimination, harassment or victimisation carried out during his or her period of employment, whether or not the employer is also liable. However, an employee is not personally liable in relation to disability discrimination in schools. **s110**

**Example:** A teaching assistant racially discriminated against a pupil. The school was able to show that it took all reasonable steps to prevent the discrimination and therefore was not liable. The pupil can still make a claim of discrimination against the teaching assistant. However, if this were a case of discrimination because of disability, the pupil would not be able to make a claim against the teaching assistant, because the personal liability provisions do not cover disability discrimination in schools.

- 5.90 If the relationship is one of a person (the 'principal') paying for someone else to take action on his or her behalf and someone taking action for him or her (his or her 'agent'), rather than that of employer and employee, the agent is personally responsible in the same circumstances.
- 5.91 Employees or agents will still be responsible for their acts of discrimination, harassment or victimisation even if they did not know that their actions were against the law.
- 5.92 But there is an exception to this: an employee or agent will not be responsible if his or her employer or principal has told him or her that there is nothing wrong with what he or she is doing and he or she reasonably believes this to be true.
- 5.93 It is a criminal offence, punishable by a fine, for an employer or **s110(4)**



principal to make a false statement in order to try to get an employee or agent to carry out an unlawful act.

## Instructing and causing discrimination

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- 5.94 A school must not instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so. **s111**
- 5.95 Both the person who receives the instruction and the intended victim will have a claim against whoever gave the instructions. This applies whether or not the instruction is carried out, provided that the recipient or intended victim suffers loss or harm as a result.
- 5.96 It applies only where the person giving the instruction is in a legal relationship with the person receiving the instruction, such between as employer and employee, or agent and principal.
- 5.97 Employment tribunals will deal with complaints from an employee or agent who has received the instructions and the victim can make a claim in the same way as he or she would for any other claim under the Act. So, if a member of staff is instructed to discriminate against a pupil because of his or her sex, for example, then the member of staff can make a claim to an employment tribunal and the pupil can make a claim to a Sheriff court.
- 5.98 The Equality and Human Rights Commission can also take action for unlawful instructions to discriminate.

## Aiding contraventions

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- 5.99 It is unlawful for a school to help someone else to commit an act that it knows is unlawful under the Act. **s112**
- 5.100 However, if the person giving assistance has been told by the person whom he or she assists that the act is lawful and he or she reasonably believes this to be true, he or she will not be legally responsible.
- 5.101 It is a criminal offence, punishable by a fine, to make a false statement in order to get another person's help to commit an unlawful act under the Act.

## Protected characteristics

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5.102 The protected characteristics for the schools provisions are:

- Disability
- Gender reassignment
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

5.103 Age, and marriage and civil partnership are not protected characteristics for the schools provisions.

### Disability

5.104 A person is a disabled person (that is, someone who has the protected characteristic of disability) if he or she has, or has had, a physical and/or mental impairment that has what the law calls ‘a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities’.

**s6**

5.105 There is no need for a person to have a medically diagnosed cause for his or her impairment; what matters is the effect of the impairment, not the cause.

5.106 In relation to physical impairment, the following are covered by the Act.

- Conditions that affect the body, such as arthritis, hearing or sight impairment (unless this is correctable by glasses or contact lenses), diabetes, asthma, epilepsy, conditions such as HIV infection, cancer and multiple sclerosis, as well as loss of limbs or the use of limbs, are covered.
- HIV infection, cancer and multiple sclerosis are covered as soon as someone has them.
- Severe disfigurement (such as scarring) is covered even if it has no physical impact on the person with the disfigurement, provided that the long-term requirement is met (see paragraph 5.108).
- People who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant

**Sch 1,  
para 6**

**Sch 1,**

ophthalmologist, are automatically treated as disabled under the Act.

**para 3**

5.107 Mental impairment includes conditions such as dyslexia and autism, as well as learning disabilities such as Down's syndrome, and mental health conditions such as depression and schizophrenia.

5.108 The other tests to apply to decide whether someone has the protected characteristic of disability are as follows.

- The length of time for which the effect of the condition has lasted or will continue must be 'long term', which means that an impairment is likely to last for the rest of the person's life, or has lasted at least 12 months, or the total period for which it lasts is likely to be at least 12 months. If the person no longer has the condition, but it is likely to recur, or if the person no longer has the condition, he or she will be considered to be a disabled person.
- The activities upon which the impairment has a substantial adverse effect must be 'normal day-to-day activities'. Just because the activity is mainly undertaken at work, for example typing, does not mean that it is not a normal day-to-day activity.
- 'Substantial' means more than minor or trivial.
- The condition must have this impact without taking into account the effect of any medication that the person is taking, or any aids or assistance or adaptations that he or she uses, like a wheelchair, walking stick, assistance dog or special computer software. The exception to this is the wearing of glasses or contact lenses, for which it is the effect while the person is wearing the glasses or contact lenses that is taken into account.

**Sch 1,  
para 2**

**s212(1)**

**Sch 1,  
para 5**

**Example:** Someone who has attention deficit hyperactivity disorder (ADHD) might be considered to have a disability even if his or her medication controls the condition so well that he or she rarely experiences any symptoms, if without the medication the ADHD would have long-term adverse effects.

5.109 There are special rules concerning impairments that are progressive or which have fluctuating or recurrent effects.

5.110 Further detailed guidance on the definition of disability is available online at: <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf>

5.111 The Act's definition of disability is not the same as the definition of additional support needs in the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act'), as amended. There will be some pupils who are covered by the Equality Act's definition of disability, but not the 2004 Act's definition of additional support needs, and vice versa, although a significant number of pupils are covered by both.

### **Gender reassignment**

5.112 Gender reassignment is a personal process (rather than a medical process) that involves a person moving away from his or her birth sex to his or her preferred gender and thus expressing that gender in a way that differs from, or is inconsistent with, the physical sex with which he or she was born. **s7**

5.113 This personal process may include undergoing medical procedures or, as is more likely for school pupils, it may simply include choosing to dress in a different way as part of the personal process of change.

5.114 A person will be protected because of gender reassignment once:

- he or she makes his or her intention known to someone, regardless of who this is (whether it is someone at school or at home, or someone such as a doctor);
- he or she has proposed to undergo gender reassignment, even if he or she takes no further steps or decides to stop later on;
- there is manifestation of an intention to undergo gender reassignment, even if he or she has not reached an irrevocable decision;
- he or she starts or continues to dress, behave or live (full-time or part-time) according to the gender with which he or she identifies as a person;
- he or she undergoes treatment related to gender reassignment, such as surgery or hormone therapy; or
- he or she has received gender recognition under the Gender Recognition Act 2004.

It does not matter which of these applies to a person for him or her to be protected because of the characteristic of gender reassignment.

- 5.115 This Guidance uses the term ‘transsexual person’ to refer to someone who has the protected characteristic of gender reassignment. **s7(2)**

### **Pregnancy and maternity**

- 5.116 The Act lists pregnancy and maternity as a protected characteristic. Pregnancy and maternity discrimination is covered in paragraphs 5.13–5.16. **s4**

### **Race**

- 5.117 Race means a person’s: **s9**
- colour, and/or
  - nationality (including citizenship), and/or
  - ethnic or national origin,
- and a racial group is composed of people who have or share a colour, nationality or ethnic or national origins.

- 5.118 A person has the protected characteristic of race if he or she belongs to a particular racial group, such as ‘British people’.

- 5.119 Racial groups can comprise two or more distinct racial groups, such as ‘British Asians’.

### **Religion or belief**

- 5.120 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief. **s10**

- 5.121 A religion need not be mainstream or well known to gain protection as a religion. It must, though, be identifiable, and have a clear structure and belief system. Denominations or sects within religions may be considered a religion. New religious movements may also be considered religions or beliefs.

- 5.122 ‘Religious belief’ goes beyond beliefs about and adherence to a religion or its central articles of faith, and may vary from person to person within the same religion. A person does not have to prove that their manifestation of their religion or belief is a core component of the religion or philosophical belief they follow, but it may instead be a

means by which they choose to express their adherence to their religious belief.<sup>2</sup>

5.123 A belief that is not a religious belief may be a philosophical belief, such as humanism or atheism.

5.124 A belief need not include faith or worship of a god or gods, but must affect how a person lives his or her life or perceives the world.

5.125 For a belief to be protected by the Act, it must have the following features.

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

## Sex

5.126 A person's sex refers to the fact that he or she is male or female. In relation to a group of people, it refers to either men and/or boys or women and/or girls. **s11**

## Sexual orientation

5.127 Sexual orientation means the attraction that a person feels towards one sex or another (or both), which determines with whom he or she forms intimate relationships or to whom he or she is attracted. **s12**

- Some people are attracted only to those of the same sex (lesbian women and gay men).

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<sup>2</sup> *Mba v Mayor & Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562 and *Eweida, Chaplin, Ladele & McFarlane v United Kingdom* (2013) applications numbers 48420/10, 59842/10, 51671/10 and 36516/1.

- Some people are attracted to people of both sexes (bisexual people).
- Some people are attracted only to the opposite sex (straight people).

5.128 Everyone is protected from being treated worse or differently because of sexual orientation, whether they are bisexual, gay, lesbian or straight.

5.129 Sexual orientation discrimination also covers discrimination connected with manifestations of that sexual orientation, such as someone's appearance, the places that he or she visits or the people with whom he or she associates.

## Frequently asked questions (FAQs)

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5.130 **Does the Equality Act prohibition on religious discrimination in schools mean that we cannot have a school uniform policy that is consistent, and so forbids the wearing of items such as burkas?**

Not necessarily. The application of any school uniform policy could amount to indirect discrimination unless the policy can be justified as being a proportionate means of achieving a legitimate aim. It is important with any school uniform policy to try to reach a consensus with parents about its adoption, but in particular to be able to justify any adverse impact that it will have on pupils with a variety of protected characteristics, whether religion, disability, gender, etc.

5.131 **Surely the harassment provisions mean that any sensitive pupil will be able to bring a claim if a teacher says something to him or her that he or she does not like?**

Not true. Unless the purpose of the conduct that is the subject of a harassment claim was to create an intimidating environment (which is not usually the case), among other things, then one of the things at which the court or tribunal will be looking is whether it is reasonable for the pupil to be affected by the behaviour in the way in which he or she says that he or she has. This means that if he or she is being oversensitive, it is unlikely that he or she will be found to have been subjected to harassment.

**5.132 Is a pupil who wants to cross-dress protected under the Act?**

If that pupil is cross-dressing as part of the process of reassigning his or her sex, then he or she will be protected from any discrimination. If he or she simply likes dressing as a member of the opposite sex, then he or she will not.

**5.133 If a teacher believes that he or she is acting in the best interests of a pupil, can he or she nevertheless be held to have discriminated?**

Discrimination does not require there have to been any specific intention on the part of the discriminator: as long as the treatment is (in the case of direct discrimination) because of the protected characteristic, then it will be discrimination, regardless of intention. This is why it is important for there to be training on equality and on the provisions of the Act for all those with pupil contact.

**5.134 A pupil with a large facial birthmark does not consider herself to be disfigured or disabled. Is she still protected by the Act?**

Yes: her birthmark is identified as a disfigurement, which is specified in the Act as a disability, and therefore she is protected by the disability discrimination provisions of the Act.



# Chapter 6: Reasonable adjustments for disabled pupils

- 6.1 Schools and education authorities have had a duty to provide reasonable adjustments for disabled pupils since 2002: originally, under the Disability Discrimination Act 1995 (the DDA 1995); and, from October 2010, under the Equality Act 2010. This Guidance will help school leaders and education authorities to understand and comply with the reasonable adjustments duty. It will also help disabled pupils and their parents to understand the duty.
- 6.2 From 1 September 2012, the reasonable adjustments duty for schools and education authorities includes a duty to provide auxiliary aids and services for disabled pupils. The decision to bring this duty into force was taken after a public consultation, including an event held in Scotland, with a positive response to its introduction without additional regulation from the majority of respondents.
- 6.3 The duty to provide auxiliary aids is not a new one, and already applies in other contexts such as employment, service provision, and further and higher education. This chapter explains how the requirement to include auxiliary aids and services within the reasonable adjustments duty works in school education.

## What is the reasonable adjustments duty?

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- 6.4 The duty is ‘to take such steps as it is **reasonable** to have to take to avoid the substantial disadvantage’ to a disabled person caused by a provision, criterion or practice applied by or on behalf of a school, or by the absence of an auxiliary aid or service. **s20; Sch 13, para 2**

- 6.5 In the Act as a whole, there are three elements to the reasonable adjustments duty that relate to:
- Provisions, criteria and practices
  - Auxiliary aids and services
  - Physical features
- 6.6 The physical features element does not apply to schools in relation to disabled pupils; instead, schools have a duty to plan to improve access for disabled pupils generally, including in relation to the physical environment of the school. **Sch 13, para 2**
- 6.7 This duty is applied by means of the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 ('the 2002 Act'), which requires responsible bodies to prepare and implement accessibility strategies to improve, year-on-year, access to education – specifically, access to the curriculum, access to the physical environment of schools, and information for and communication with disabled pupils.
- 6.8 The duty to make reasonable adjustments in relation to provisions, criteria and practices is not a new duty for schools and is the same as the duty under the DDA 1995. The new element of the duty for schools is the provision of auxiliary aids and services for disabled pupils.
- 6.9 Many of the reasonable adjustments that schools are already making for disabled pupils undoubtedly include the use of some auxiliary aids, such as coloured overlays for dyslexic pupils, pen grips, adapted PE equipment, adapted keyboards and computer software.

**Example:** Following assessment, a disabled pupil's additional support plan includes the use of an adapted keyboard, which is purchased for his use. The keyboard can be detached and reattached to computers as the pupil moves between subject classrooms. The education authority introduces a policy that prevents USB devices from being attached and so the adapted keyboard can no longer be moved among different computers. The authority makes a reasonable adjustment to its policy so that the individual pupil can be given a login that will allow him to attach his keyboard.

- 6.10 Where the provision of auxiliary aids and services involves the provision of information, there is a requirement under the Act to provide that information in an accessible format.
- 6.11 The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school, and that they can enjoy the other benefits, facilities and services that the school provides for pupils.
- 6.12 Many reasonable adjustments are inexpensive and will often involve a change in practice rather than the provision of expensive pieces of equipment or additional staff.
- 6.13 A school's duty to make reasonable adjustments is an anticipatory one owed to disabled pupils generally, and therefore schools need to think in advance about what disabled pupils might require and what adjustments might need to be made for them.

### To whom does the duty apply?

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- 6.14 The reasonable adjustments duty is owed to disabled pupils, as defined in the Act.
- 6.15 The Act says that a pupil has a disability if he or she has a physical or mental impairment that has a long-term and substantial adverse effect on his or her ability to carry out normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing.
- More guidance on the definition of disability is available online at: [www.equalityhumanrights.com/uploaded\\_files/EqualityAct/odi\\_equality\\_act\\_guidance\\_may.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/odi_equality_act_guidance_may.pdf)
- 6.16 Some, but not all, disabled pupils will also have been identified as having additional support needs and may already be receiving additional support in school or may have a coordinated support plan. The fact that a disabled pupil is receiving additional support does not take away a school's duty to make reasonable adjustments for that pupil. In practice, many disabled pupils who also have additional support needs will receive the necessary additional support through an individualised educational programme (sometimes called an additional

support plan) or a coordinated support plan, where the criteria is met. In that case, there will be no additional requirement on the school to make reasonable adjustments. However, some disabled pupils will not have additional support needs and some disabled pupils with additional support needs will still need reasonable adjustments to be made for them, in addition to any support that they already receive.

## What is meant by ‘substantial disadvantage’?

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- 6.17 The reasonable adjustments duty is triggered only where there is a need to avoid ‘substantial disadvantage’. ‘Substantial’ is defined as being anything more than minor or trivial. Whether a disabled pupil is at a substantial disadvantage or not will depend on the individual situation. **s212(1)**

**Example:** A disabled pupil with severe manual dexterity difficulties finds it difficult to write large amounts of text by hand and so this takes him considerably longer than other pupils. In a lesson in which large amounts of text are being copied from the board, he would be at a substantial disadvantage; in a lesson in which there is no handwriting required, he would not be at a substantial disadvantage in relation to his difficulties with handwriting.

- 6.18 The pupil must be at a substantial disadvantage in comparison with non-disabled pupils. In most cases, this will be obvious.

**Example:** A visually impaired pupil who can see material only in 16pt font or larger will be at a substantial disadvantage compared to non-disabled pupils if materials are provided in smaller print.

- 6.19 In other cases, it will not be so obvious, but it will be no less a substantial disadvantage.

**Example:** A pupil with chronic fatigue syndrome finds it harder to concentrate in lessons in the afternoon as a result of an increase in her tiredness.

## What does the duty cover?

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- 6.20 The phrases ‘provision, criterion and practice’ and ‘auxiliary aids and services’ are not defined in the Act. The duty in relation to provisions, criteria and practices covers the way in which a school operates on a daily basis, including its decisions and actions.

**Example:** A school uniform policy would fall within this element of the reasonable adjustments duty and a school may be required to make adjustments to this policy for disabled pupils with an allergy to synthetic materials who need to wear cotton clothing.

- 6.21 The duty in relation to the provision of auxiliary aids and services generally means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff.

**Example:** Providing a pupil who is a wheelchair user with a support assistant to push him or her around school would be an auxiliary service. Providing a step so that a pupil with restricted growth syndrome can reach the desks in the science lab would be an example of providing an auxiliary aid.

## What is meant by ‘reasonable’ steps

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- 6.22 The duty to make reasonable adjustments requires schools to take what are referred to in the Act as ‘reasonable steps’ to make adjustments.
- 6.23 The Act does not say what is ‘reasonable’. This allows flexibility for different sets of circumstances so that, for example, what is reasonable in one set of circumstances may not be reasonable in another.
- 6.24 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 offered generally to pupils.

- 6.25 The crux of the reasonable adjustments duty is not whether something is an auxiliary aid or whether it is an adjustment to a practice, but whether it is something that is reasonable for the school to have to do. It is not possible for a school to justify a failure to make a reasonable adjustment; the question is only whether or not the adjustment is reasonable.
- 6.26 While it is not possible to say what will or will not be reasonable in any particular situation, some of the factors that are likely to be taken into account in deciding what it is or is not reasonable for a school or an education authority to have to do are set out in paragraph 6.29. These factors are based on those that tribunals and courts have already taken into account when considering reasonable adjustments under the equivalent provisions in the DDA 1995.
- 6.27 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. It is unlikely, though, that there will be nothing that a school will be able to do for a pupil in such a situation.
- 6.28 Where a school decides that there are no reasonable steps that it can take, it is important that it sets out its reasons for this decision so that, if it is challenged by the child's parents, it can explain to them and, if necessary, a tribunal why it has acted in the way that it has.

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

- 6.29 Without intending to be exhaustive, and in no particular order, the following are some of the factors that are likely to be taken into account when considering what adjustments it is reasonable for a school to have to make:
- The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
  - The extent to which support will be provided to the pupil under the Education (Additional Support for Learning) (Scotland) Act 2004, as amended
  - The resources of the school and the availability of financial or other assistance

- The financial and other costs of making the adjustment
- The practicability of the adjustment
- The effect of the disability on the individual
- Health and safety requirements
- The need to maintain academic, musical, sporting and other standards
- The interests of other pupils and prospective pupils

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

6.30 There is likely to be a significant overlap between those pupils who are disabled and those who have been identified as having additional support needs.

6.31 Many disabled pupils may receive additional support in school. In some cases, the substantial disadvantage that they experience may be overcome by this support and so there will be no obligation under the Act for the school to make reasonable adjustments.

**Example:** A disabled pupil with an additional support plan attends a mainstream secondary school. The additional support that she receives comprises two hours a week of specialist teaching and the use of an electronic notetaker in lessons. Because the support that she requires is already being provided, the school does not therefore have to make any additional reasonable adjustments by providing these auxiliary aids and services for her.

6.32 In other cases, a disabled pupil may need reasonable adjustments to be made as well as the additional support that he or she is receiving.

**Example:** A primary school disabled pupil with attention deficit hyperactivity disorder (ADHD) that meets the criteria of a disability receives some individual teaching assistant support. He is diagnosed with severe asthma and needs assistance with his nebuliser. Although this could and should be considered to be an additional support need, the duty on reasonable adjustments is clear: because his asthma is likely to be a disability for the purposes of the Act, a failure to provide a reasonable adjustment will place him at a substantial disadvantage.

The school trains the teaching assistant to provide the pupil with the assistance that he needs. This would be a reasonable adjustment for the school to make.

- 6.33 While most disabled pupils will be classified as having additional support needs, there may still be circumstances in which they are suffering a substantial disadvantage and reasonable adjustments may need to be made.

**Example:** A disabled pupil at a primary school has diabetes, and requires daily support with reading blood sugar levels and insulin injections. He is classified as having additional support needs and receives additional support during school hours. However, this support is not available to the pupil to allow him to take part in a school trip and this therefore places him at a substantial disadvantage compared to his peers. Because he is disabled, the school would be under a duty to make an adjustment of providing the support, if it would be reasonable to do so in the particular circumstances.

- 6.34 There will be some instances in which 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, although the school should work with the other agency to coordinate the support under the terms of the 2004 Act.

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

- 6.35 In the case of independent schools, it is more likely to be reasonable for a school with substantial financial resources to make an adjustment that incurs a significant cost to the school than it is for an independent school with fewer resources. The resources available to the school as a whole in practice – such as its staffing levels – should be taken into account, as well as other calls on those resources. The reasonableness of an adjustment will depend not only on the resources available in practice for the adjustment, but also on all other relevant factors (such as effectiveness and practicability). It may also be relevant to consider what other similar schools spend on adjustments.



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

- 6.36 If a disabled pupil has a particular piece of special or adapted equipment that he or she is prepared to use while at school, it may be reasonable for the school to allow the use of the equipment.
- 6.37 While the same principles regarding resources apply to education authorities in relation to publicly funded schools, given their responsibilities for planning and delivering improvement through the 2002 Act, they should be in a position to anticipate future financial costs associated with making reasonable adjustments.

**Example:** An education authority recognises that The Scottish Voice offers high-quality text-to-speech options that will benefit a number of disabled pupils in schools across the authority. When renewing its contract with a managed service provider, the authority stipulates that this option must be included through the tendering process. Thereafter, awareness-raising is provided to support learning staff so that they know which pupils, whether disabled or with additional support needs, are likely to benefit most. School technicians are advised to respond positively to any requests made by teachers or pupils.

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

- 6.38 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 of 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 and also on what other schools, in similar situations, might spend.

- 6.39 In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account, for example from social work services or health boards.

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

- 6.40 Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by the individual disabled pupil. In line with additional support for learning, the needs of the individual pupil are central. Even pupils with the same disability might need different adjustments to overcome the disadvantage. It is important not to make assumptions about a disabled pupil's needs, because this may lead a school to provide a completely ineffective adjustment.

**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 – but the pupil does not use a hearing aid and so is unable to benefit from the induction loop. The pupil reads lips and so a reasonable adjustment would have been to train all staff to ensure that they face the pupil when speaking to him.

- 6.41 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. If this is the only possibility, however, of avoiding the disadvantage and there is a prospect of it having some effect, then it may be reasonable for the school to have to take the step.
- 6.42 Where, however, there are other reasonable steps that a school could take, it is unlikely that a school will discharge its reasonable adjustments duty if the adjustment made provides little benefit to the pupil.
- 6.43 An adjustment, when taken alone, is of marginal benefit but may be one of several adjustments that, if grouped together, would be effective in overcoming the disadvantage, in that case, it would be reasonable for the school to make the adjustment.

**Example:** A disabled pupil with chronic fatigue syndrome finds moving around a large three-floor secondary school very tiring and, despite the school adjusting the timetable and location of classes to minimise the amount that she has to move around the school, she is still too exhausted to complete the school day. The school then makes further adjustments, giving her a ‘buddy’ to carry her books for her, using a dictaphone to record those lessons that she misses and establishing 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.

- 6.44 It will usually be a matter of discussing with the pupil, and those who know him or her and his or her needs, what those needs are and what is likely to be most effective.

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

- 6.45 It is more likely to be reasonable for a school to have to make an adjustment that is easy than one that is difficult, although in some circumstances it may be reasonable to have to make an adjustment, even if it is difficult.

**Example:** A visually impaired child requires printed handouts to be prepared in 24pt font or larger. This can easily be accommodated by ensuring that fonts are reset to this size prior to any documentation being printed.

**Example:** A pupil who is a wheelchair user is unable to access classrooms on the first floor of a school. A reasonable adjustment would be for the school to rearrange the timetabling and location of classes so that all of her classes are on the ground floor. Although this may be difficult, it does not mean it is not a reasonable adjustment for the school to make. If specialist facilities such as science labs are available only on the first floor, then it may not be possible to move classes that require the use of the specialist equipment to a different classroom; in this case, the school will need to consider what other adjustments it could make to enable the disabled pupil to access learning opportunities equivalent to those of her peers.

## The effect of the disability on the individual

- 6.46 The effect of a disability on a particular pupil will affect the adjustments that it is 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 provides handouts on yellow paper for her. This would be a reasonable adjustment for this pupil.

**Example:** 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.

## Health and safety requirements

- 6.47 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.
- 6.48 However, as with the approach to any question of health and safety, and risk assessment, schools are not required to eliminate all risk. Suitable and sufficient risk assessments should be used to help the school to 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. Proportionate risk management relevant to the disability should be an ongoing process throughout a disabled pupil's time at the school.
- 6.49 There might be instances in which, 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. There might be other instances in which schools could make anticipatory reasonable adjustments in line with health and safety legislation, ensuring compliance with, and not infringing, that legislation.

- 6.50 Health and safety issues must not be used inappropriately 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 applies to a large secondary school with several flights of stairs. The school initially prevents him from using the stair-climbing wheelchair in the school because it thinks that it will be dangerous. However, after carrying out a risk assessment and finding out more about the wheelchair, the school realises that it does not present a significant health and safety risk, and therefore that it would be reasonable for the school to allow him to use it.

**Example:** A disabled pupil who attends a mainstream school has a tracheostomy, 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 tracheostomy care, and then timetables the trained staff so that one is always able to monitor the pupil. All staff are trained in identifying when the pupil needs intervention and are 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 applies to be admitted to 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 the pupil has a seizure in school. The head teacher carries out a risk assessment, and seeks advice from the local authority and from another school in the area with a pupil with epilepsy. She identifies that the risks decrease the more members of staff are trained and able to assist in the case of a seizure. The head teacher decides to provide training to all staff, teaching and non-teaching, as part of an Inservice day; then, after the training has

been undertaken, she asks staff to volunteer to agree to support the pupil and to 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, to raise staff awareness generally and to minimise the health risk for the pupil. This could be a reasonable adjustment for the school to make.

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

6.51 The reasonable adjustments duty 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. Under the Curriculum for Excellence, every pupil, including those with a disability, is entitled to experience a broad general education. This includes learning across the full range of outcomes and experiences associated with physical education, physical activity and sport, including cooperation and competition.

**Example:** A school regularly takes part in football matches with other local schools and selects its best footballers to play in the team. A pupil who is a wheelchair user plays football at school, but not able to play at the necessary standard to be chosen for the team. The school is not required, as a reasonable adjustment, to select him for the team, because it is permitted to select only the best football players.

### **The interests of other pupils and prospective pupils**

6.52 Ordinarily, the interests of other pupils regarding the reasonable adjustments required by a disabled pupil will be irrelevant. However, there are limited circumstances in which the provision of a particular reasonable adjustment for a disabled pupil will disadvantage other pupils. This is relevant only 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 that is aggravated by cold and his parents ask that his classroom is kept at a very hot temperature. However, this would mean that the other pupils in the class would be uncomfortably hot. The school may not be expected to keep the classroom at the requested temperature, but it could take other steps, such as raising the classroom temperature to a level that is still comfortable for other pupils, placing the pupil in the hottest part of the room, such as by a radiator, and relaxing the school uniform policy to allow him to wear warmer and more comfortable clothing.

- 6.53 There will, however, be other instances in which 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 its town to undertake some activities. One of the pupils in the class is deaf and, because 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 because 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 is unable to attend the trip.

**Example:** A secondary school takes its Primary 7 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 in which the pupils can participate. This year, a disabled pupil 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 pupil, the school considers cancelling the trip and seeking an alternative, such as 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 that pupils do not miss out on this valuable residential experience, and are not required to travel to and from activities each day. But, to minimise the disadvantage faced by the disabled pupil, the school arrange for transport from his home to attend the centre for day visits on three days of the week, so that 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. This is likely to be a reasonable step for the school to have to take. It is unlikely to be reasonable for the school to have to alter its decision to undertake the week-long activities course.

### Charging for providing reasonable adjustments

- 6.54 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. However, as set out in paragraph 6.29, the cost of an adjustment is one of the factors to be taken into account when considering whether or not the adjustment is reasonable. **s20(7)**

**Example:** An independent school provides a dyslexic disabled pupil with overlay sheets to assist him in reading text, along with 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.

## Frequently asked questions (FAQs)

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### Auxiliary aids

#### 6.55 What has changed since September 2012?

Schools and education authorities now have additional obligations towards disabled pupils to provide what are called 'auxiliary aids and services' to overcome disadvantages that these pupils experience in schools.



**6.56 Is that not something with which the Education (Additional Support for Learning) (Scotland) Act 2004, as amended, deals?**

Some disabled children and young people will have additional support needs, and the necessary auxiliary aids may already be being provided under the 2004 Act. In these cases, the schools will be under no obligation to duplicate that support. However, some disabled pupils may not have additional support needs and they may require auxiliary aids to prevent them from being at a substantial disadvantage.

Many schools will already be doing this and so it will add little or no additional burden. But it is important that all staff know about these new obligations.

**6.57 What if we do not have the money or resources to do this?**

The Act obliges schools to make only 'reasonable' adjustments. Cost and resources are some of the factors that are taken into account in determining what is 'reasonable'. It is important to document carefully any decisions taken on reasonable adjustments, so that they can be justified to parents and/or a tribunal.

**6.58 What sort of things might we have to do?**

Schools may have to provide a disabled pupil with:

- A piece of equipment
- Assistance from a sign language interpreter, lip-speaker or deaf-blind communicator
- Extra staff assistance
- An electronic or manual notetaking service
- Induction loop or infrared broadcast system
- Videophones
- Audiovisual fire alarms
- Readers for people with visual impairments
- Assistance with guiding
- An adapted keyboard
- Specialised computer software
- Enhancing signage using symbols to support a disabled pupil with communication support needs

**6.59 If a school provides a disabled pupil with a piece of equipment, whose responsibility is it to ensure that the equipment is looked after and is repaired when necessary?**

The reasonable adjustments duty includes making sure that the reasonable adjustment provided actually works, so the school would be responsible for the maintenance and repair of the piece of equipment. However, schools may want to work with other schools in their local area or with the education authority to share resources both in terms of equipment, and the maintenance and repair of equipment.

**6.60 A disabled pupil is supplied with a portable computer with specialised software that he uses to access the curriculum at school. Should he have access to it at home, so that he can complete his homework?**

The school's duty is to avoid the substantial disadvantage experienced by the disabled pupil while he or she is accessing the education and other benefits, facilities and services that the school provides to pupils. A school is not required to provide anything that the pupil requires outside of education. Although the school does not have a duty to provide the computer for home use, however, an agreement could be reached with the pupil's parents that they would pay for any damage incurred outside of school.

**6.61 Can an adjustment involve equipment that belongs to a disabled pupil?**

Yes, and in some circumstances the adjustment may involve a change to a particular policy or practice.

**Example:** A disabled pupil's parents have purchased a tablet computer with apps that allow the pupil to read magnified text in an appropriate font, offering text-to-speech where required. The device is light and portable, and allows the pupil to obtain accessible copies of textbooks and related curriculum materials that are used by non-disabled pupils in class. The education authority does not allow the tablet device to be used on the school network, which is run by an external service provider. The authority discusses with a national agency how the tablet computer can be secured and managed, so that it can be used on the school network.

When the authority prepares its next tender document for a service provider to run school networks, it works with the national agency to include a specific clause that requires the provider to give disabled pupils access to networks for tablet and related devices. This is considered to be a reasonable adjustment; it is included in the authority's accessibility strategy planning framework, and reported on under its general and specific public sector equality duty.

**6.62 Can a school charge disabled pupils or their parents for the additional cost of providing auxiliary aids?**

No. The Act prohibits schools from passing on the cost of reasonable adjustments to the disabled pupil or his or her parents.

**6.63 It can be difficult to include disabled pupils on residential school trips. Would it be better to cancel such trips to ensure that disabled pupils are not discriminated against?**

The Act does not require a school to cancel school trips or any other activities arranged for pupils, but it does require a school to look at ways in which to ensure that disabled pupils are given the same opportunities to participate as other pupils. This might include considering alternative trips to those previously arranged by the school, providing additional assistance to enable the disabled pupil to attend or allowing the disabled pupil to attend for only some of the trip. Because most disabled pupils will have been known to the school or education authority for some time, the need for careful planning and to explore alternative options should have been foreseen. By working with disabled pupils and their parents, who will have experience of taking their children on trips and outings, and learning from the experiences of other schools, schools are likely to be able to come up with solutions that mean that everyone is able to benefit from the trip or activity.

## Other issues

### 6.64 **If a school does not know that a pupil is disabled, is it still required to make reasonable adjustments?**

In the majority of cases, schools will be aware of a child's disability for a number of reasons, such as the arrangements for the assessment of and the provision of additional support. In many cases, parents will volunteer information about their child's disability. It may not be immediately obvious that a child is disabled. Underachievement and unexplained behaviour may, in some cases, indicate an underlying disability that has not yet been identified.

The duty to make reasonable adjustments is an anticipatory duty. This means 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 the school. Schools should therefore not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments, and should anticipate the requirements of disabled pupils and the adjustments that may have to be made for them.

This complements duties under the 2002 Act.

### 6.65 **If a pupil asks a school to keep his or her disability confidential, does this mean that a school does not have to make any adjustments?**

Disabled pupils and their parents have a right to request that a pupil's disability be treated as confidential. In this case, what is reasonable for the school to do must be consistent with the request for confidentiality. The school still has a duty to make reasonable adjustments, but might make different adjustments from those that it would have made if there had not been a confidentiality request.

### 6.66 **Does the duty apply to independent and grant-aided schools?**

The duty applies to all schools in Scotland irrespective of how they are funded or managed.

## Case studies

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**Example:** A child with a recent diagnosis of dyslexia and Asperger's syndrome attends an independent school, and does not receive any additional support. His parents believe that he needs some one-to-one support and specialist teaching, because he is falling behind his peers.

### 6.67 **Is he at a substantial disadvantage?**

Because he is falling behind with his schoolwork, this may be an indication that the pupil is at a substantial disadvantage. If the school doubts that he is at a substantial disadvantage, then it could carry out or arrange an assessment to obtain more information about any disadvantage that he is experiencing (and about the steps that could be taken to avoid any substantial disadvantage).

### 6.68 **Could the disadvantage be avoided?**

If the assessment shows that the pupil is at a substantial disadvantage compared to non-disabled pupils, some one-to-one support and specialist teaching could help the school to avoid the disadvantage. If it suggests that he is not at a substantial disadvantage, then the school is not required to make any reasonable adjustments.

### 6.69 **Is it reasonable for the school to take these steps?**

This will depend on the resources available to the school and the other factors listed in paragraph 6.29.

**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 a learning support assistant provided through additional support. 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.

### 6.70 **Is he at a substantial disadvantage?**

Yes: he is unable to attend the trip with his peers. This means that he is missing out on an additional valuable learning experience available to non-disabled pupils in his class.

**6.71 Could the disadvantage be avoided?**

The following options could avoid the disadvantage and enable the pupil to attend:

- 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; and
- discussing with the pupil and his parents ways in which they think the support could be provided, such as a family member going on the trip to provide the overnight support.

**6.72 Is it reasonable for the school to take these steps?**

These steps are all potentially reasonable depending on the circumstances. 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 equivalent trip that could be organised for that year group in which the disabled pupil would be able to participate.

**Example:** A pupil with physical difficulties starts at a primary school partway through the school year, having recently moved to Scotland from abroad. His parents request that the education authority carry out an assessment, because they think that he may have additional support needs arising from a disability that requires significant support from education and health services. It is therefore likely that any additional support that he needs will be provided through an additional support plan, but in the meantime, until the assessment process is completed, the pupil is struggling to access education: he is unable to write by hand or to lift books, turn pages or access other learning materials.

**6.73 Is he at a substantial disadvantage?**

Yes. He is unable to access education in the same way as his peers.

**6.74 Could the disadvantage be avoided by the provision of an auxiliary aid or service?**

Yes – by means of individual and specialist support.

- A national agency might be asked to provide an equipment loan so that he can access digital versions of textbooks used by his peers.
- The school might access the Books for All Scotland Database, find the books required and download them to a computer that he can access in school.
- The national agency might provide switches through an equipment loan back that the pupil can use to turn the electronic pages of the accessible copy of the book.
- The school might request CPD to allow it to apply the methods used with accessible books across all learning materials.

**6.75 Is it reasonable for the school to take this step?**

Although support would ultimately be provided through an additional support plan, it is likely to be reasonable for the school to put in place at least some support to enable the pupil to access education in the meantime.

**Example:** A child with Asperger's syndrome attends a school and is provided with transport in the form of a school bus that stops near to her home and then goes to the school. She wants to attend an afterschool activity and, although there is a bus that she could catch home, she would need to change buses and is not familiar with the route.

**6.76 Is she at a substantial disadvantage?**

Yes. She cannot attend the afterschool activity.

**6.77 Could the disadvantage be avoided by the provision of an auxiliary aid or service?**

Yes – by means of the provision of individual transport.

**6.78 Is it reasonable for the school to take this step?**

In some circumstances, it may be reasonable for the school to provide individual transport, but there are also other options that the school could consider, such as working with the pupil to develop her independent travelling skills, which might include someone escorting her on the bus the first few times or practising the route with her.

# Chapter 7: Positive action

## What is 'positive action'?

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- 7.1 'Positive action' is the term used to describe action that the Act allows schools to take to counter the effects of past or present discrimination experienced by groups of pupils who share a protected characteristic, to meet the particular needs of pupils in such groups, or to facilitate their participation in activities in which participation by members of their group is disproportionately low.
- 7.2 Positive action might therefore be used to address things such as:
- Low participation of girls in certain subjects, resulting in future economic disadvantage
  - Low achievement of Gypsy Traveller pupils
  - High numbers of exclusions of disabled pupils
  - High levels of bullying of lesbian, gay and bisexual (LGB) pupils
- 7.3 Positive action can include providing additional or bespoke education, benefits, facilities or services, separate facilities, or targeting resources or opportunities to benefit a particular disadvantaged group.
- 7.4 Positive action is about addressing the needs of pupils in a group who share a protected characteristic. It is not about giving preferential treatment to a particular pupil because of a protected characteristic. That is positive discrimination, which is unlawful under the Act in most circumstances.
- 7.5 Measures that are permitted by the Act's positive action provisions are lawful even if they involve discrimination against members of other groups that might otherwise be unlawful under the Act.
- 7.6 Schools have no duty to take positive action. However, by taking appropriate and proportionate positive action, schools are likely to improve their education and services for pupils, and to overcome barriers for particular groups of pupils. Also, schools (public schools



managed by an education authority) that are subject to the public sector equality duty may wish to consider using positive action to help them to comply with the duty and improve outcomes for particular groups of pupils.

**Example:** When deciding on what action to take under the public sector equality duty, an education authority analyses its data on attainment at Primary 7, and finds that Gypsy Traveller pupils are underachieving compared to other pupils when previous attainment is taken into account.

The education authority sets an objective under the duty to tackle the underachievement of Gypsy Traveller pupils. In order to achieve this, it plans to offer a range of activities, including study skills support, mentoring and additional classes. These activities act as positive action measures and also contribute to meeting the duty to advance equality of opportunity.

## What does the Act say?

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- 7.7 The Act says that where a school reasonably thinks that pupils who share a protected characteristic: **s158(1)**
- a) experience a disadvantage connected to that characteristic, or
  - b) have needs that are different from the needs of persons who do not share that protected characteristic, or
  - c) have disproportionately low participation in an activity compared to those who do not share that characteristic,
- then the school may take any action that is proportionate to meet any of the aims stated in the Act.
- 7.8 Those aims (known as ‘the stated aims’) are: **s158(2)**
- a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
  - b) meeting those different needs, or
  - c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

## Basic requirements for taking positive action

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- 7.9 There are two basic requirements for taking positive action.
- The first requirement is that the school must reasonably think that one or more of the three circumstances in which positive action may be taken has arisen.
  - The second requirement is that the action the school takes must be proportionate to meet the relevant stated aims.
- 7.10 The first requirement means that there must be some indication or evidence to show that one or more of the relevant circumstances has arisen. However, it does not require a school to have sophisticated statistical data or research to show that this is the case; it may simply involve looking at the profiles of pupils and/or making enquiries 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 quantitative evidence of underperformance by pupils with a protected characteristic, 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 boys from particular ethnic groups. 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 these ethnic groups to understand the reasons why these pupils are facing higher levels of exclusions. Following the consultation, the school implements a whole-school policy on tackling racial equality and a programme of positive action that specifically targets these boys' needs. This includes parent and pupil workshops, visits from role models, learning mentors, and classes on emotional literacy, assertiveness, socialisation and anger management skills.

7.11 The second requirement – that the action is proportionate to meet the relevant stated aims – means that consideration must be given to any relevant competing factors. The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the activity concerned will need to be balanced against the impact of the action on other protected groups and the relative disadvantage, need or degree of participation of those groups.

7.12 Before taking positive action, a school should ask itself the following questions.

- Is the action an appropriate way in which 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 other people being treated less favourably than those for whom the action is taken?

**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. It would involve less favourable treatment of female pupils who are underachieving, and would not meet the appropriate and necessary test, since not all boys are underachieving in literacy.

**Example:** A secondary school reviews its data on participation in PE and discovers 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, with a female swimming instructor, and changes 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 non-Muslim female pupils are permitted to wear a similar style of swimming costume if requested.

### Taking action to overcome or minimise disadvantage

- 7.13 This is the first of the stated aims for which schools may take positive action. The Act does not define what ‘disadvantage’ means, but it includes exclusion, rejection, lack of opportunity or choice, and barriers to accessing provision. **s158(2) (a)**
- 7.14 The only limit that the Act places on positive action to overcome or minimise disadvantage is that it must be a proportionate means of achieving this aim. So positive action could include action to identify possible causes of the disadvantage through consultation and surveys, or a review of data, and then:
- targeting provision at specific disadvantaged groups, for example through advertisements, outreach programmes and special arrangements to encourage increased take-up;
  - aiming provision specifically at a disadvantaged group;
  - making provision in a different way, at different times, at different locations; and/or
  - making specific provision for a disadvantaged group only.
- 7.15 Positive action to overcome disadvantage may 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–teacher 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' evenings at which interpreting is provided if required. This would be a lawful positive action taken to minimise disadvantage.

### Taking action to meet different needs

7.16 The second of the stated aims for which positive action may be taken is to target the needs of pupils who share a protected characteristic where those needs are different from the needs of pupils who do not share that characteristic. Such needs may arise because of past or present discrimination or disadvantage, or because of other factors that apply in particular to pupils who share a protected characteristic. **s158(2) (b)**

7.17 However, the needs of pupils who share a protected characteristic can be different from the needs of others, without those needs being entirely unique. Needs may also be different because of a disproportionate failure to meet those needs in comparison with the needs of other groups, or because of the particular importance of the need to the group in question.

**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.

7.18 The only limit that the Act places on positive action to meet different needs is that it must be a proportionate means of achieving this aim. So positive action could include:

- 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 taught by a female teacher for Muslim girls); and/or
- making additional provision specifically to meet particular needs, such as additional English language classes for pupils whose first language is not English.

**Example:** A school analyses its pupil destination data, and becomes aware that Pakistani and Sikh girls are disproportionately more likely to leave school at the age of 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 and Sikh girls from age 14 to try to 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.

### **Taking action to encourage participation**

- 7.19 The third and final reason for which positive action may be taken is to enable or encourage pupils who share a protected characteristic to participate in an activity in which participation by people who have that characteristic is disproportionately low. It follows that there will need to be some reliable indication or evidence that participation in the activity in question by people with the protected characteristic is low compared to participation by members of other groups, adjusted if necessary to allow for relevant factors such as type of school and locality. **s158(2)  
(c)**
- 7.20 Positive action may be taken not only to facilitate access to the activity itself, but also to enable or encourage experiences of undertaking the activity and completion of it. It includes activities undertaken, organised or facilitated by a school, and might include school trips abroad or careers events, for example. It could also allow schools to address the low take-up of particular courses by a particular pupil group, such as the low take-up of science courses by girls.
- 7.21 The only limit that the Act places on positive action to encourage participation is that it must be a proportionate means of achieving this aim. So positive action could include:
- providing training or additional classes targeted at pupils with a particular protected characteristic;
  - extending or changing locations or times for activities to take place;
  - making the provision in different ways;
  - targeting advertisements and prospectuses, and sources of advice;
  - improving careers advice and providing mentoring for pupils who have the protected characteristic; and/or
  - using outreach and monitoring.

**Example:** An education authority analyses its data on the types of work experience placement taken by its pupils and finds that girls are far less likely to undertake a placement with science, engineering and technology employers than are boys. The education authority carries out some additional evidence-gathering and finds that this under-representation extends to further and higher education, and into wider employment, and that gender segregation in the workplace is one of the main causes of the gender pay gap. The school decides to implement a programme to increase the numbers of female pupils undertaking placements in science, engineering and technology. It runs 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 to hear from women working in construction and engineering. The school follows up on this initial taster event by working to find work placements with local employers.

## Implementing and monitoring positive action

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- 7.22 It is good practice for schools, when considering positive action, to draw up an action plan that 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 that the school is aiming to achieve;
  - an identification of possible steps;
  - an assessment of the proportionality of those possible steps;
  - the steps that the school decides to take to achieve its aims; and
  - measurable indicators of progress towards those aims, set against a timetable.
- 7.23 It is also good practice for schools to consult with groups of pupils who share the protected characteristic in question before deciding whether to take positive action, because this is likely to be helpful in identifying needs and evaluating possible actions. In addition, of course, it is advisable for schools to explain to staff, parents and pupils why positive action is being taken and what it comprises.



**Example:** A secondary school has a number of lesbian, gay and bisexual (LGB) pupils and pupils whose parents are LGB. The school wants to ensure that any barriers to learning that these pupils are facing are tackled by means of 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 reports several barriers affecting these pupils' school experience, including homophobic bullying, which is contributing to underachievement and putting some pupils at the risk of dropping out.

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 meet with other pupils who are tackling homophobia in their schools and running various activities for lesbian, gay, bisexual and transgender (LGBT) history month.

- 7.24 If a school takes positive action, it should monitor the impact that the action is having and regularly review progress towards the identified aim. Not only will this help the school to see whether the action it is taken is successful, but it will also help the school to make sure that the action continues to be lawful. This is because action might cease to be proportionate if circumstances change so that the conditions for taking the action no longer apply. For the same reason, it is good practice for schools to plan to take positive action for a set period only and for the position to be reviewed at the end of that period.

**Example:** A school IT coordinator sets up a 'computer club for girls' to try to 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 male-dominated environment common in many school computer labs. The clubs allow girls to explore things at their own pace and to 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 is going to run for just one year initially to see if it tackles the issue.



**Example:** A school has a large intake of refugee pupils. The school decides to employ a support worker to work with the pupils to help them to 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 the public sector equality duty

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- 7.25 Education authorities are subject to the public sector equality duty, and may wish to consider using positive action to help them to comply with the duty. **s149(1), (3)**

## Frequently asked questions (FAQs)

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- 7.26 **What is the difference between action that is always lawful under the Act, positive action and positive discrimination?**

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'.

Actions that fall within the framework of the Act's positive action provisions are lawful only if they meet the statutory conditions for positive action measures and as long as they do not exceed the limitations set out in the Act.

Actions that involve preferential treatment – often referred to as 'positive discrimination' – to benefit members of a disadvantaged or under-represented group who share a protected characteristic in order to address inequality, but which do not meet the statutory requirements for positive action, will be unlawful unless a statutory exception applies.

**Example:** In monitoring the gender breakdown of Higher design and manufacture, 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 manufacture at a local university to run some activities at the school design and manufacture club to try to 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 manufacture, 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. Because 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 courses, it being suggested that while boys are required by the school to have studied design and technology at National 5 level to get onto the Higher course, girls should not have to meet this requirement before being accepted for the Higher 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. Because there are less discriminatory steps that 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.

# Chapter 8: Dispute resolution and enforcement

- 8.1 This chapter explains what happens if someone makes a complaint under the Act against a school and what routes of redress exist. It also explains what action may be taken to put right any discrimination, harassment or victimisation that is found to have taken place.
- 8.2 This section is not intended to be a procedural guide to raising an action in the Sheriff court or making a claim to the Additional Support Needs Tribunal.
- 8.3 The civil courts procedure is contained in the Sheriff Court Ordinary Cause, Summary Cause and Small Claim Rules; user-friendly guides to presenting a claim to the Sheriff court can be found on the Commission's website. The procedures for the tribunal are available online at the tribunal website.

## Resolving disputes

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- 8.4 It is usually in everyone's best interests to attempt to resolve disputes without the need for legal action. In many instances, the pupil (or his or her parent acting on his or her behalf) who believes that he or she has been discriminated against will want to raise the complaint directly with the school.
- 8.5 It is good practice for schools to make pupils and parents aware of the complaints procedure, and to ensure that it is accessible to everyone, for example by making it available in different languages or formats, if appropriate.
- 8.6 Defending a claim can be lengthy, expensive and draining, and it can have a damaging impact on a school's reputation. It is likely to be in everyone's interest to try to put things right before a claim is brought.

However, there will be occasions on which pursuing a school's complaint procedure will be neither practical nor appropriate. The timescales for presenting a claim in the Sheriff court or tribunal are not extended if a complaint is made through a school's internal complaints procedure.

- 8.7 Schools must make reasonable adjustments to any internal complaints procedures to prevent disabled people from being placed at a substantial disadvantage in comparison with people who are not disabled. Failure to do so will itself amount to discrimination.

### Obtaining information ('the questions procedure')

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- 8.8 Before starting legal proceedings, it may be helpful to the person considering bringing proceedings to obtain information from the school, to help him or her to decide whether or not he or she has a valid claim. **s138**

#### **Breaches of the Act before 6 April 2014**

- 8.9 Any pupil (or his or her parent on his or her behalf) who thinks that he or she was the subject of an unlawful act before 6 April 2014 may request information from the school using the question and answer procedure in s.138 of the Equality Act 2010. This is known as the 'questions procedure' and it is additional to other means of obtaining information under the courts or tribunal rules. The questions and answers are admissible in evidence in court and tribunal proceedings.
- 8.10 If a school does not respond to the questionnaire within eight weeks, then the court or tribunal can take that into account when making a judgment. The court or tribunal can also take into account answers that are evasive or unclear, except where the failure to respond is because answering differently might prejudice a criminal matter.
- 8.11 In addition to the formal questions procedure, a person who is considering making a claim can write to the school asking for information, and that correspondence can be used as evidence. If the school fails to respond, then the court or tribunal can be asked to take that into account.

### **Breaches of the Act on or after 6 April 2014**

8.12 The questions procedure was abolished on 6 April 2014<sup>3</sup>. It will continue to apply to complaints about breaches of the Equality Act 2010 that happened before 6 April 2014<sup>4</sup>. It will remain good practice for a pupil (or their parent on their behalf) who thinks that they may have been unlawfully discriminated against, harassed or victimised under the Equality Act 2010 to seek relevant information before issuing a formal claim. This may prevent the complaint escalating to a formal claim.

The Government Equalities Office has issued a good practice guide on asking and responding to questions about discrimination in the provision of services and public functions including education services. This can be found at:

<https://www.gov.uk/government/publications/asking-and-responding-to-questions-of-discrimination-in-the-provision-of-goods-and-services-and-public-functions>

### **Time limits**

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- 8.13 A court action must normally be raised and served on the school, or a claim made to the Additional Support Needs Tribunal, within six months (less a day) of the alleged discrimination. Where there has been a continuing process of discrimination taking place over a period of time, the six months begins at the date of the last discriminatory act. However, where the continuing act is a failure to do something, then the six months begins from either the date on which the person said that he or she was not going to do it, or from the date on which he or she could have reasonably been expected to do it. However, an ongoing failure to do something is treated as having happened when the person in question decided not to take the action. In the absence of evidence showing when the decision was made, a person is taken to have decided to fail to do something when he or she either carries out
- s118;  
Sch 17,  
para 4**

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<sup>3</sup> S.138 of the Equality Act 2010 was repealed by s.66 of the Enterprise and Regulatory Reform Act 2013 which was brought into effect from 6 April 2014 by the Enterprise and Regulatory Reform Act 2013 (Commencement No.6, Transitional Provisions and Savings Order 2014).

<sup>4</sup> S.66(2) of the Enterprise and Regulatory Reform Act 2013.

an act inconsistent with doing it or on the expiry of the period in which he or she might reasonably have been expected to do it.

- 8.14 Courts and tribunals have the discretion to consider a claim brought outside the six-month period if they consider that it is fair to do so, but they are not required to do so. **s118; Sch 17, para 4**

## Where claims are made

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8.15 All claims in relation to protected characteristics other than disability are brought in the Sheriff court.

8.16 Disability discrimination claims are made to the Additional Support Needs Tribunal.

## Claims presented in the Sheriff court

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### Who can present a claim?

- 8.17 Anyone can present a claim to the Sheriff court if he or she believes that he or she has been discriminated against, harassed or victimised. **s114(1)**
- 8.18 A parent may make a claim on behalf of his or her 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.
- 8.19 Pupils over the age of 16 may make a claim in their own right.
- 8.20 Below the age of 16, a child has the right to make a claim in his or her own right if he or she 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 his or her own right, provided that he or she has the requisite maturity and understanding to do so.
- 8.21 Where both child and parent have rights to make a claim, either may do so.

## Remedies

- 8.22 The Sheriff court has the power to award all of the remedies that the Court of Session can grant in proceedings in reparation or in a petition for judicial review. These remedies include: **s119**
- A declaration that unlawful discrimination, harassment or victimisation has taken place, or a declaration that no unlawful discrimination, harassment or victimisation has taken place
  - An order for specific implement requiring the school to do something (such as to admit the child as a pupil) or an interdict to prevent the school from repeating any discriminatory act in the future
  - Damages to compensate for any loss suffered by the person bringing the claim, including compensation for injury to feelings
  - Interest on any damages
  - Expenses

## Additional Support Needs Tribunal claims

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### What claims can the tribunal hear?

- 8.23 Disability discrimination claims against schools in Scotland are heard by the Additional Support Needs Tribunal. **Sch 17**

### Who can make a claim?

- 8.24 A disabled pupil who has legal capacity can make a claim that he or she has been discriminated against.  
A child aged 12 or over is presumed to have capacity.
- 8.25 Where a disabled pupil does not have legal capacity, the pupil's parent may make a claim.
- 8.26 Where both child and parent have rights to make a claim, either may do so.

### What can the tribunal order?

- 8.27 The tribunal may make any order that it thinks appropriate in that individual case, often with the intention of trying to remedy the damage done to the disabled person and to reduce any future disadvantage.

- 8.28 The tribunal cannot order the payment of compensation. Examples of the type of remedies ordered by the tribunal include:
- A letter of apology
  - Staff training
  - Changes to policies and procedures
  - Additional education for a pupil who has missed education
  - An additional school trip for a pupil who has missed a trip

## The Commission

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| 8.29 | In addition to the rights given to an individual under the Act, the Equality and Human Rights 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 that person from committing that act.  | <b>EA<br/>2006,<br/>s24</b>                              |
| 8.30 | 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 that would, if they were ever applied to an individual, amount to an unlawful act, for example to deal with the publication of an advertisement that suggests that a school would discriminate. This power could also be used to challenge a provision, criterion or practice that indirectly discriminates, even if it has not yet put any particular pupil at a disadvantage. | <b>EA<br/>2006,<br/>s24A</b>                             |
| 8.31 | 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 the school to prepare an action plan to avoid repetition or continuation of that act, or recommend that it takes action for that purpose.   | <b>EA<br/>2006,<br/>s34;<br/>ss20–<br/>22; Sch<br/>2</b> |
| 8.32 | The Commission may also, if it suspects that a school is committing an unlawful act, enter into a binding agreement with the school to avoid such contraventions.   | <b>EA<br/>2006,<br/>s23</b>                              |
| 8.33 | The Commission also has a power to assist a pupil who is taking enforcement action against a school.  | <b>EA<br/>2006,<br/>s28</b>                              |



# Chapter 9: Exceptions

- 9.1 This section gives an overview of the exceptions that apply generally across the Act and therefore apply to schools, as well as exceptions that apply only to certain types of school. Exceptions that relate to specific school activities were explained in earlier chapters.

## Residential schools

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### Communal accommodation

- 9.2 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 following criteria are satisfied. **Sch 23, para 3(1)**
- 9.3 'Communal accommodation' is residential accommodation that 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 that should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation. **Sch 23, para 3(5)**
- Example:** Where a school boarding block has dormitory-style accommodation, it would be lawful for the school to restrict the block to only male or only female pupils.
- 9.4 Restricting admission to communal accommodation under this exception will be lawful only if the accommodation is managed as fairly as possible for both sexes. **Sch 23, para 3(2)**

- 9.5 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 lawfully refused only if the person can lawfully be refused use of the accommodation. **Sch 23, para 3(7)**

**Example:** It would be lawful to restrict access to the bathrooms in a single-sex boarding block to those living in the boarding block.

- 9.6 In refusing to admit a pupil to communal accommodation because of sex or gender reassignment, the school must take account of: **Sch 23, para 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.
- 9.7 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, para 3(4)**

## Schools that are charities

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- 9.8 A school that 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: **ss193, 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 the Capability Scotland to run a school for pupils with severe and complex physical difficulties, and not for other disabled or non-disabled pupils.

- 9.9 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: **s194(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

- 9.10 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 sponsored swim by only female pupils to raise money for charity. **s193(7)**

## General exceptions that apply across the Act

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### Competitive sport and sex discrimination

- 9.11 The Act includes an exception for sex discrimination in relation to a competitive sport, game or other competitive activity. **s195**
- 9.12 For sporting competitions in which physical strength, stamina or physique are significant factors in determining success or failure, a school is allowed to organise separate events for boys and girls.
- 9.13 If the physical strength, stamina or physique of the average pupil of one sex would put him or her at a disadvantage compared to the average pupil of the other sex as a competitor in a sport, game or other competitive activity, it is not unlawful for those arranging the event to restrict participation in the activity to pupils of one sex.

**Example:** A secondary school holds an athletics day during which male and female pupils compete in separate races. This is not unlawful sex discrimination.

- 9.14 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. Therefore, this exception is much less likely to apply to children of primary school age.

### **Competitive sport: nationality, birthplace or residency**

- 9.15 In selecting one or more people 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 take into account a person's nationality or place of birth, or how long that person has lived in a particular area or place. **s195**

### **Statutory authority**

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- 9.16 There are limited circumstances in which the provisions of the Act are overridden by other legal requirements. These exceptions are of narrow application and are therefore likely to permit discrimination only in very rare circumstances.

### **Statutory requirement**

- 9.17 Where there is an express statutory requirement for a school to act in a particular way, then the school's action will not be unlawful even if it appears to breach the provisions of the Act. However, it is only in cases in which 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. **s191; Sch 22, para 1**
- 9.18 This applies only to the following protected characteristics for schools (and mirrors the provisions in previous equality legislation):
- Disability
  - Religion or belief
  - Sex
  - Sexual orientation

9.19 A statutory requirement is anything that is required under:

- An Act of Parliament
- An Act of the Scottish Parliament
- Subordinate legislation of such Acts (such as regulations)

9.20 For the protected characteristics of disability, religion or belief, and sexual orientation, a statutory requirement also includes any requirement or condition imposed pursuant to such an Act or measure by:

- A minister of the Crown
- A member of the Scottish Executive

### **Nationality discrimination authorised by statute or the executive**

9.21 The Act provides that:

- direct or indirect nationality discrimination, or
- indirect discrimination, where the provision, criterion or practice refers to a place of residence or length of time for which a person has been present or resident in or outside Britain 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.

**Sch 23,  
para 1**

### **National security**

9.22 A school does not breach the Act by doing anything that it is proportionate to do for the purpose of safeguarding national security. This exception would apply to schools only 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.

**s192**

# Contacts

This publication and related equality and human rights resources are available from the Commission's website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

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