

Equality Act 2010 Technical Guidance on Further and Higher Education



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This Technical Guidance applies to the provisions in the Equality Act 2010 that were commenced on 1st October 2010.

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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 education providers, employers and businesses greater clarity about their responsibilities, and it sets 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. We are committed to our vision of a modern Britain where everyone is treated with dignity and respect, and we all have an equal chance to succeed.

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

This Technical Guidance sets out the Act's requirements on further and higher education providers in relation to 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. It will be invaluable to education providers, lawyers, advocates, human resources personnel, courts and tribunals, and everyone who needs to understand the law in depth, or apply it in practice.

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

More information about the full range of guidance available for individuals, service providers, businesses, and employers can be found on our website:

<http://www.equalityhumanrights.com/advice-and-guidance/information-for-advisers/equality-act-codes-of-practice/>

Chapter 1

Introduction

Purpose of the Equality Act 2010

1.1

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

1.2

An important purpose of the Act is to unify the legislation outlawing discrimination against people with different protected characteristics where this is appropriate. There are, however, some significant differences and exceptions, which this Technical Guidance explains.

1.3

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.

1.4

Different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and the exercise of public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education and general qualifications bodies. Part 7 deals with discrimination by membership associations.

An education provider will have duties under more than one Part of the Act, where, for example, they employ people or provide services, as well as in relation to their role in providing education to students.

Status of the Technical Guidance

1.5

The Commission has prepared and issued this Technical Guidance on the basis of its powers under the Equality Act 2006.

This guidance is not a statutory Code issued under s.14 EA 2006, however it may be used as evidence in legal proceedings.

If education providers follow this guidance, it may help them to avoid an adverse decision by a court in such proceedings.

Scope of the Technical Guidance

1.6

This Technical Guidance covers discrimination in further and higher education as set out in Chapter 2 of Part 6 of the Act.

Chapter 2 of Part 6 is based on the principle that people should not be discriminated against in further or higher education provision on the basis of any of the protected characteristics set out in the Act, when seeking admission to further or higher education, in the education and benefits provided, or by being excluded from further or higher education. 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 provide education in a different way to meet the needs of people so that they can receive the same standard of education as far as this is possible. The steps that education providers should take to ensure that they do not discriminate are explained in this Technical Guidance.

It sets out the Act's requirements on further and higher education providers 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 an education provider provides or offers to provide for students. Guidance on the Equality and Human Rights Commission's website explains the operation of the Public Sector Equality Duty (set out briefly in Chapter 10, paragraph 10.8) which will apply to many further and higher education providers.

1.7

Private education/training providers and students unions do not have obligations under the education provisions but do have obligations under the service provider provisions which are explained in a separate Code of Practice on Services, Public Functions and Associations.

The duties on further and higher education providers as employers, bodies which carry out public functions and service providers are not covered by Part 6 of the Act and are set out in the separate Employment Code of Practice and Code of Practice on Services, Public Functions and Associations.

1.8

This Technical Guidance applies to England, Scotland and Wales. However, education provided outside Great Britain may be covered by the Act.

Marriage and civil partnership

1.9

The Act does not provide protection against discrimination because of marriage and civil partnership in the areas covered by this Technical Guidance (Chapter 2 of Part 6 of the Act). Therefore, this Technical Guidance does not cover discrimination because of this characteristic in the provision of further and higher education.

However, a civil partner treated less favourably than a married person (or a married person treated less favourably than a civil partner) can bring a claim for sexual orientation discrimination.

Purpose of the Technical Guidance

1.10

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

1.11

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

1.12

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

- help education providers to understand their responsibilities and to avoid complaints and discrimination claims
- help students to understand the law and what they can do if they believe they have been discriminated against because of a protected characteristic
- help lawyers and other advisers to advise their clients
- give guidance to the courts on matters designed to ensure or facilitate compliance with the Act and which is admissible in evidence and must be taken into account by it in any case in which it appears to the court to be relevant.

Role of the Equality and Human Rights Commission

1.13

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

1.14

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

Human rights

1.15

Public authorities have a duty under the Human Rights Act 1998 (HRA) not to act incompatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). The public functions of education providers are functions of a public nature as defined in the HRA. As indicated above, the duties on further and higher education providers as bodies which carry out public functions are not covered by Part 6 of the Act, and how the HRA interfaces with the Equality Act in these circumstances is set out in a separate Code on Services.

1.16

Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with the Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a public authority is involved in the case or not. So, in any discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.

1.17

Human rights issues can arise in relation to the exercise of any public function where any Convention right is engaged. If a public authority or any other body discriminates when carrying out a function of a public nature, this may also amount to a breach of the HRA if a Convention right is engaged because discrimination in the enjoyment of Convention rights is a breach of the Convention (under Article 14). Where discrimination in the enjoyment of Convention rights is based on a characteristic protected under the Equality Act this could also be a breach of the Equality Act.

1.18

Because of the close relationship between human rights and equality it is good practice for those exercising public functions to consider equality and human rights together when drawing up equality or human rights policies.

How to use the Technical Guidance

1.19

Chapter 1 (this chapter) gives an introduction to the Guidance.

Chapter 2 explains the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Chapter 3 gives an overview of the further and higher education provisions in Part 6 of the Act.

Chapter 4 explains direct discrimination.

Chapter 5 explains indirect discrimination.

Chapter 6 explains discrimination arising from disability.

Chapter 7 explains the duty to make reasonable adjustments for disabled students, including the duty to change a provision, criterion or practice, the duty to provide auxiliary aids or services and the duty in relation to physical features.

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

Chapter 9 explains victimisation.

Chapter 10 explains the provisions of Part 6 as they relate to further and higher education institutions and what discrimination (or other prohibited conduct) looks like in practice.

Chapter 11 explains the duties on local authorities (in England and Wales) and education authorities (in Scotland) under the further and higher education provisions.

Chapter 12 explains the duties on maintained schools in England and Wales under the further and higher education provisions.

Chapter 13 explains the positive action provisions of the Act. This chapter explains the measures the Act permits further and higher education institutions to take which may involve treating groups differently to address disadvantage, to meet different needs or to improve low levels of participation.

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

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

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

Appendix 2 provides an overview of how Part 6 of the Act applies to Qualification Bodies.

Appendix 3 contains further information about the meaning of disability in the Act.

Appendix 4 explains how leases and other legal obligations affect the duty to make reasonable adjustments to premises.

Examples

1.20

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

Use of the terms ‘education provider’, and ‘student’

1.21

As explained above, the Act imposes duties on those education providers falling under the further and higher education provisions in Part 6 of the Act. These bodies include universities and higher education institutions, further education colleges and institutions, designated institutions in Scotland, local authorities, education authorities and, in some circumstances, maintained schools in England and Wales (Chapter 3, paragraphs 3.2, 3.3, 3.9 and 3.12 provide further details in this regard).

The Technical Guidance uses the terms ‘education provider’ and ‘student’ and terms which flow from these generically to refer to all those who have duties (not just further and higher education institutions) or who are protected in the areas covered by this Technical Guidance (Chapter 3, paragraphs 3.4, 3.10 and 3.14 provide further details in this regard).

References in the Technical Guidance

1.22

In this Technical Guidance, ‘the Act’ means the Equality Act 2010. References to particular sections and Schedules of the Act are shown in the margins, abbreviated as ‘s’ and ‘Sch’ respectively. Occasionally other legislation or regulations are also referred to in the margins.

1.23

This Technical Guidance refers to the provisions in the Equality Act which came into force on 1 October 2010 and 5 April 2011.

The duty on maintained schools in England and Wales providing further education (as explained in detail in Chapter 12) to provide auxiliary aids as part of the reasonable adjustments duty came into force in September 2012.

There are expected to be changes to the Act made by Order and other legislation that may have an effect on the duties explained in the Technical Guidance.

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

The Act contains provisions relating to the new Public Sector Equality Duty. This came into force on 5 April 2011.

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

Further information

How to get hold of the Act

1.24

Copies of the Act and regulations made under it can be purchased from The Stationery Office. Separate Codes of Practice and Technical Guidance covering other aspects of the Act are also available from The Stationery Office. The text of all the Equality and Human Rights Commission's Codes of Practice and Technical Guidance (including this Technical Guidance) and guidance relating to the Codes and Technical Guidance can also be downloaded free of charge from the Commission's website where Word and PDF versions are also available: www.equalityhumanrights.com

How to get hold of a copy of this Technical Guidance

1.25

The Commission's publications are available to download on our website: www.equalityhumanrights.com. If you are an organisation and would like to discuss the option of accessing a publication in an alternative format or language please contact engagementdesk@equalityhumanrights.com. If you are an individual please contact the Equality Advisory and Support Service (EASS) using the contact methods below.

Equality Advisory and Support Service (EASS)

The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

Telephone: 0800 444 205

Textphone: 0800 444 206

Opening hours:

09:00 to 20:00 Monday to Friday

10:00 to 14:00 Saturday

Website: www.equalityadvisoryservice.com

Post: FREEPOST Equality Advisory Support Service FPN4431

Chapter 2

Who has rights under the further and higher education provisions of Part 6 of the Act?

Introduction

2.1

Part 2 of the Act contains the key concepts of equality as we further describe below. The Act protects people from discrimination, harassment and victimisation based on ‘protected characteristics’.

As explained in Chapter 1, the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

2.2

The ‘protected characteristics’ under the Act with which this Technical Guidance is concerned are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Age

What the Act says

2.3

s5(1) Age is defined in the Act by reference to a person’s age group. In relation to age, when the Act refers to people who share a protected characteristic, it means that they are in the same age group.

2.4

s5(2) An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, ‘people under 50’; ‘under 18s’). They can also be quite narrow (for example, ‘people in their mid-40s’; ‘people born in 1952’). Age groups may also be relative (for example, ‘older than me’ or ‘older than us’).

2.5

The meaning of certain age-related terms may differ according to the context. For example, whether someone is seen as ‘youthful’ can depend on their role: compare a youthful bartender with a youthful CEO. Age groups can also be linked to actual or assumed physical appearance, which may have little relationship with chronological age – for example, ‘the grey workforce’.

2.6

There is some flexibility in the definition of a person’s age group. For example, a 40 year old could be described as belonging to various age groups, including ‘40 year olds’; ‘under 50s’; ‘35 to 45 year olds’; ‘over 25s’; or ‘middle-aged’. Similarly, a 16 year old could be seen as belonging to groups that include: ‘children’; ‘teenagers’; ‘under 50s’; ‘under 25s’; ‘over 14s’ or ‘16 year olds’.

Example: A female student aged 25 could be viewed as sharing the protected characteristic of age with a number of different age groups. These might include ‘25 year olds’, ‘the under 30s’, ‘the over 20s’ and ‘mature students’.

Example: A man of 86 could be said to share the protected characteristic of age with the following age groups: ‘86 year olds’, ‘over 80s’, ‘over 65s’, ‘pensioners’, ‘senior citizens’, ‘older people’ and ‘the elderly’.

2.7

Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which comparison should be made. It could be everyone outside the person’s age group, but in many cases the choice of comparator age group will be more specific; this will often be led by the context and circumstances. (More detail on how to identify a comparator in direct discrimination cases is covered in paragraphs 4.21–4.31.)

Example: In the first example above, the 25 year old student might compare herself to the ‘over 25s’, or ‘over 35s’, or ‘young students’. She could also compare herself to ‘the under 25s’ or ‘18 year olds’.

Who has rights under the further and higher education provisions of Part 6 of the Act?

Disability

s6 What the Act says

2.8

s6(3) Only a person who meets the Act's definition of disability has the protected characteristic of disability. When the Act refers to people who share a protected characteristic in relation to disability, it means they share the same disability.

2.9

s6(4) In most circumstances, a person will also have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability.

2.10

People who currently have a disability are protected because of this characteristic against harassment, victimisation and discrimination – including discrimination arising from disability (Chapter 6) and a failure to comply with the duty to make reasonable adjustments (Chapter 7). People who have had a disability in the past are also protected against harassment, victimisation and discrimination (see Appendix 3).

Example: A person discloses in his course application form that he once experienced depression. The fact that he no longer has depression at the point he applies does not matter in order to gain protection from discrimination, harassment and victimisation under the Act on the basis of the protected characteristic of disability. If the depression had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities, it does not matter if there has been no recurrence of the condition. If he met the definition of a disabled person in the past, he will still be afforded protection, under the Act from discrimination, harassment and victimisation in relation to the protected characteristic of disability because he had a disability in the past.

2.11

Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (see paragraphs 4.18 – 4.20). In some circumstances a non-disabled person may be protected where they experience harassment (see Chapter 8) or some other unlawful act such as victimisation (see Chapter 9).

<p>2.12</p> <p>The Act says that a person has a disability if they have a physical or mental impairment which has a long term and substantial adverse effect on their ability to carry out normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing.</p>	s6(1)
<p>2.13</p> <p>Long term means that it has lasted or is likely to last for at least 12 months or for the rest of the disabled person's life.</p>	Sch1, para 2(1)
<p>2.14</p> <p>Substantial means more than minor or trivial.</p>	s212(1)
<p>2.15</p> <p>Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day-to-day activities, it is still to be treated as though it does have such an effect.</p>	Sch1, para 5
<p>2.16</p> <p>This means that 'hidden' impairments are also covered (for example, mental illness or mental health problems, and conditions such as diabetes and epilepsy) where they meet the definition in the Act.</p>	Sch1, para 3
<p>2.17</p> <p>An impairment which consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.</p>	Sch 1, para 6
<p>2.18</p> <p>Cancer, HIV infection and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.</p>	EA 2010 (Disability) Regs 2010/2128
<p>2.19</p> <p>Progressive conditions and fluctuating and recurring conditions will amount to disabilities in certain circumstances.</p>	Sch1, para 2(2) and 8
<p>2.20</p> <p>For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix 3 to this Technical Guidance.</p>	

Who has rights under the further and higher education provisions of Part 6 of the Act?

Gender reassignment

What the Act says

2.21

s7(1) The Act defines gender reassignment as a protected characteristic. People who are proposing to undergo, are undergoing or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

2.22

s7(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

2.23

Under the Act 'gender reassignment' is a *personal* process (that is, moving away from one's birth sex to the preferred gender), rather than a *medical* process.

2.24

The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

Example: A student who was born physically female decides to spend the rest of his life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully passes as a man without the need for any medical intervention. He would be protected as someone who has undergone gender reassignment.

2.25

This broad, non-medical definition is particularly important for gender variant young people: although some young people do reassign their gender while in education, there are others who are too young to make such a decision. Nevertheless they may have begun a personal process of changing their gender identity and be moving away from their birth sex. Manifestations of that personal process, such as mode of dress, indicate that a process is in place and they will be protected under the Act.

2.26

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

Example: A student born physically male lets her friends know that she intends to reassign her gender. She attends counselling sessions to start the process. However she decides to go no further. Although she does not wish to take any further steps, she will remain protected against discrimination on that basis because she has undergone part of a process to change attributes of sex for the purpose of gender reassignment.

2.27

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

Example: Before going to a party in a college bar, a man lets it be known that he intends to come dressed as a woman for a laugh. However, the door staff say he cannot attend the event dressed as a woman as it would create a bad image for the college if there was bad behaviour on the premises.

The door staff also tell a transsexual woman that she can't come dressed as a woman as they don't feel comfortable with the idea, notwithstanding the fact that they know she lives as a woman.

The man in the first paragraph would not have a claim for gender reassignment discrimination because he has not proposed undergoing gender reassignment (so he does not have the protected characteristic of gender reassignment); and further, the reason he is told not to come dressed as a woman relates to the door staff's concern that overly boisterous behaviour would give a bad impression of the college, not because they think he is a transsexual person.

The transsexual woman in the second paragraph would have a claim for gender reassignment discrimination as the reason for the less favourable treatment was her gender reassignment.

Who has rights under the further and higher education provisions of Part 6 of the Act?

2.28

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

Gender Recognition Certificates

2.29

The Gender Recognition Act 2004 (GRA) provides that, where a person holds a Gender Recognition Certificate, they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act and the privacy provisions contained in section 22 of that Act; see also the Data Protection Act 1998 which deals with processing sensitive personal information).

Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person’s right to privacy. If an education provider requires proof of a person’s legal gender, then their (new) birth certificate should be sufficient confirmation.

Pregnancy and maternity

What the Act says

2.30

s4 The Act lists pregnancy and maternity as a protected characteristic.
s13(6) and (7) Pregnancy and maternity discrimination is considered in Chapter 4, paragraphs 4.35–4.48.

Race

What the Act says

2.31

s9(1) The Act defines ‘race’ as including colour, nationality and ethnic or national origins.

2.32

s9(2) A person has the protected characteristic of race if they fall within a particular racial group. A racial group can also be made up of two or more distinct racial groups. See paragraphs 2.41–2.44 for the meaning of ‘racial group’.

Nationality

2.33

Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins (see paragraphs 2.38–2.40).

s9(1)(b)

Ethnic origins

2.34

Everyone has ethnic origins but the provisions of the Act only apply where a person belongs to an ‘ethnic group’ as defined by the courts. This means that the person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community.

s9(1)(c)

2.35

There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language, a common literature, a common religion, a common geographical origin, or a sense of being a minority or an oppressed group.

2.36

An ethnic group could include members new to the group, for example, a person who marries into the group. It is also possible for a person to leave an ethnic group.

2.37

The courts have confirmed that the following are protected ethnic groups: Sikhs, Jews, Romany Gypsies, Irish Travellers and Scottish Gypsy Travellers.

National origins

2.38

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

s9(1)(c)

Who has rights under the further and higher education provisions of Part 6 of the Act?

2.39

National origin is distinct from nationality. For example, people of Chinese national origins may be citizens of China but many are citizens of other countries.

2.40

A person's own national origin is not something that can be changed, though it can change through the generations.

Meaning of 'racial group'

2.41

s9(3) A racial group is a group of people who have or share a colour, or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act.

2.42

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

2.43

A racial group can be made up of two or more distinct racial groups. For example, a racial group could be 'black Britons' which would encompass those people who are both black and who are British citizens. Another racial group could be 'South Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans.

2.44

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

Religion or belief

What the Act says

2.45

s10(1) and (2) The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of a religion or belief.

2.46

For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or may lack.

2.47

The meaning of religion or belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion). It is for the courts and tribunals to define what is a specific religion or belief on a case by case basis.

Meaning of ‘religion’**2.48**

‘Religion’ means any religion and includes a lack of religion. The term ‘religion’ includes the more commonly recognised religions in the UK such as the Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism.

s10(1)

2.49

A religion need not necessarily be mainstream or well-known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

Meaning of ‘belief’**2.50**

‘Belief’ means any religious or philosophical belief and includes a lack of belief.

s10(2)

2.51

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

2.52

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

2.53

A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

2.54

For a philosophical belief to be protected under the Act:

- it must be genuinely held

Who has rights under the further and higher education provisions of Part 6 of the Act?

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

Example: A student believes in a philosophy of racial superiority for a particular racial group. It is a belief around which they centre the important decisions in their life. However, it is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a 'belief' for the purposes of the Act.

Manifestation of religion or beliefs

2.55

While people have an absolute right to hold a religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. Also, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10) (see also paragraph 8.20).

2.56

Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or a belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination. Where the limitation is applied generally to a group of people (for example, students in a college) this could amount to indirect discrimination.

Sex

What the Act says

2.57

Sex is a protected characteristic and refers to a male or a female of any age. In relation to a group of people it refers to either men and/or boys or women and/or girls.

s11(a), (b)
and 212(1)

2.58

A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see 2.21–2.29) or sexual orientation (see 2.60–2.64).

2.59

There are specific provisions which apply where the treatment of a woman is because of her pregnancy and maternity or because she is breastfeeding (see Chapter 4, paragraphs 4.35–4.48).

s13(7)(a)
and 13(8)

Sexual orientation

What the Act says

2.60

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

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

s12(1)

2.61

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

2.62

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

2.63

When the Act refers to the protected characteristic of sexual orientation it means the following:

s12(2)

Who has rights under the further and higher education provisions of Part 6 of the Act?

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

2.64

Gender reassignment is a separate protected characteristic and unrelated to sexual orientation, despite a common misunderstanding that the two characteristics are related (see 2.21–2.29).

Restrictions on protection under the Act

2.65

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

- For pregnancy and maternity, there is no protection from direct discrimination by association or perception (see paragraphs 4.18 and 4.20); indirect discrimination (see paragraph 5.1); or harassment (see paragraph 8.6). However, in these three situations described above, the sex discrimination provisions may provide protection.
- Apart from discrimination by association or perception, protection from direct discrimination because of disability only applies to disabled people (see paragraph 4.33).
- Indirect disability discrimination and discrimination arising from disability only apply to disabled people (see Chapter 4, 5 and 6).
- An education provider is only under a duty to make reasonable adjustments for a disabled student, former student who is disabled or potential student who is disabled (see Chapter 7).

Chapter 3

An overview of the further and higher education provisions

Introduction

3.1

This chapter gives an overview of the further and higher education provisions in Part 6 of the Act. It explains who has rights and who has obligations under those provisions and outlines what is made unlawful by them. Later chapters explain the provisions in greater detail.

This chapter also explains the potential liability of education providers as employers or principals for the actions of their employees and agents.

Exceptions from the Act's provisions that apply to all or some education providers are explained in Chapter 14.

As explained in Chapter 1, the terms 'education provider' and 'student' and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

3.2

There are three sets of education providers who have duties under the further and higher education provisions in Part 6 of the Act. The three types of education providers can be categorised as:

- | | |
|--|--------|
| a. Further and higher education institutions (whose duties are explained in detail in Chapter 10). | s91 |
| b. Local authorities (in England and Wales) and education authorities (in Scotland) securing further and higher education and providing recreational and training facilities (whose duties are explained in detail in Chapter 11). | s92-93 |
| c. Maintained schools in England and Wales providing further education (whose duties are explained in detail in Chapter 12). | s92 |

Further and higher education institutions

Who has duties?

3.3

s91 The Act imposes obligations on the following further and higher education institutions:

- Universities in Scotland, England and Wales.
- Higher education institutions in England and Wales.
- Further education institutions in England and Wales.
- Sixth form colleges in England and Wales.
- Colleges of further education in Scotland.
- Designated institutions in Scotland.

Who has rights under the Act?

3.4

s91 The Act protects people applying for admission to a further or higher education institution, students at an institution and former students. The Act defines a student as a person for whom education is being provided by the institution.

s94(3)

s91(3), (5) and (8) Disabled people who are not students but are applicants for a qualification which the institution confers are also protected (see Chapter 10, paragraphs 10.36–10.39 for further details).

What is unlawful?

3.5

s91 The Act makes it unlawful for a further or higher education institution to discriminate against an applicant or student in relation to:

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

The Act makes it unlawful for a further or higher education institution to harass or victimise an applicant or student.

3.6

The Act makes it unlawful for a further or higher education institution to discriminate against, harass or victimise a former student, in limited circumstances.

s108

3.7

The Act also makes it unlawful for a further or higher education institution to discriminate against, harass or victimise a disabled person who is not a student at the institution in relation to the conferment of a qualification.

s91(3), (5)
and (8)**3.8**

Further and higher education institutions' obligations under the Act are explained in detail in Chapter 10.

Local/education authorities**Who has duties?****3.9**

The Act imposes obligations on:

- Local authorities (in England and Wales)
 - securing a course of further education
 - securing a course of higher education, and
 - securing recreational and training facilities.
- Education authorities (in Scotland)
 - securing a course of further education, and
 - providing recreational and training facilities.

s92
and s93**Who has rights under the Act?****3.10**

The Act protects anyone who seeks enrolment onto a course of further or higher education secured by a local or education authority or seeks to use the recreational and training facilities provided by them, as well as anyone who is enrolled on the course or uses the facilities, and former students and users.

s92
and s93

What is unlawful?

3.11

s92 and s93 The Act makes it unlawful for a local authority or education authority to discriminate against a person:

- in the arrangements it makes for deciding who is enrolled on a course or provided with the facilities
- as to the terms on which it offers to enrol a person on the course or to provide the facilities to the person
- by not accepting the person's application for enrolment or for the provision of the facilities, and
- in the services it provides or offers to provide in relation to the course or facilities.

The Act also makes it unlawful for a local authority or education authority to harass or victimise a person who seeks enrolment, is enrolled or is a user of services provided by the authority in relation to the course or a user of recreational training facilities.

Local authority and education authority obligations under the Act are explained in detail in Chapter 11.

Maintained schools providing further education

Who has duties?

3.12

s92(8)(b) Maintained schools (in England and Wales) providing further education to people other than pupils, as set out in section 80 of the School Standards and Framework Act 1998, have obligations under the Act as further education providers. This only applies if they are providing part-time further education to people, other than pupils, who are over compulsory school age, or full-time further education to people, other than pupils, aged 19 and over.

3.13

It is the governing body of the school that is the responsible body.

Who has rights under the Act?

3.14

The Act protects anyone who seeks enrolment onto such a course of further education as well as anyone who is enrolled on the course and former students.

What is unlawful?

3.15

The Act makes it unlawful for a maintained school providing further education to discriminate against an applicant or student in relation to:

- enrolment
- the provision of the course of further education
- the services provided in connection with the course.

What does discrimination mean in this chapter?

3.16

Any reference to ‘discrimination’ in this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise:

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

Other unlawful conduct

Harassment

3.17

The Act prohibits three different types of harassment:

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

Chapter 8 provides a detailed explanation of harassment.

s26

Victimisation

3.18

Victimisation occurs where an education provider subjects a student or an applicant for admission as a student to a detriment because of:

- a. bringing proceedings under the Act
- b. giving evidence or information in connection with proceedings brought under the Act

s27

- c. doing anything else for the purposes of or in connection with the Act, and
- d. making an express or implicit allegation that another person has done something in breach of the Act (whether or not the allegation is later dropped).

Chapter 9 provides a detailed explanation of victimisation.

Relationships which have ended

3.19

s108 It is unlawful for an education provider to discriminate against or harass someone who used to be a student or (in the case of recreational and training facilities) a user of its facilities or services, where the treatment arises out of and is closely connected with the person having been a student or user; and which would have been prohibited if the person were still a student or user.

3.20

A person will be able to enforce protection against discrimination or harassment as if they were still a student or user.

Example: A former student undergoing gender reassignment asks an employee in the relevant department of the university to provide an altered degree certificate in her new name. The employee tells her that he will not do this because he disagrees with gender reassignment. This is likely to amount to unlawful discrimination or harassment of the former student. If the university has a policy not to provide amended degree certificates, this may amount to unlawful indirect discrimination of the former student since the policy puts transsexual people at a particular disadvantage compared to students who have not undergone gender reassignment.

Example: A university organises an alumni reunion weekend. The invitation states that alumni and their partners are able to attend the trip with double rooms available for couples. An alumni member applies for him and his male partner and requests a double room. He is told by the university that double rooms are only available to heterosexual couples and he and his partner must book single rooms. This would be unlawful direct discrimination because of sexual orientation.

3.21

Reasonable adjustments must be made for disabled people who have previously been students with the education provider if they are put at a substantial disadvantage in comparison to people without a disability.

Example: A college sends out a regular alumni newsletter. A former student with a visual impairment requests that he receives the newsletter in an electronic format as he is unable to read the hard copy. Providing this would be a reasonable adjustment.

Not providing the newsletter in this format would be a failure to provide a reasonable adjustment. The Act states that where a provision, criterion or practice places a disabled student at a substantial disadvantage, and this relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format.

Example: A student withdraws from her course after making a sexual harassment complaint against the tutor. Several weeks later, she tries to enrol on another course at the college but is refused a place because of her complaint. This could amount to victimisation.

Liability for acts of employees and agents

3.22

The Act makes education providers as employers legally responsible for acts of discrimination, harassment or victimisation committed by their employees in the course of their employment. Education providers are also liable for such acts committed by their agents while acting under the education provider's authority. It does not matter whether the education provider knows about or approves of the acts of their employee or agents.

s109

Example: A tutor routinely turns his back on the class when he is teaching although he knows that one of the students has a hearing impairment and needs to lip-read. The student is being substantially disadvantaged by the failure of the tutor to make a reasonable adjustment. Even though the governing body is not aware that discrimination is occurring, it is likely that the responsible body would be considered to be acting unlawfully.

3.23

An education provider's liability does not extend to criminal offences committed by employees or agents.

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

3.24

The phrase 'in the course of employment' has a wide meaning: employees who commit an unlawful act against students or users, while carrying out duties, will usually be regarded as acting in the course of their employment. The same breadth of meaning should be given to acting 'with the authority of the [education provider]' in the case of agents.

The employer's defence**3.25**

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

3.26

An education provider would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an education provider should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.

Example: A college runs a series of seminars on staff responsibilities under the Equality Act. Despite having attended these seminars, an employee still carries out an unlawful act. While the step of running the seminars may not be effective, it could be judged as reasonable and therefore a relevant defence.

Liability for acts of agents**3.27**

An education provider will not be liable for the unlawful discrimination carried out by its agents where the agent acted in contravention of the education provider's express instructions not to discriminate. In such circumstances the agent will not have acted 'with the authority' of the education provider.

Example: The refectory at a college is contracted out to a catering company. An employee of the catering company refuses to serve a gay student and is abusive to him because of his sexuality. The college has taken steps to ensure that the company is aware of the requirements of discrimination law and that the college will not accept discriminatory behaviour. The college will not be liable for the sexual orientation discrimination by the person working in the refectory because the employee of the catering company has not acted with the authority of the college.

Liability of employees and agents

What the Act says

3.28

Individual employees may be held personally liable under the Act for unlawful acts which they commit in the course of employment with the education provider whether or not the education provider has a defence against liability (see paragraphs 3.25–3.26). Agents are also personally liable for acts which they commit under the education provider's authority, whether or not the education provider condoned the acts.

s110

Knowledge that the act is unlawful

3.29

It is not necessary for the employee or agent to know that they are acting unlawfully to be liable for their actions.

3.30

However, if the employee or agent reasonably relies on a statement by the education provider that an act is not unlawful, then the employee or agent is not liable for the unlawful act.

3.31

It is an offence, punishable by fine, for an education provider to knowingly or recklessly make a false or misleading statement on which the employee or agent relies to carry out an unlawful act.

s110(4)

Other prohibited conduct

Aiding unlawful acts

3.32

s112 The Act makes it unlawful to knowingly help someone to discriminate against, harass or victimise another person (or to contravene the Act in any other way). A person (including an education provider) who helps another in this way will be treated as having done the unlawful act themselves.

3.33

It is also unlawful to help a person to discriminate against or harass another person after a relationship has ended where the discrimination or harassment arises from and is closely connected to the relationship.

3.34

Aiding discrimination is prohibited in all of the areas covered by this Technical Guidance.

Example: An engineering manufacturing firm offers 10 internships for engineering students who have completed their course at a local FE college. The firm explains to the course tutor that they have an all male working environment and so only want male interns. The course tutor agrees to advertise the opportunity to male ex-students only. The engineering firm would be discriminating because of sex and the education provider would be unlawfully assisting them.

3.35

The Act makes it unlawful to instruct, cause or induce another person to contravene the Act, or knowingly to help another person do anything which contravenes the Act.

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

3.36

‘Help’ should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible.

What does the helper need to know to be liable?

3.37

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

Reasonable reliance on another's statement

3.38

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

s112(2),
(3) and (4)

It is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of an act on which a helper reasonably relies.

3.39

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

Instructing, causing or inducing discrimination

3.40

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

s111(1)

3.41

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

3.42

An inducement may amount to no more than persuasion, and need not necessarily involve a benefit or loss. Nor does the inducement have to be applied directly: it may be indirect. It is enough if it is applied in such a way that the other person is likely to come to know about the inducement.

3.43

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

3.44

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

3.45

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

When does the Act apply?**3.46**

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

Example: A training provider has a contract to deliver apprenticeships. The contract stipulates a 'Minimum Level of Performance', that is that a certain number of apprentices must complete their framework, otherwise the contract is taken away. Senior management makes it clear to the Apprenticeship Coordinator that they must restrict the number of disabled applicants admitted to apprenticeships because they believe they are less likely to complete their frameworks. In turn the Apprenticeship Coordinator encourages those working in admissions to discriminate against disabled applicants. The Apprenticeship Coordinator would be inducing discrimination because of disability and senior management would be unlawfully instructing him to discriminate. The staff in admissions will be discriminating unlawfully unless they can show that they are reasonably relying on a statement that what they are doing is not in contravention of the Act. If the management or the coordinator knowingly or recklessly makes such a statement which is false or misleading, they will be committing a criminal act punishable by a fine.

Contracts

3.47

The Act prevents education providers from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts.

S142-144

Unenforceable terms

3.48

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

S142

3.49

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

S144

Removal or modification of terms

3.50

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

The order can be retrospective in its effect.

Territorial scope

3.51

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

3.52

The Act does not limit the scope of the further and higher education provisions to activities which take place in Great Britain. Whether or not an act which takes place outside Great Britain is covered by the Act's provisions

will be determined by the courts. (See paragraph 4.3 of the F/HE non-statutory guidance, for advice on how best to approach this issue.)

Exceptions

3.53

Exceptions from the Act's provisions that apply to all or some education providers are explained in Chapter 14.

What is not covered by the further and higher education provisions of the Act?

Schools

3.54

Schools also have obligations under Part 6 of the Act in relation to nursery, primary, secondary and sixth form education that they provide. These provisions are not covered by this Technical Guidance. Sixth form colleges are covered by the further and higher education provisions of the Act and therefore by this Technical Guidance.

General Qualifications Bodies

3.55

General Qualifications Bodies (those awarding general qualifications such as GCSEs) also have obligations under Part 6 of the Act. These provisions are set out in summary in Appendix 1 of this Technical Guidance.

Qualifications Bodies

3.56

Qualifications Bodies (awarding professional or trade qualifications) have obligations under Part 5 (Employment provisions) of the Act. These provisions are set out in summary in Appendix 2 of this Technical Guidance.

Other providers of education and training

3.57

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

- education services and children's services provided by local authorities including school transport and special educational needs provision
- youth clubs and services run by voluntary organisations

- private education/training providers, even when offering the same courses as education providers covered by Part 6
- Student Unions.

There is a separate Code of Practice covering services, public functions and associations.

Example: A national charity runs various activities for teenage mothers including drop in centres, social events and short courses to develop basic skills in literacy, numeracy, and ICT, with the aim of helping to re-engage these young women in education and training. These activities are covered by the services provisions under Part 3 of the Act not the further and higher education provisions.

3.58

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

- vocational guidance or training services
- work placement providers
- apprenticeship contracts.

There is a separate Code of Practice covering Employment.

Example: A young person enrolls on a pre-apprenticeship course in plumbing which is provided by the local FE college. As part of the course she undertakes a work placement with an employer. When she is on her placement, the employer has a responsibility not to discriminate against her under the employment provisions (Part 5) of the Act. When she is studying at college, the college has a responsibility not to discriminate against her under the further and higher education provisions (Part 6) of the Act. So, for example, vocational training and guidance provided at work will be covered under Part 5 of the Act, and vocational training and guidance provided at college will be covered under Part 6 of the Act.

3.59

Part 11 of the Act describes the Public Sector Equality Duty that will apply to many further and higher education institutions. Those institutions subject to the equality duty must, in the exercise of their functions, have due regard to the need to eliminate discrimination, advance equality and foster good relations.

Chapter 10, paragraph 10.8 contains an overview of these duties.

Chapter 4

Direct discrimination

Introduction

4.1

This chapter explains what the Act says about direct discrimination in relation to the further and higher education provisions of the Act for all of the protected characteristics covered by this Technical Guidance. It discusses how the requirement for a comparator may be met. It also refers to provisions in the Act making it unlawful to treat a woman unfavourably because of her pregnancy or maternity.

As explained in Chapter 1, the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

What the Act says

4.2

s13(1) Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic.

Example: In responding to his invitation to his graduation ceremony, a student provides the name of his civil partner as attending. The university informs the student that his partner will be unable to attend as the decision has been made to limit places to spouses due to a shortage of space at the venue. Treating civil partners less favourably than heterosexual married couples (or vice versa) is direct discrimination because of sexual orientation so this will be unlawful.

The examples below illustrate decisions that are likely to be unlawful direct discrimination because they are based on stereotypes:

Example: An interviewer assumes that a young Muslim woman who wears a hijab probably still lives with her parents and won't be allowed out late, so he doesn't offer her a place on a course which has compulsory night shifts on its placements.

Example: A college lecturer in construction assumes that young women aren't strong enough to carry out the lifting required on the course and doesn't shortlist a female applicant.

Example: A prospectus describes a short, intensive degree programme and emphasises that it requires stamina to complete the course and therefore it is unsuitable for anyone with a long-term or fluctuating health condition. This statement is based on the assumption that no one with a long-term or fluctuating health condition, including mental health conditions, would be able to complete the course.

4.3

Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances: s13(3)

- In relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person (see paragraph 4.33).
- Where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (see Chapter 14).
- In relation to the protected characteristic of age where discrimination which can be objectively justified will not be unlawful (see paragraph 4.34).

What is 'less favourable' treatment?

4.4

To decide whether an education provider has treated a student 'less favourably', a comparison must be made with how they have treated other students or would have treated them in similar circumstances. If the education provider's treatment of the student puts the student at a clear disadvantage compared to other students, then it is more likely that the treatment will be less favourable: for example, refusing to allow a student to

go on a field trip. Less favourable treatment could also involve being refused admission, or being deprived of a choice or opportunity or being excluded. If the quality of the education being offered or the manner in which it is offered is comparatively poor, this could also amount to less favourable treatment.

Example: A college organises a ‘Family Day’ for prospective students with children – as part of its commitment to encourage more mature students to join the college. However, a prospective student arrives with her son who has severe physical and learning disabilities. The event organiser asks the prospective student to sit at the back of the room away from the other prospective students and their children because they are concerned about the reaction of other young children. This would constitute direct disability discrimination against the son, and direct disability discrimination by association against the mother (see paragraph 4.18 in relation to discrimination by association).

4.5

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

4.6

Under the Act it is not possible for the education provider to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, by offering an alternative service at a discount.

Example: An adult and community learning provider decides to reserve a number of places for women on an oversubscribed cooking course. This is likely to be direct discrimination against male applicants because of sex. The fact that the learning provider decides to offer men who are unable to get a place a discount on another course does not offset the less favourable treatment, and the provider is still likely to be acting unlawfully.

4.7

s17 For direct discrimination because of pregnancy or maternity, the test is whether the treatment is *unfavourable* rather than less favourable. Hence there is no need for a female student to compare her treatment with that

experienced by other students. (See paragraphs 4.35 to 4.48 for further discussion of pregnancy and maternity discrimination.)

Segregation

4.8

When the protected characteristic is race, deliberately segregating a student or group of students from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because racial segregation is always discriminatory. But it must be a deliberate act or policy rather than a situation that has occurred inadvertently.

s13(5)

Example: Following a series of racist incidents, a further education college decides that the all weather football pitches should be available on Tuesdays and Thursdays for black Caribbean students only and on Wednesdays and Fridays for Asian students only. As this is a deliberate policy and practice of separating students by race, this is likely to be unlawful direct discrimination by racial segregation.

Example: At an event run by the college where all students are welcome, if black students choose to separate themselves from white students, taking part in different activities or simply standing in a group, as this is a choice of the students and not an enforced policy of the club, it would not amount to segregation and would not be unlawful.

4.9

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

Shared protected characteristics

4.10

Direct discrimination takes place even where the person carrying out the discriminatory act and the student share the same protected characteristic giving rise to the less favourable treatment.

s24(1)

Example: After a number of incidents of a racist nature, the black librarian at a further education college refuses to allow black young men into the library after 7pm on Friday or Saturday. This is likely to be direct race discrimination even though the librarian shares the same protected characteristic (race) with the students he refuses to allow into the library.

‘Because of a protected characteristic’

4.11

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

Example: After a heated argument in the general studies course at a further education college, involving Muslim and non-Muslim students shouting and threatening each other during a discussion about radicalisation and terrorism, the college moves some of the Muslim students into other general studies groups. It does not take a similar approach to non-Muslim students involved in the incident. It is likely that religion is one of the causes of the treatment of this group of students. As a result this treatment could be unlawful discrimination because of religion.

4.12

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

Example: A college advertises a plumbing course for men only. It is obvious from the advertisement and the treatment that women receive that their less favourable treatment is because of their sex.

4.13

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

4.14

Direct discrimination is unlawful, no matter what the education provider's motive or intention, and regardless of whether the less favourable treatment of the student is done consciously or not. Education providers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the student differently because of a protected characteristic.

Example: A theatre studies course that organises theatre trips for its students turns down an application for a trip from a woman with a hearing impairment as they believe she would not get the same benefits as other students. This is likely to be direct disability discrimination.

4.15

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

Example: Relying on a current belief that girls are much more suited to childcare, a tutor in a college puts on a taster course for students and positively discourages boys from taking part (based on stereotypes that they are unsuited to childcare and also that they would be disruptive and would not complete the course). This is an example of less favourable treatment based on stereotyping and would be likely to be unlawful direct discrimination because of sex.

4.16

An education provider cannot base its treatment on another criterion that is discriminatory – for example where the treatment in question is based on a decision to follow a discriminatory external rule.

Example: A university (in England or Wales) is aware that students from non-EC countries pay higher tuition fees under a statutory exception, and decides that it is legitimate to charge higher fees for other education-based services, such as trips to the theatre and art galleries. While the practice of the university charging higher fees to non-EC students is permitted in law, it is not lawful for the university to mirror this difference of treatment in other education-based services. Thus its differential pricing policy is likely to be unlawful direct discrimination because of nationality (non-EC nationality).

4.17

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

Discrimination by association

4.18

It is direct discrimination if an education provider treats a student less favourably because of the student’s association with another person who has a protected characteristic; however, this does not apply to pregnancy or maternity. Discrimination by association can occur in various ways – for example, where the student has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.

Example: A student whose child has attention deficit hyperactivity disorder is denied access to an awards ceremony because of fears about the child’s behaviour. This is likely to be direct discrimination by association because of disability. This might not stop the child from being excluded if they were noisy or disruptive at the ceremony.

Example: During Freshers' Week, two university students decide to sign up for an additional course in Religious Studies. One is chair of the Lesbian, Gay, Bisexual and Transsexual Society and is gay. The other student is a friend and not gay. They are both told that the Religious Studies course has no more places available so they cannot join up. Some time later, one of them sees a group of four men sign up to the Religious Studies course. In this case not only the gay student but also the friend could complain of discrimination. For the friend the discrimination would be on the basis of his association with his friend who is gay.

4.19

Direct discrimination by association because of a protected characteristic could also occur if a student is treated less favourably because they campaigned to help people with a particular characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the education provider believes to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here (see paragraphs 3.40–3.46). So may the provisions on victimisation (see paragraph 9.20).

Discrimination by perception

4.20

It is also direct discrimination if an education provider treats a student less favourably because the education provider mistakenly thinks that the student has a protected characteristic. However, this does not apply to the characteristics of pregnancy and maternity.

Example: A course coordinator at a university does not offer a placement at a Catholic primary school to a student on a teaching course because they think he is gay and are worried that the school will be 'uncomfortable' with a gay student. Despite the fact that the student is not gay, this would still be direct discrimination because of sexual orientation.

Comparators

4.21

In most circumstances direct discrimination requires that the education provider's treatment of the student is less favourable than the way the

education provider treats, has treated or would treat another student to whom the protected characteristic does not apply. This other person is referred to as a ‘comparator’. However, no comparator is needed in cases of racial segregation or pregnancy and maternity discrimination (see paragraph 4.8 and paragraphs 4.35–4.48).

Example: A blind person who meets the entry requirements for a chemistry course is refused because the chemistry school is concerned they will be unable to complete the course successfully. An appropriate comparator would be a sighted person who also meets the entry requirements and is accepted.

Who will be an appropriate comparator?

4.22

s23(1) The Act says that in comparing people for the purpose of direct discrimination there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the student and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the student are the same or nearly the same for the student and the comparator.

Example: A group of Deaf students travelling together on an educational trip, organised by their university department, are having animated conversations using British Sign Language. The coach driver warns them that unless they ‘calm down’, they will be asked to leave the coach as their behaviour is disturbing other passengers. The group notice that a similar warning has not been given to a far livelier group of non-Deaf teenagers moving about at the front of the coach. The two groups are likely to be in a comparable situation.

Hypothetical comparators

4.23

In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

4.24

In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same; nevertheless their treatment may help to construct a hypothetical comparator.

4.25

Referring to the example of the Deaf students in paragraph 4.22 above, if the group of ‘far livelier teenagers’ turned out to be a group of young people with ADHD who were supervised by two teachers, the fact of their supervision would be a significant difference in their circumstances compared to those of the Deaf students so that individuals in that group would not be actual comparators. However the fact of the difference in treatment of the two groups could help to define a hypothetical comparator group that might be treated more favourably than the Deaf students.

4.26

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

Example: A young black man on a 10-week computer course at a further education college arrives late for the first three classes. The college manager tells him that his late arrivals are disturbing the concentration of the other students and if he arrives late a fourth time he will not be able to continue on the course. In the absence of an actual comparator, the black student can compare his treatment to that given to two white students in slightly different circumstances. One white student arrives drunk on two occasions and disrupts the class but is not given a final warning. Another white student left the class 30 minutes early on two occasions which also distracts the class but he is not warned. The treatment of these two comparators could allow a court to construct a hypothetical comparator showing the black student had been treated less favourably.

4.27

Who could be a hypothetical comparator may also depend on the reason why the education provider treated the student as they did. In many cases it may be more straightforward for the court to establish the reason for the student’s treatment first. This could include considering the education provider’s treatment of a person whose circumstances are not the same as the student’s

to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, comparison with the treatment of hypothetical comparator(s) can then be made.

Example: A number of young Kurdish refugees try to register with the local sixth form college, having just moved into the area as part of the Refugee Dispersal Programme, but are told that there are no places available for them, and they will have to register at the technical college three miles away. They are told that the sixth form college does not have suitable staff to provide translation facilities for them. As no other young people were trying to register at the same time, they do not have an actual comparator. They have learned from other young Kurdish refugees who have lived in the area for some time that no Kurdish young person has ever been able to register at that sixth form college and all have been given the same explanation. As they build up evidence that the reason for their treatment is race, and more specifically Kurdish national origin, they will be able to define a hypothetical comparator who would have been treated more favourably.

4.28

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

Comparators in disability cases

4.29

s23(2)(a) The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled student, including their abilities must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled student (regardless of whether those abilities or skills arise from the disability itself).

4.30

It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, some abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

Example: A disabled student with a chronic heart condition is told that he will not be selected for the college golf team because his game is not good enough but he suspects it is because of his disability. The correct comparator in a claim for direct discrimination would be a student who does not have a chronic heart condition who has the same golf handicap.

Comparators in sexual orientation cases

4.31

For sexual orientation the Act states that the fact that one person is a civil partner while another is married is not a material difference between the circumstances relating to each case. Marriage and civil partnership are equivalent characteristics when making comparisons.

s23(3)

Advertising an intention to discriminate

4.32

If an education provider advertises that in offering education, benefits, facilities or services they will treat applicants less favourably because of a protected characteristic, where no exception in the Act makes this lawful, this would amount to direct discrimination. The question of whether an advertisement is discriminatory depends on whether a reasonable person would consider it to be so. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition.

Example: A further education college advertises places on its courses in a local paper promising all applicants under 30 an interview regardless of the skills and qualifications they have. This is direct age discrimination and is likely to be unlawful as the college will find it difficult to justify a blanket maximum age policy for applicants without giving any consideration to the skills and qualifications of the individual applicants (see paragraph 4.33 below).

When is it lawful to treat a person more favourably?

More favourable treatment of disabled people

4.33

s13(3) In relation to disability discrimination, the Act only protects disabled people so it is not unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person because of their disability. Most of the protected characteristics offer symmetrical protection so that, for instance, men are protected from sex discrimination in the same way that women are. In relation to disability discrimination, however, the Act only protects disabled people and it does not protect non-disabled people. This means that treating a disabled person more favourably than a non-disabled person because of their disability is not unlawful direct discrimination against the non-disabled person.

Example: A university history department puts on a quiz night for students and their guests at a small charge. The organisers of the event offer free entry to a support worker accompanying a disabled student. This allows the disabled student to enjoy the quiz night without having to pay for two tickets. This more favourable treatment of disabled people is lawful under the Act.

Example: A university Art Department arranges an exhibition at the university, which is open to students and members of the public. It provides advance viewing sessions so that disabled people and their support workers can enter the exhibition 30 minutes before other viewers. This more favourable treatment of disabled people is lawful under the Act.

Justifiable direct discrimination because of age

4.34

A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as justifiable. Less favourable treatment of a person because of their age is not direct discrimination if the education provider can show the treatment is a proportionate means of achieving a legitimate aim. This is often called the 'objective justification test'.

In considering direct discrimination because of age, it is important to distinguish a rule or practice affecting students in a particular age group from

a neutral provision, criterion or practice applied equally to everyone that may give rise to indirect discrimination (see paragraph 5.6).

The objective justification test, which also applies to other areas of discrimination law, is explained in more detail in paragraphs 5.24–5.35.

The question of whether an age-based rule or practice is ‘objectively justified’ – that is, a proportionate means of achieving a legitimate aim – should be approached in two stages:

- First, is the aim of the rule or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- Second, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

The following example illustrates an age-based rule that would probably fail the objective justification test.

Example: A 40 year old male applicant to an engineering course at an FE college is rejected by the course lecturer. At the interview, the lecturer tells the man that he prefers to have younger students on his courses. This is direct age discrimination and it is likely to be unlawful as the college is unlikely to be able to objectively justify the subjective preference of the college tutor.

Discrimination because of pregnancy and maternity

4.35

The Act protects female students from discrimination because of their pregnancy or maternity.

s17

4.36

It is discrimination to treat a female student unfavourably because:

- she is, or has been, pregnant
- she has given birth, and the unfavourable treatment occurs within a period of 26 weeks beginning with the day on which she gave birth, or
- she is breastfeeding, and the unfavourable treatment occurs within the period of 26 weeks beginning with the day on which she gave birth.

s17(2)

s17(3)

Outside the 26-week period, she may be protected by the sex discrimination provisions.

s17(4)

4.37

A female student is protected even when her baby is stillborn, so long as she was pregnant for at least 24 weeks before she gave birth.

4.38

The unfavourable treatment will be pregnancy and maternity discrimination if the female student would not have received the treatment but for the fact that she is or has been pregnant, has given birth within the previous 26 weeks or is breastfeeding a baby that is not more than 26 weeks old.

What does 'unfavourable' mean?**4.39**

For pregnancy and maternity discrimination to occur, a female student must have been treated 'unfavourably'. This means that she must be put at a disadvantage. If the disadvantage is obvious, it will be clear that the treatment has been unfavourable: for example, she may have been denied education or given a poorer service. Not being admitted, being denied a choice or an opportunity or being excluded is also likely to be unfavourable treatment. Even if an education provider thinks that they are acting in the best interests of a pregnant student or a female student who has recently given birth they may still be treating the student unfavourably.

Example: A pregnant student on a forestry course at an FE college is told to stay at home on the day when some practical work is planned which involves training in the use of cutting tools and lessons in safe tree climbing. No risk assessment has been carried out. Although the college may think they are acting in the best interests of the student, she is being denied the opportunity to undertake practical work and this may be unlawful pregnancy and maternity discrimination.

What does 'because' mean in relation to pregnancy or maternity?**4.40**

'Because' in this context should be understood in the same way as 'because of' discussed above in relation to direct discrimination (paragraphs 4.11–4.17). Pregnancy and maternity needs to be a cause of the unfavourable treatment but does not need to be the only or even the main cause.

Example: A woman applies for a place at her local college for a catering course, and mentions that she is pregnant. She is subsequently refused a place on the catering course, and is told that there are concerns about her attendance and completion of the course due to her pregnancy. Although the refusal is because of these reasons, the effective cause of that assessment is her pregnancy and it would therefore be unlawful pregnancy and maternity discrimination.

4.41

The motive of the education provider is irrelevant, and it does not matter if the unfavourable treatment is conscious or unconscious.

4.42

Pregnancy and maternity discrimination includes unfavourable treatment of a student based on a stereotype, whether or not the stereotype is accurate.

Example: A student who has recently given birth is denied the opportunity to undertake a PhD which involves overseas research because the university believes it will be too difficult for her to travel and complete the research with a small baby. This may be unlawful pregnancy and maternity discrimination based on a stereotype.

4.43

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

Direct sex discrimination: pregnancy and maternity

4.44

Treating a female student less favourably because she is breastfeeding a baby who is more than 26 weeks old amounts to direct sex discrimination.

s13(6)(a)

4.45

The direct sex discrimination provisions apply, and the special provisions for pregnancy and maternity discussed above do not apply, when a student is breastfeeding a child more than 26 weeks old.

s17(6)

4.46

Where the claim is direct sex discrimination she will need to show that she has been treated less favourably than others are or would be treated in comparable circumstances and so a comparator will need to be identified. If a hypothetical comparator is used, it would be to establish how the student herself would have been treated were she not breastfeeding. (For a fuller discussion of comparators see paragraphs 4.21–4.31.)

Example: A student who is breastfeeding her eight-month-old child is asked to leave a university cafeteria and feed her baby in the toilets as she is offending other students. The student could use herself as a hypothetical comparator to show that the reason for the unfavourable treatment is because she is breastfeeding. This would be direct sex discrimination.

4.47

s13(6)(b) In considering discrimination against a male student, it is not relevant to take into account any special treatment given to a female student in connection with pregnancy or childbirth. (The time limits that define pregnancy and maternity discrimination do not apply here.)

Example: A university provides a private resting area for students who are pregnant or breastfeeding. A male student feeling tired complains that he does not have access to a similar facility. This is not discrimination because a man cannot compare himself to a woman in connection with pregnancy or breastfeeding.

Exceptions for pregnancy or maternity

4.48

See Chapter 14 for the limited circumstances in which an education provider may treat a female student differently because of pregnancy or maternity, by refusing to make a particular provision or making it conditionally.

Chapter 5

Indirect discrimination

Introduction

5.1

This chapter explains indirect discrimination and ‘objective justification’. The latter concept also applies to discrimination arising from disability, positive action and to some of the exceptions permitted by the Act.

s19(3)

Indirect discrimination applies to all the protected characteristics except pregnancy and maternity (although in pregnancy and maternity situations, indirect sex discrimination may apply).

5.2

As explained in Chapter 1, the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

What does the Act say?

5.3

Indirect discrimination may occur when an education provider applies an apparently neutral provision, criterion or practice which puts or would put students sharing a protected characteristic at a particular disadvantage.

s19(1)
and (2)

5.4

For indirect discrimination to take place, all four requirements must be met:

- the education provider applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group, including a particular student, and
- the provision, criterion or practice puts, or would put, students who share the student’s protected characteristic at a particular disadvantage when compared with students who do not have that characteristic, and
- the provision, criterion or practice puts, or would put, the student at that disadvantage, and

- the education provider cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.

What constitutes a provision, criterion or practice?

5.5

s19(1) The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase ‘provision, criterion or practice’ is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a ‘one off’ or discretionary decision.

Example: A further education college put in place a ‘no headgear’ policy on college grounds. This policy was introduced because of an increase in the amount of graffiti on college premises and difficulties for staff identifying those involved as they were wearing hooded tops. However, it puts a Sikh student at a disadvantage as he is required by his religion to wear a turban. A more proportionate policy would be one that makes an exception for Sikh students who wear turbans. Unless the college can justify their ‘no headgear’ policy, it is likely to be unlawful indirect discrimination because of race and also religion or belief.

Is the provision, criterion or practice a neutral one?

5.6

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

Example: A university requires students to attend certain courses full-time and does not provide part-time courses. The practice of providing only full-time courses is neutral, but the lack of a part-time option would make it difficult for individuals who have childcare or other caring responsibilities. As the majority of such individuals are women, this could be unlawful indirect sex discrimination unless it can be justified. Offering part-time courses is likely to be a more proportionate and legitimate practice.

What does ‘would put’ mean?

5.7

It is a requirement of the Act that the provision, criterion or practice puts or would put students who share the student’s protected characteristic at a particular disadvantage when compared with students who do not have that characteristic. The Act also requires that it puts or would put the particular student at that disadvantage. This allows challenges to provisions, criteria or practices which have not yet been applied but which would have a discriminatory effect if they were.

s19(2)(c)

5.8

However, for a claim for indirect discrimination to succeed the student must show that they would experience a disadvantage if the provision, criterion or practice were applied to them.

What is a disadvantage?

5.9

‘Disadvantage’ is not defined by the Act. It could include: refusal to admit; denial of an opportunity, or choice; deterrence or exclusion. The courts have found that ‘detriment’, a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the person does not have to experience actual loss (economic or otherwise). It is enough that the person can reasonably say that they would have preferred to be treated differently.

5.10

Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic.

Example: An old-established college has a tradition of allocating its most desirable rooms to students from a handful of schools whose association with the college goes back to its founding – all or most of them single-sex boys' schools. This is likely to be both indirect sex discrimination, and indirect race discrimination against its significant numbers of overseas students.

5.11

In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example a dress code may create a disadvantage for a person with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.

Example: A university schedules a number of lectures from 5pm to 6pm. As most nurseries close by 6pm, and schools finish at 3.30pm, this is likely to have a negative impact on students with caring responsibilities for young children. While the link between childcare and women might be considered to be an obvious one, statistics showing the percentage of women students with childcare responsibilities would help to demonstrate that the disadvantage exists. The practice would need to be justified in order to be lawful.

5.12

Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. Statistics relating to the education provision in question can be obtained through the questions procedure (see Chapter 15). It may also be possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage.

5.13

However, a statistical analysis may not be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison. In this situation, the court may find it helpful for an expert to provide evidence as to whether there is any disadvantage and, if so, the nature of it.

5.14

There are other cases where it may be helpful to have evidence (including if appropriate from an expert) to help the court understand the nature of a protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principle of a particular religious belief. See example at 5.21.

Example: An adult education college is facing funding cuts and has to limit the number of places it can offer on courses. It decides to give priority to local people and makes it a qualifying criterion for course attendees that a person must have lived in the area for a minimum of one year. This is likely to disadvantage Gypsies and Travellers and is likely to be indirect race discrimination unless it can be objectively justified. Evidence is presented to the college on the history and culture of Gypsy and Travellers who, because of their cultural heritage, are likely to be more mobile and less likely to be resident in a locality for one year. The college recognises the disadvantage to the Gypsy and Traveller community and agrees that the criterion is not a justifiable requirement and should be removed.

The comparative approach

5.15

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

s19(2)(b)
and s23(1)

5.16

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

Example: A further education college introduces a change to its drugs policy to specify that no hypodermic needles will be permitted on campus due to a number of dirty needles being found in college grounds. This policy has a negative impact on some disabled students who need to use hypodermic needles in the treatment of their condition, such as diabetic students who need to inject insulin at regular intervals during the day. In this case, the pools for comparison would be all diabetic students (and any other students with disabilities that required them to use hypodermic needles in the treatment of their condition), and all other students (both non-disabled and disabled).

The 'pool for comparison'

- s19(2)(b) **5.17** The people used in the comparative exercise are usually referred to as the 'pool for comparison'.

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

Example: Using the example at 5.14, a person from the Gypsy and Traveller community who has recently moved to the area complains that the local adult education colleges requirement for applicants to have lived in the local area for the past year at a minimum prevents him from applying for a course. The pool for comparison could be all those who have been living in the area for over a year who might reasonably use the local community college's courses. Alternatively, the pool could be those who have been admitted onto college courses using the one year residency criteria.

Making the comparison

- 5.18** Looking at the pool, a comparison must then be made between the impact of the provision, criterion or practice on students *without* the relevant protected characteristic, and its impact on students *with* the protected characteristic.

5.19

The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may, in some circumstances, be necessary to carry out a formal comparative exercise using statistical evidence.

s19(2)(c)

Carrying out a formal comparative exercise

5.20

If the court is asked to undertake a formal comparative exercise to decide an indirect discrimination claim, it can do this in a number of ways. One established approach involves the court asking these questions:

- What proportion of the pool has the particular protected characteristic?
- Within the pool, does the provision, criterion or practice affect students without the protected characteristic?
- How many of these students are not (or would not be) put at a disadvantage by it? How is this expressed as a proportion ('x')?
- Within the pool, how does the provision, criterion or practice affect students who share the protected characteristic?
- How many of these students are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?

5.21

Using this approach the court will then compare (x) with (y). It can then decide whether the student group with the protected characteristic experiences a 'particular disadvantage' in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

Example: A local adult education college starts providing local history classes for residents in the area. It is only made available on Friday evenings. Making the course available on a Friday night is a neutral practice but the college has complaints about Jewish people not being able to attend on Fridays.

- a. The college looks at the information it holds from the census on the religious make-up of the 'pool' (which is the 10,000 people living in the local ward). Of these, 1,000 state that they are Jewish (a protected characteristic). The proportion of the pool with the particular protected characteristic is one tenth.
- b. The local college knows that non-Jewish residents are unlikely to be prevented from taking the course by their religious beliefs.
- c. It estimates that none of the 9,000 non-Jewish residents will be disadvantaged by this practice.

However, following discussions with a local Jewish group, they estimate that there are at least 500 Jewish residents whose religious practice of observing Shabbat would prevent them from taking the course.

- d. Therefore, 50 per cent of Jewish residents will be disadvantaged by the practice.
- e. The local authority then compares the proportion of Jewish people who are disadvantaged by the practice (half of them) with the proportion of those who are disadvantaged by the rule but are not Jewish (none). From this comparison, the college concludes that the group with the protected characteristic (Jewish) experiences a particular disadvantage, and recognises that it must justify the practice (see below) or change it to avoid acting unlawfully. It chooses to make the course available on another evening instead of Friday, and decides to rotate courses so that the same classes are not held on Friday evenings every year.

Is the student concerned put at that disadvantage?

5.22

It is not enough that the provision, criterion or practice puts (or would put), at a particular disadvantage a group of students who share a protected characteristic. It must also have that effect (or be capable of having it) on the individual student concerned. So it is not enough for a student merely to establish that they are a member of the relevant group. They must also show that they have personally suffered (or could suffer) the particular disadvantage as an individual. (See paragraph 5.4 above.)

Example: Using the above example, a Jewish resident makes a complaint that he is unable to attend the local history course because it is held on Friday evenings. He observes the Sabbath so is able to demonstrate that he is personally disadvantaged by this decision. This may be indirect discrimination because of religion or belief. However, if another Jewish resident who is non-observant made the same complaint, he would not be able to show that he himself is disadvantaged by the decision to run the course on Friday evenings, and so that complaint would not result in a successful unlawful discrimination claim.

The intention behind the provision, criterion or practice is irrelevant

5.23

Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. If an education provider applies the provision, criterion or practice without the intention of discriminating against the student, the court may decide not to order a payment of compensation. (See Chapter 15 on Enforcement.)

s118(5)
and (6)

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

5.24

If the person applying the provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination. This is often known as the 'objective justification' test. The test also applies to other areas of discrimination law, for example, discrimination arising from disability (see Chapter 6).

s19(2)(d)

Example: In the university example at 5.11, the Physics Department schedules courses between 5 and 6pm. While this would put women students with caring responsibilities at a disadvantage, the Department might have timetabling issues and university schedules as a justification for having to run courses at this time and could claim that having to schedule all its courses at times to suit women with caring responsibilities would be a disproportionate response, given the student profile on the course.

5.25

If challenged in the courts it is for the education provider to justify the provision, criterion or practice. So it is up to the education provider to produce evidence to support its assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the education provider can set out the justification to the court.

5.26

The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages.

- Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

What is a legitimate aim?

5.27

The concept of ‘legitimate aim’ is taken from European Union (EU) Equal Treatment Directives and decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and it must represent a real, objective consideration.

5.28

Although reasonable business needs and economic efficiency may be legitimate aims, an education provider simply aiming to reduce costs cannot expect to satisfy the test. For example, the education provider cannot simply argue that to discriminate is cheaper than not to discriminate.

5.29

Examples of legitimate aims 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 those using the education provider’s service or others, provided risks are clearly specified and backed by others
- preventing fraud or other forms of abuse or inappropriate use of services provided by the education provider

- ensuring the wellbeing or dignity of those using the education provision, and
- maintaining academic and other standards.

What is proportionate?

5.30

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise, taking into account the relative importance and weight to be attached to relevant factors. A court may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the education provider's reasons for applying it, taking into account all the relevant facts.

5.31

Although not defined by the Act, the term 'proportionate' is taken from the EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

Example: An outdoor centre attached to a university provides a variety of activities from walks on gravelled areas to those involving strenuous physical effort. On health and safety grounds, it requires a medical certificate of good health for all students taking part in any activities. Although ensuring health and safety is a legitimate aim, the blanket application of the policy is likely to be disproportionate because customers with disabilities restricting strenuous exercise could be admitted to undertake parts of the course which do not create a safety risk, and because some conditions which doctors may refer to when refusing to certify 'good health' do not, in practice, impede the ability to undertake strenuous exercise safely.

5.32

The greater financial cost of using a less discriminatory approach cannot, by itself, provide a legitimate aim for applying a particular provision, criterion or practice. Reducing or avoiding costs can only be taken into account as part of the education provider's justification that applying the provision, criteria or practice is proportionate if there is another legitimate reason for adopting it.

5-33

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

Example: In the example at 5.16 concerning the no-needles policy, if the university recognised and addressed the negative impact of the policy on diabetic students who need to inject insulin at regular intervals during the day and made a clear exception to the policy for people in this situation as an anticipatory reasonable adjustment (see Chapter 7) then the no-needles policy is likely to be justifiable as a proportionate means of achieving the legitimate aim of tackling drugs problems on campus.

5-34

The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be.

Example: A university's swimming pool policy states that only one-piece swimming costumes can be worn. A Muslim female student objects as her religion does not allow her to wear such costumes as they are not considered sufficiently modest. This may constitute unlawful indirect discrimination because of religion or belief unless the policy can be objectively justified.

Public authorities and justification of indirect discrimination

5-35

A significant factor in determining whether a public authority (including all non-private FE and HE institutions) is able to justify what may be indirect discrimination is the extent to which the authority has complied with their Public Sector Equality Duty.

Guidance on the Public Sector Equality Duty is available on the Commission's website.

Indirect discrimination, competence standards and the duty to make reasonable adjustments for disabled students

5.36

As well as having an obligation not to indirectly discriminate against disabled students, education providers have an anticipatory duty to make reasonable adjustments for disabled students (more detail of which is given in Chapter 7). These two duties frequently overlap and it is sensible to consider them together.

5.37

When planning its provision, an education provider will need to consider whether its practices indirectly discriminate against disabled students. If a practice indirectly discriminates against disabled students, then the education provider must consider whether the practice can be justified.

Example: A college with two sites offers a science course that requires students to attend lectures on one site followed immediately afterwards by practicals at the other site. This means that individuals have to move from one site to another in a very limited amount of time. This disadvantages students who have mobility impairments and is likely to be unlawful disability discrimination unless it can be objectively justified.

Example: A university course requires applicants to have completed all their A levels at one sitting. This could place disabled applicants at a disadvantage. It may be unlawful indirect discrimination, unless it can be objectively justified.

5.38

If the education provider plans to provide reasonable adjustments for disabled students and makes those adjustments, then it will not have to change the practice for non-disabled students, but will simply adjust the practice appropriately.

Example: If in the first example above the college offers its courses either on one site or the other, or builds in more appropriate time allowances and other measures needed to allow students with mobility impairments to travel between sites, this could eliminate the potential discrimination described.

In the second example above, exceptions could clearly be made to the policy for applicants who have had to re-sit A levels due to disability, which could eliminate the discrimination described.

5-39

Sch13, para 4 The duty of FE and HE institutions to make reasonable adjustments for disabled students does not apply to a provision, criterion or practice that constitutes a competence standard.

Chapter 7 explains the meaning of competence standards. Paragraphs 7.33–7.38 further explain the limits of the reasonable adjustments duty in relation to competence standards.

5-40

In many cases when the education provider considers the question of whether a practice is justifiable despite its impact on disabled students, it will discover ways in which anticipatory reasonable adjustments can be made (see Chapter 7 for more information about the reasonable adjustments duty).

Example: A FE lecturer is developing a new course and decides to include several short film clips for the students to explore in their tutorial discussions. This is a ‘one-off’ decision which is apparently neutral. However, if the film clips do not have subtitles, Deaf students could be placed at a disadvantage compared with students who are not Deaf, because they will not have access to the content which their fellow students are discussing, and so it could amount to indirect disability discrimination and a failure to comply with the duty to make a reasonable adjustment. The lecturer decides to take the film clips from sources with subtitles, wherever possible, and provides a transcript of the content in the other cases. This would help to meet the obligation to anticipate the needs of disabled students and make reasonable adjustments in advance.

Chapter 6

Discrimination arising from disability

Introduction

6.1

This chapter explains the duty of education providers not to treat disabled students unfavourably for a reason connected with disability. Protection from this type of discrimination which is known as ‘discrimination arising from disability’ only applies to disabled people.

s15

As explained in Chapter 1, the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

What is discrimination arising from disability?

What does the Act say?

6.2

The Act says that treatment of a disabled student amounts to discrimination arising from disability where:

s15

- an education provider treats the disabled student unfavourably
- this treatment is because of something arising in consequence of the disabled student’s disability, and
- the education provider cannot show that this treatment is a proportionate means of achieving a legitimate aim unless the education provider does not know, and could not reasonably be expected to know, that the student has the disability.

Example: A student with autism often displays inappropriate behaviour as a symptom of his impairment. A further education college excludes the student for saying inappropriate things to a tutor. Other students have been excluded for similar behaviour. However, the student with autism has been treated unfavourably because of something which arises in consequence of his disability. This would be unlawful unless the college can show that the treatment is a proportionate means of achieving a legitimate aim.

How does it differ from direct discrimination?

6.3

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

Example: A student seeks admission to a further education college. The student has been diagnosed with depression, hence his attendance may be irregular, and he may be subject to panic attacks.

The college says that they cannot admit the student because the particular course includes an intensive two-week starter session with lectures every day. The refusal to admit the man is not because of the disability itself. He is experiencing detrimental treatment as a consequence of his disability. The college could be discriminating unlawfully unless it could show that its decision is justified.

How does it differ from indirect discrimination?

6.4

Indirect discrimination occurs when a disabled student is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) students sharing the disabled student's disability at a particular disadvantage compared to others, and puts (or would put) the disabled student at that disadvantage (see Chapter 5).

6.5

By contrast, discrimination arising from disability only requires the disabled student to show that they have experienced unfavourable treatment because of something connected with their disability. If the education provider can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability, it will not be discrimination arising from disability (see paragraphs 6.13–6.17). However, as with indirect discrimination, the education provider will not be unlawfully discriminating (on the basis of something arising from disability) if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraphs 6.11–6.12).

Is a comparator required?

6.6

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

Example: A disabled student is not allowed to enter a public speaking competition because his speech is slurred as a result of having cerebral palsy. In this case there is no need for a comparator. This amounts to discrimination arising from disability (which will be unlawful unless it is justified).

What is unfavourable treatment?

6.7

For discrimination arising from disability to occur, a disabled student must have been treated 'unfavourably'. This means that he or she must be put at a disadvantage. Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable: for example, a student may have been refused admission to a course or excluded from the institution. 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 an education provider thinks that they are acting in the best interests of a disabled student, they may still treat that student unfavourably.

s15(1)(a)

What does ‘something arising in consequence of their disability’ mean?

6.8

s15(1)(a) The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

6.9

The consequences of a disability include anything which is the result, effect or outcome of a disabled student’s impairment or condition. The consequences will be varied, and will depend on the individual effect upon a disabled student of their disability. Some consequences may be obvious, such as an inability to walk unaided. Others may not be obvious, such as an inability to concentrate for long periods, the need for regular rest breaks or toilet breaks, or the need for instructions to be repeated or given in visual form.

6.10

So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the education provider did not know or could not reasonably have been expected to know that the person was disabled.

Example: A student with Tourette’s Syndrome is asked to leave an exam because he is making loud noises, and sudden movements which are distracting other students. However, this is a result of his having Tourette’s Syndrome. The request that he should leave the examination room is likely to be discrimination arising from disability and would need to be justified to be lawful, or unless the education provider did not know, and could not reasonably have been expected to know, that the person was disabled.

When can discrimination arising from disability be justified?

6.11

s15(1)(b) Unfavourable treatment will not amount to discrimination arising from disability if the education provider can show that the treatment is a ‘proportionate means of achieving a legitimate aim’. This ‘objective justification’ test is explained in detail in paragraphs 5.24 – 5.35.

6.12

It is for the education provider to justify the treatment. It must produce evidence to support the assertion that it is justified and not rely on mere generalisations.

Example: An individual with dyspraxia is admitted to a higher education institution to study biochemistry. She is having significant difficulty in following instructions, especially more than one at a time and has difficulty with concentration. There is also evidence that her poor motor coordination may put other students at risk during practical experiments. The university carries out a risk assessment and arranges for a support worker in practicals who can carry out the experiments under the disabled student's instruction, but her difficulties with forming and following instructions mean that she is not able to instruct the support worker safely and effectively. Despite making a number of reasonable adjustments, the university recognises that there are continuing risks to the student and others and it is considered that she is unable to continue on the course as it is not possible for her to participate safely. This is likely to be justified discrimination arising from disability because it is a proportionate means of achieving the legitimate aim of maintaining academic standards and of ensuring the health and safety of students including the disabled student herself.

What if the education provider does not know that the student is disabled?

6.13

If the education provider can show that they:

- did not know that the disabled student had the disability in question, and
- could not reasonably be expected to know that the disabled student had the disability,

then the unfavourable treatment does not amount to discrimination.

6.14

It is not enough for the education provider to show that they did not know that the disabled student had the disability. They must also show that they could not reasonably have been expected to know about it.

s15(2)

6.15

An education provider should do all they can reasonably be expected to do to find out if a student has a disability. What is reasonable will depend on the circumstances.

When making enquiries about disability, education providers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: A community college sends out questionnaires to people who are thinking of applying for evening classes, asking if they have any needs related to a disability that they wish to advise the college of and whether the college can take any disability-related steps to make their attendance at the course any easier. This is a reasonable step to take to find out what potential disabled students' requirements may be, and could help the college prevent discrimination arising from disability. But this information must not be used in the admission decision-making process.

6.16

Where there is no ongoing relationship, for example where an applicant is attending an interview, an education provider will nevertheless need to consider whether there is a disability and, as a result, the particular treatment will amount to unfavourable treatment because of something arising in consequence of their disability. This may involve something as simple as giving a disabled person the opportunity to disclose their disability by asking them if there is any reason for their behaving in a particular way.

Example: A student with diabetes applies to a university to study medicine. He is called for a day of interviews, with various lecturers, tutors and the head of department. His diabetes means that he feels thirsty most of the time, and needs to frequently go to the toilet, which results in him turning up late for interviews. The student informs the department head that he has diabetes, which means he needs to use the toilet frequently. The interview schedules are adjusted to cater for his disability.

6.17

If one of an education provider's employees or agents knows of a disability, in that capacity, the education provider will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled student to discrimination arising from disability.

Example: A student has just enrolled at his local community college to do a course in local history. He has chronic heart disease and finds walking up stairs and for long distances tiring. He tells one of the administrators this when he is enrolling, but she does not realise that this will impact on his ability to go to classes at the top of the building or at the college campus on the other side of town. He is allocated to classes which are on the third floor of the college and he finds these classrooms very difficult to access. As a member of college staff is aware of his disability the college would not be able to claim that it did not know he had a disability and therefore cannot avoid liability for any discrimination arising from his disability.

Can education providers treat a disabled student more favourably?

6.18

It is never unlawful under the Act to treat a disabled student more favourably than a non-disabled student for a reason connected to their disability. Therefore, education providers may provide education, benefits, facilities and services on more favourable terms to a disabled person compared to a non-disabled person.

Relevance of reasonable adjustments

6.19

Education providers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 7).

6.20

If an education provider has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

Example: In the example at 6.10 above, the college could have prevented discrimination arising from disability occurring if they had knowledge of the disability and complied with the duty to make reasonable adjustments, perhaps by providing alternative accommodation for the student with Tourette's Syndrome to take the exam.

6.21

Even where an education provider has complied with a duty to make reasonable adjustments in relation to the disabled student, they may still subject the disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

Example: A diabetic student at university is allowed time to inject insulin when needed during tutorials. However, he isn't allowed to do this during the course of an examination, which he then fails because his low blood sugar level makes him unwell. The fact that a reasonable adjustment has been made in relation to tutorials is of no relevance to a claim for discrimination arising from disability in respect of the examination.

Chapter 7

Disabled persons: reasonable adjustments

Introduction

7.1

This chapter explains the duty to make reasonable adjustments for disabled students in relation to further and higher education.

In this chapter the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance, unless the text makes clear otherwise.

7.2

The duty to make reasonable adjustments requires education providers to take positive steps to ensure that disabled students can fully participate in the education and enjoy the other benefits, facilities and services which education providers provide for students. This goes beyond simply avoiding discrimination. It requires education providers to anticipate the needs of potential disabled students for reasonable adjustments.

7.3

The duty to make reasonable adjustments is not a minimalist requirement of simply ensuring that some access is available to disabled students; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled students to that enjoyed by the rest of the student body. The purpose of the duty to make reasonable adjustments is to provide access to an education as close as is reasonably possible to the standard normally offered to students at large.

What is the duty to make reasonable adjustments?

7.4

s21(2) One form of discrimination against a disabled student occurs where an education provider fails to comply with a duty to make reasonable adjustments imposed on them in relation to that disabled student.

7.5

The duty to make reasonable adjustments comprises three requirements. For further and higher education providers, these requirements are:

- s20(3) and Sch13 • Where a provision, criterion or practice puts disabled students at a substantial disadvantage compared with those who are not disabled, to take reasonable steps to avoid that disadvantage.
- s20(4) and Sch13 • Where a physical feature puts disabled students at a substantial disadvantage compared with people who are not disabled, to take reasonable steps to avoid that disadvantage or adopt a reasonable alternative method of providing the service or exercising the function.
- s20(5) and Sch13 • Where not providing an auxiliary aid or service puts disabled students at a substantial disadvantage compared with students who are not disabled, to take reasonable steps to provide that auxiliary aid/service.

7.6

Sch13(3) The duty applies to further and higher education providers in the following circumstances:

- deciding who is offered admission as a student
- the provision of education
- access to a benefit, service or facility
- deciding on whom a qualification is conferred, and
- a qualification that the education provider confers.

7.7

Sch13(5) and (6) The duty applies to local authorities and education authorities in the following circumstances:

- arrangements for enrolling a person on a course of further and higher education secured by the local authority or education authority
- the services provided for people enrolled on the course, and
- the arrangements for providing recreational or training facilities.

7.8

The first and third requirements of the duty (referred to in 7.5 above) apply to maintained schools providing further education in the following circumstances: Sch13(5)

- arrangements for enrolling a person on a course of further education provided by the school, and
- the services provided for people enrolled on the course.

Accessible information

7.9

The Act states that where the provision, criterion or practice, or the need for an auxiliary aid or service, relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format. An auxiliary aid includes an auxiliary service. This is discussed further from paragraph 7.40 below. s20(6)
s20(11)

What disadvantage gives rise to the duty?

7.10

The duty to make adjustments arises where a provision, criterion or practice, any physical feature of the education provision or the absence of an auxiliary aid or service puts disabled students at a substantial disadvantage compared with students who are not disabled. s20

7.11

The Act states that disadvantage must be substantial, which is defined as more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis. s212(1)

7.12

The purpose of the comparison with students who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature, or the absence of an auxiliary aid, disadvantages the disabled student in question. Accordingly – and unlike direct or indirect discrimination – there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled student's under the duty to make reasonable adjustments. s23(1)

7.13

The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled student in question did not have a disability.

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

7.14

Where the duty to make reasonable adjustments arises, an education provider cannot justify a failure to make a reasonable adjustment. However, the Act does place specific restrictions on the duty in relation to further and higher education institutions and maintained schools providing further education.

7.15

Sch13(4) A further or higher education institution will not be required to make any reasonable adjustments to the application of a competence standard. Competence standards are discussed further at paragraphs 7.33–7.38.

7.16

Sch13(5) Maintained schools in England and Wales providing courses of further education are not required to make adjustments in relation to physical features.

To whom is the duty to make reasonable adjustments owed?

7.17

The duty to make reasonable adjustments is an anticipatory one owed to disabled people and disabled students generally. It is not solely a duty that is measured in relation to each individual disabled person who wants to access further or higher education.

7.18

The duty to make reasonable adjustments applies in admission and during all stages of education provision including exclusion. It may also apply in relation to former students. The duty relates to all disabled students and any disabled applicants, not just those entitled to Disabled Students' Allowances. The duty also applies in respect of any disabled person (other than a student) who has notified the education provider that they may be an applicant for a qualification which the education provider confers.

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

7.19

In relation to further and higher education the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede all disabled people prior to an individual disabled student seeking to access education or the benefits, facilities and services offered to students by the education provider.

7.20

Education providers should therefore not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled students and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or may render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment.

Example: A further education college buys a textphone and advertises the number in promotional material. As well as buying and advertising the number for the textphone, the college trains the reception staff in using the equipment and ensures that maintenance staff check that it is working at regular intervals.

Example: A university takes proactive steps to install induction hearing loops in all lecture rooms anticipating that this adjustment is likely to be required to meet the needs of hearing impaired students.

Example: A person with a visual impairment regularly receives printed handouts in lectures, despite the fact that on previous occasions he has indicated his need for Braille and this has been provided. He finds this repeated need to ask for Braille frustrating and inconvenient as he does not receive the handouts at the same time as other students. This may constitute a failure to make reasonable adjustments if it is judged to have left the disabled student at a substantial disadvantage and there was a reasonable adjustment that could have been made.

Does the duty to make reasonable adjustments apply even if the education provider does not know that the person is disabled?

7.21

Because there is a duty to disabled students generally, it applies regardless of whether the education provider knows that a particular person is disabled or whether it currently has disabled students.

7.22

An education provider should do all it can reasonably be expected to do to find out whether a student is disabled and requires reasonable adjustments. The action that it is appropriate to take to find out about a student's disability may differ between different types of provision.

Guidance is available on the reasonable action an education provider should take to find out about people's disabilities. 'Finding out about people's disability: a good practice guide for further and higher education institutions DfES/0023/2002 England only or guidance from the Equality Challenge Unit e.g. www.ecu.ac.uk/publications/evidencing-equality-approaches-to-increasing-disclosure-and-take-up-of-disabled-students-allowance.

Must education providers anticipate every barrier?

7.23

Education providers are not expected to anticipate the needs of every prospective student, but they are required to think about and take reasonable steps to overcome barriers that may impede people with different kinds of disability. For example, people with learning difficulties, mental health conditions or mobility impairments may face different types of barriers.

7.24

Disabled people are a diverse group with different requirements – for example, visually impaired people who use assistance dogs will be prevented from using education facilities with a 'no dogs' policy, whereas visually impaired people who use white canes will not be affected by this policy. The duty will still be owed to members of both groups.

7.25

Once an education provider has become aware of the requirements of a particular disabled student it might then be reasonable for the education provider to take a particular step to meet these requirements. This is especially so where a disabled student has pointed out the difficulty that they face or has suggested a reasonable solution to that difficulty.

Example: A university anticipates that some Deaf students will require the use of British Sign Language (BSL) interpreters and ensures it has access to BSL interpreters at short notice. However, a student who arrives at the university uses American Sign Language (ASL) and had not previously notified the university of this. As soon as the university is aware of this it should consider making the necessary reasonable adjustment by seeking an ASL interpreter, even though it may not have been reasonable to have arrangements with an ASL interpreter before the student arrives.

How long does the duty continue?

7.26

The duty to make reasonable adjustments is a continuing duty. Education providers should keep the duty and the ways they are meeting the duty under regular review in light of their experience with disabled students. In this respect it is an evolving duty, and not something that needs simply to be considered once only, and then forgotten. What was originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might then have to be considered.

7.27

Equally, a step that might previously have been an unreasonable one for an education provider to have to take could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may provide new or better solutions to the difficulties faced by disabled students.

Confidentiality and reasonable adjustments

7.28

A disabled student has a right to request that the existence or nature of their disability be treated as confidential. In determining whether it is reasonable to make an adjustment the responsible body must have regard to the extent that making the adjustment is consistent with a disabled student's request for confidentiality.

7.29

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

Sch13,
para 8(6)

Example: A student with a visual impairment can only read clearly if he has text enlarged into 16-point type. He has requested strict confidentiality. Normally his tutors, as a reasonable adjustment, would give a visually impaired student large-print handouts at the beginning of each class. However, because he has asked the tutors not to tell any of his fellow students about his disability or to draw attention to it in any way, they agree to give him his handouts in advance so that he can look at them before the lesson but does not have to be seen reading them during the class.

7.30

In some cases a confidentiality request might mean that a less satisfactory reasonable adjustment is provided or that no reasonable adjustment can be provided.

Example: A student with HIV is on a chemical engineering course. His condition means that he sometimes needs to have time off for medical appointments. His course coordinator offers to speak to his tutors so they can make arrangements for him to catch up on the work he has missed, for example, by providing extra time in the laboratory after hours. However, he has refused this adjustment because he doesn't want his tutors to know about his condition. As an alternative, the course coordinator offers to provide him with extra lecture notes which may be a less effective adjustment but will maintain confidentiality.

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

7.31

An education provider might have a provision, criterion or practice which places disabled students at a substantial disadvantage in accessing education and any benefit, facility or service. In such a case, the education provider must take such steps as it is reasonable for them to have to take, in all the circumstances, to change the provision, criterion or practice so that it no longer has such an effect. This may simply mean waiving a criterion, amending a practice to allow exceptions, or abandoning it all together. Often, such a change involves little more than an extension of the flexibility and individual approach which most education providers already show to their students. This duty does not apply to competence standards – see paragraphs 7.33–7.38 below.

What is a provision, criterion or practice?

7.32

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

Example: A student with a visual impairment has difficulty using the IT services at his university because his screen reading software is not easily compatible with the IT system and does not allow him to upload the software. He raises this issue with the IT department, who agree to make changes to the system so that the software is compatible and install the screen reading software permanently on his user account. This is likely to be a reasonable adjustment to the way in which the university provides access to IT facilities.

Example: A lecturer on an English Literature course at a FE college does not use slides, handouts or other visual materials, expecting the students to bring the set texts so he can refer to them as needed. However, a blind student who uses audio versions of the texts cannot navigate to the relevant portion of the text while continuing to listen to the lecture. It is likely to be a reasonable adjustment for the lecturer to indicate in advance which passages will be used in the lecture, and to read key passages aloud in the course of discussion.

Competence standards

What is a competence standard?

7.33

The Act defines a ‘competence standard’ as an academic, medical, or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability.

Sch13,
para 4(3)

7.34

Education providers are likely to impose various requirements and conditions in respect of courses. However, any such requirement or condition only amounts to a competence standard if its purpose is to demonstrate a

particular level of a relevant competence or ability such as a requirement that a person has a particular level of relevant knowledge of a subject.

Example: The admissions criteria for a course in choreography include a requirement to demonstrate ‘a high level of physical fitness’. The course itself, however, is predominately theory-based and does not involve any strenuous physical activity. This is unlikely to be a competence standard.

Example: The requirement for students studying for a law degree to demonstrate a particular standard of knowledge of certain areas of law in order to obtain the degree is a competence standard.

7.35

On the other hand, a condition that a person can, for example, do something within a certain period of time will not be a competence standard if it does not determine a particular level of competence or ability.

Example: A requirement that a person completes a test in a certain time period is not a competence standard unless the competence being tested is the ability to do something within a limited time period.

Competence standards and assessment process

7.36

Sometimes the process of assessing whether a competence standard has been achieved is inextricably linked to the standard itself. The passing of an assessment may be conditional upon having a practical skill or ability which must be demonstrated by completing a practical test. Therefore, in relatively rare circumstances, the ability to take the test may itself amount to a competence standard.

Example: An assessment for a practical course in car maintenance cannot be done solely as a written test, because the purpose of the test is to ascertain whether someone can complete car repairs.

What is the significance of this distinction?

7.37

A provision, criterion or practice does not include the application of a competence standard. Therefore the duty to make reasonable adjustments does not include a duty to make reasonable adjustments to the application of a competence standard.

Sch13,
para 4(2)

7.38

Although there is no duty to make reasonable adjustments to the application of a competence standard, such a duty does apply to the process by which competence is assessed. So although an education provider has no duty to alter a competence standard, it needs to consider whether or not a reasonable adjustment could be made to some aspect of the process by which it assesses a competence standard.

Example: When assessing the competence standard of a person's ability to read French it would be a reasonable adjustment to provide a visually impaired student with text in large font (if that was the adjustment the student required).

Example: A law student has severe arthritis in her hands. When assessing her level of knowledge, it might be a reasonable adjustment to provide an oral exam or viva instead of a timed handwritten exam. However, there may be an overlap between a competence standard and any process by which an individual is assessed against that standard.

Example: A woman taking a written test for a qualification in office administration asks the education provider for extra time for the test because she has dyslexia. This is likely to be a reasonable adjustment for the education provider to make. She also asks if she can leave out the questions asking her to write a business letter and to précis a document, because she feels that these questions would substantially disadvantage her because of her dyslexia. The education provider would not have to make this adjustment because these questions are there to determine her competence at writing and précising, so are part of the competence standard being tested.

Provision of information

7.39

s20(6) The Act states that where a provision, criterion or practice places a disabled student at a substantial disadvantage, and this relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format.

Example: A further education college takes steps to ensure that their prospectus is available in a range of accessible formats including easy read and enlarged font. This would be a reasonable adjustment to the provision of information.

What is the duty to provide auxiliary aids and services?

7.40

An education provider must take such steps as it is reasonable for them to have to take, to provide auxiliary aids or services to remove a substantial disadvantage experienced by a disabled student.

What is an auxiliary aid or service?

7.41

An auxiliary aid or service is anything which provides additional support or assistance to a disabled student. Examples include:

- a piece of equipment
- the provision of a sign language interpreter, lip-speaker or deaf-blind communicator
- extra staff assistance for disabled students
- an electronic or manual note-taking service
- induction loop or infrared broadcast system
- videophones
- audio-visual fire alarms
- readers for people with visual impairments, and
- assistance with guiding.

7.42

Education providers should ensure that any auxiliary aids they provide are carefully chosen and properly maintained. They should have in place contingency arrangements in case of an unexpected failure of an auxiliary aid.

Example: A college with permanent induction loops in all of its lecture halls ensures that they are regularly tested. They also purchase a portable induction loop for use in case the permanent loops are not working. This would be a reasonable adjustment to make.

7.43

Nothing in the Act requires an education provider to provide an auxiliary aid or service to be used for personal purposes unconnected to the education, benefit, facility or service being provided or to be taken away by the disabled student after use.

Example: A further education college provides an electric wheelchair for a student with mobility difficulties to assist her with getting around campus. The wheelchair is kept on college premises and is only used by the student when she is at college. The college is not required to let the student use the wheelchair when she is not attending college.

7.44

The Act leaves open what particular auxiliary aids or services might be provided in specific circumstances. The duty remains with the education provider to determine what steps it would be reasonable for them to take.

See paragraphs 7.54–7.81 for an explanation of what is reasonable.

Provision of information

7.45

The Act states that where the absence of an auxiliary aid or service places a disabled person at a substantial disadvantage, and this relates to the provision of information, the steps which it is reasonable for a service provider to take include steps to ensure that the information is provided in an accessible format.

s20(6)

Physical features

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

7.46

An education provider must take such steps as it is reasonable to take to avoid putting disabled students at a substantial disadvantage caused by a physical feature.

Avoiding substantial disadvantage

7.47

s20(9) The Act states that avoiding a substantial disadvantage caused by a physical feature includes:

- removing the physical feature in question
- altering it, or
- providing a reasonable means of avoiding it.

Removing the physical feature

7.48

Removing the physical feature may be a reasonable step – and the most effective one – for an education provider to take.

Example: A set of low-level bollards at the front entrance of the college which present a hazard for a visually impaired student are removed. This would be a reasonable adjustment of removing a physical feature.

Altering the physical feature

7.49

Altering the physical feature so that it no longer has the effect of making it substantially difficult for a disabled student may also be a reasonable step for an education provider to take.

Example: A classroom at a college has hard flooring and high ceilings which means sound echoes. This makes it difficult for someone with a hearing impairment to hear. The college decides to lay carpet and install a drop ceiling which alters the room to address the substantial disadvantage faced by hearing impaired students. This is an example of a reasonable adjustment of altering physical features.

Providing a reasonable means of avoiding the physical feature

7.50

Providing a reasonable means of avoiding the physical feature may also be a reasonable step for an education provider to take.

Example: A college allows a student who is a wheelchair user to access the college building through the staff entrance which is fully accessible, rather than the main entrance which has steps.

7.51

The Act requires that any means of avoiding the physical feature must be a ‘reasonable’ one. Relevant considerations in this respect may include whether the provision of education or any benefit, service or facility in this way significantly offends the dignity of disabled students and the extent to which it causes disabled students inconvenience or anxiety.

Example: A college arranges for two of its security staff to lift a wheelchair user up the steps at the entrance of a college building. This is unlikely to be a reasonable means of avoiding the physical feature. A reasonable alternative could be installing a ramp.

What is a ‘physical feature’?

7.52

Physical features of a building or premises include:

- any feature arising from the design or construction of a building
- any feature of any approach to, exit from, or access to a building
- any fixtures, fittings, furnishings, furniture, equipment or other moveable property in or on premises, and
- any other physical element or quality.

All these features are covered by the duty, whether the feature in question is temporary or permanent. A building means an erection or structure of any kind.

7.53

Physical features include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer scale of premises (for example, the size of a shopping centre). This is not an exhaustive list.

Example: Clear glass doors at the end of a corridor in a college present a hazard for a visually impaired student. This is a substantial disadvantage caused by the physical features of the college.

What is meant by ‘reasonable’ steps?

7.54

The duty to make reasonable adjustments places education providers under a responsibility to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step for a particular education provider to have to take depends on all the circumstances of the case.

7.55

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

7.56

Education providers should bear in mind that there are no rigid solutions and there are often several solutions to one situation. Action which may result in reasonable access to education being achieved for some disabled students may not necessarily do so for others.

Example: A Deaf student applies to attend a small further education college and indicates that he requires an induction loop to access lectures. In line with its anticipatory duty the college has already purchased a portable induction loop and provided some basic training for staff. The college discusses with the Deaf student his reasonable adjustment requirements and ascertains that they do not need to install an induction loop in every seminar room and lecture theatre as the student can use the portable loop. The college then arranges for further staff training and also alerts maintenance staff to the need to ensure that the loop is working and is periodically tested.

Example: Another Deaf student applies to attend the same small further education college. The college assumes that it will need to purchase another portable hearing loop. However, after discussing her requirements with the student, the college finds that she does not normally use a hearing loop and prefers to lip-read. The college ensures that all staff are aware of the need to face the student and to speak clearly when they are talking to her.

7.57

The purpose of taking the steps is to ensure that disabled students are not placed at a substantial disadvantage compared with non-disabled students. Where there is an adjustment that the education provider could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the education provider to take some lesser step that would not provide education or access to a benefit, facility or service in as accessible a manner.

7.58

Similarly, an education provider will not have taken reasonable steps if they attempt to provide an auxiliary aid or service which in practice does not help disabled students to access the education, benefit, facility or service.

7.59

In all cases, it is important to use, as far as is reasonable, a means of communication which is itself accessible to disabled students.

7.60

If, having considered the issue thoroughly, there are genuinely no steps that it would be reasonable for an education provider to take to make its education, benefits, facilities or services accessible, the education provider is unlikely to be in breach of the law if it makes no changes. Such a situation is likely to be rare.

Factors to be taken into account

7.61

Without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:

- whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the education or other benefit, facility or service in question

- the type of education or other benefit, facility or service being provided
- the extent to which it is practicable for the education provider to take such steps
- the effect of the disability on the individual
- the financial and other costs of making the adjustment
- the availability of grants, loans and other assistance to disabled students
- the extent to which aids and services will otherwise be provided to disabled people or students
- the resources of the education provider and the availability of financial or other assistance
- health and safety requirements, and
- the relevant interests of other people, including other students.

The effectiveness of the step in avoiding the disadvantage

7.62

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

Example: A wheelchair user cannot access classes on a course that take place on the higher floor levels of the small college he attends. There isn't an accessible lift between floors in the college premises and it is unlikely to be reasonable for the education provider to install an accessible lift. Instead of relocating classes to an accessible floor, so that the student can attend the course without experiencing substantial disadvantage, the college asks the wheelchair user to change to a different course where classes are held at an accessible floor level. This step would not be effective in preventing the disadvantage experienced in relation to the course the wheelchair user has chosen to undertake.

7.63

However, an adjustment which, taken alone, is of marginal benefit, may be one of several adjustments which, when looked at together, would be effective. In that case, it is likely to be reasonable to have to make it. Effective steps might not always be the most obvious steps.

The type of education or other benefit, facility or service being provided

7.64

What is appropriate in one setting might not be appropriate in another setting. Clearly more extensive adjustments may be considered reasonable when they facilitate access to core services. It is more likely to be reasonable for an education provider to have to make an individualised adjustment with significant costs for a student who is likely to be at the institution for some time than for a temporary student.

The practicability of the adjustment

7.65

It is more likely to be reasonable for an education provider to have to make an adjustment which is easy and cheap to make than one which is difficult and expensive to make. In some circumstances it may be reasonable to have to make an adjustment, even though it is difficult.

Example: A person with restricted growth applies for a course in photography. The darkroom that will be used needs some adjustments to be made to make a workstation accessible for the student. This will require some building work which cannot be completed before the start of term. However, the course tutor makes some small changes to the structure of the course so that it begins with non-darkroom work, to allow the adjustments to the darkroom to be made.

7.66

There may be some instances, when, although an adjustment might overcome the substantial disadvantage, it will not be practicable for the education provider to take such a step.

Example: A person with severe learning difficulties is taking a weekly local history class. Although much of the class is practical, involving visits to local places of interest, the tutor also regularly gives out articles from history journals. While every effort should be made to ensure that the person with learning difficulties understands what the articles say, it might not be practicable for the tutor to try to represent them all in pictorial or symbol form which is the method used by the person with learning difficulties.

The effect of the disability on the individual

7.67

The effect of an individual's disability may affect what adjustments are reasonable for an education provider to make.

Example: A student with a specific learning difficulty finds it difficult to read text typed on white paper. The college routinely uses white paper for all handouts. The college decides to provide handouts on yellow paper for the disabled student. This would be a reasonable adjustment for this student. However, another student with a specific learning difficulty finds it difficult to read typed text on any colour of paper without a plastic overlay sheet. The college provides this student with a plastic overlay sheet. This would be a reasonable adjustment for this disabled student.

The financial and other costs of the adjustment

7.68

s20(7) If an adjustment costs little or nothing to implement it would be reasonable to do so unless some other factor (such as practicability or effectiveness) made it unreasonable. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the education provider might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

7.69

The Act prohibits education providers who are under a duty to make reasonable adjustments for a disabled student from requiring those students to pay to any extent for the costs of making those adjustments.

Example: A university library charges a photocopying fee for enlarging materials for a student who has a visual impairment. This will be unlawful.

The availability of grants, loans and other assistance to disabled students

7.70

Some disabled students following higher education courses may be eligible for Disabled Students' Allowances, the specific purpose of which is to pay for additional aids and services which students require because of a disability. It may not be reasonable to expect an education provider to pay for the same aids and services for which Disabled Students' Allowances are available.

Example: A student with a visual impairment is eligible for a Disabled Students' Allowance grant for specialist equipment and assistance that will help him to undertake his course. He requests that his university provide specialist equipment including computer software and a note-taker as a reasonable adjustment. As these would be available under a Disabled Students' Allowance grant, it is unlikely to be reasonable to expect the university to pay for these.

7.71

FE colleges receive Additional Learner Support funds from the relevant funding agencies to provide study support on site in the form of, for example, equipment, helpers or accessible study materials for disabled students. However, there are charitable grants that students may choose to apply for and if a student is successful in obtaining such a grant, it would not be reasonable for a college to have to pay for the same item or support the grant is for, if that item or support can be used on site.

Example: A student with dyslexia on an FE course already has a laptop computer. It is unlikely to be reasonable to expect the college to fund another laptop computer for the student to use in lectures, if the student can easily take her own laptop to lectures.

7.72

However, there are instances when disabled students might need reasonable adjustments to be provided by the education provider in addition to those resourced through the Disabled Students' Allowances or other funding. Education providers should anticipate that this might be the case.

Example: Disabled Students' Allowance pays for the cost of Dragon computer software for a visually impaired student, but the university needs to purchase a licence to make Dragon available across its IT services, as the Disabled Students' Allowance does not cover this.

Example: A student who is a BSL user receives funding through his Disabled Students' Allowance to cover the cost of a BSL interpreter for some, but not all, of his lectures. Subject to effectiveness, practicability and cost (among other factors), it may be reasonable for the university to provide him with individually-tailored additional communication support for his other lectures.

7.73

If a disabled person has a particular piece of special or adapted equipment which he is prepared to use while studying, this might make it reasonable for the education provider to have to take some other step (as well as allowing the use of the equipment).

Example: A disabled student has a Dictaphone which he needs in all lectures and while working at home. The education provider allows him to use it in all lectures and the lecturer is careful not to move around too much so that the student is able to obtain a clear recording of the lecture.

The extent to which aids and services will otherwise be provided to disabled students

7.74

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

Example: A man with physical disabilities who needs assistance with toileting is enrolled on an adult education course. His disabilities mean that he requires a support worker with him at all times. He is already receiving a package of care funded by his local authority and he has a full-time support worker allocated to him. It is unlikely to be reasonable to expect the education provider to provide an additional support worker to carry out the same role. However, if he also needs additional learning support it is the education provider's duty to provide the necessary reasonable adjustment.

The resources of the education provider and the availability of financial or other assistance

7.75

It is more likely to be reasonable for an education provider with substantial financial resources to make an adjustment with a significant cost, than for an education provider with fewer resources. The resources in practice available to the education provider as a whole 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 in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

Example: A sign language user wishes to use the careers service at a higher education institution. Although the careers service has a very small budget and does not have sufficient funds to cover the cost of an interpreter, the institution has a large enough budget to cover the cost and funding should be provided in order to make its careers service accessible to the student.

Health and safety requirements

7.76

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 student in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. However, education providers are not required to eliminate all risk and should look at reasonable adjustments which will minimise risks. Suitable and sufficient risk assessments should be used to help determine whether such risks are likely to

arise and what reasonable adjustments can be put in place to minimise those risks. Risk assessments should be specific to the individual student and the activities in question. Risk management should be an ongoing process throughout a student's course.

Example: A wheelchair user with a stair-climbing wheelchair is required to attend lectures on the first floor of a building without a lift. The education provider has concerns about the health and safety risks associated with him using his stair-climbing wheelchair. Following a risk assessment the education provider identifies the main risks and puts processes in place to minimise these such as ensuring the student is accompanied while moving up and down stairs and that other students are aware of the need to allow him space to do so.

7.77

There might be instances when, although an adjustment could be made, it would not be reasonable to do so because it would endanger the health and safety either of the disabled student or of other people.

7.78

There might be other instances where education providers could make anticipatory reasonable adjustments in line with health and safety legislation, ensuring compliance with, and not infringing, that legislation.

Example: An education provider trains staff to use evacuation chairs and installs flashing fire alarms to reduce the risks associated with the evacuation of disabled students in the case of a fire.

7.79

Health and safety issues must not be used spuriously to avoid making a reasonable adjustment. Education providers should avoid making uninformed assumptions about health and safety risks.

Example: A student with HIV wants to take a nursing course. The education provider assumes that his condition will create a health and safety risk and refuses him a place. If the college had obtained further information about the student's condition and the associated risks, it would have been able to put adjustments in place to ensure there were no unnecessary health and safety risks.

The relevant interests of other people including other students

7.80

Ordinarily the interests of other students regarding the reasonable adjustments required by a disabled student will be irrelevant. However, there are limited circumstances where the provision of a particular reasonable adjustment for a disabled student will disadvantage other students. This is only relevant where the adjustment results in significant disadvantage for other students. In such a case, it may not be reasonable to expect the education provider to make the adjustment.

Example: A disabled person applies for a full-time course. His health condition requires hospital appointments for dialysis three times a week. For the disabled person to take part in the course full-time, he would either have to miss large amounts of the course, or the timetable would need to be substantially revised, which would make it very difficult for many other members of the course to attend. It is likely that this would not be a reasonable adjustment, as it would significantly adversely affect other students on the course. In this case, it is likely to be appropriate to look at alternative arrangements, such as a similar part-time course.

7.81

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

Example: A disabled student has an impairment that causes him to need short rest breaks due to fatigue. For the final 15 minutes of each class, the tutor asks students to complete a written exercise. Before this exercise, the tutor allows the student a short rest break if required. The other students complain that they have to wait an additional few minutes for the disabled student. However, the delay does not significantly adversely affect the group to the extent that it makes the adjustment unreasonable. This is because the short delay experienced by other students is unlikely to be considered a sufficient reason for not allowing the disabled student to have rest breaks and thereafter allow him to participate in the written exercises.

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

7.82

Where an education provider does not comply with the duty to make reasonable adjustments it will be committing an act of unlawful discrimination. A disabled student will be able to make a claim based on this (see Chapter 15 for more detail about claims).

What is the duty in relation to conferment of qualifications on non-students?

7.83

In addition to the duty in relation to disabled students and applicants, education providers also have a duty to make reasonable adjustments for disabled people who are not students at the institution who apply for the conferment of a qualification or hold a qualification conferred by the education provider.

7.84

The duty applies in relation to a provision, criterion or practice, other than a competence standard, for determining on whom a qualification is to be conferred which places a disabled person at a substantial disadvantage. This duty only covers a disabled person who has applied for the conferment of a qualification or has notified the education provider that he may apply for the conferment of a qualification. This duty only applies to disabled persons who are not students of this education provider and who are therefore not covered by the duties described in paragraphs 3.5–3.6.

Although in this situation the HE and FE provisions of the Act only refer to non-students with the protected characteristic of disability, educational institutions conferring qualifications on people who are not their students would be prohibited by the provisions relating to goods and services from discriminating in relation to any of the other protected characteristics. Guidance on Services, Public Functions and Associations is available on the Commission's website.

Example: A disabled student studies for a foundation degree with his employer and at his local FE college, but the degree is accredited and awarded by a university. The disabled student finds corresponding with the university in writing or emails very difficult. It would be a reasonable adjustment for the university to allow the disabled person to make contact by telephone and the university records this person's requirement for future reference.

7.85

The duty also applies in relation to any other provision, criterion or practice which places a disabled person at a substantial disadvantage.

7.86

This duty covers a disabled person who holds a qualification conferred by the education provider or applies for a qualification which the education provider confers.

Good practice regarding reasonable adjustments

7.87

When an education provider is considering making reasonable adjustments, the following measures may be helpful and constitute good practice that may help avoid acts of discrimination. In some circumstances, they may either be a means to identify reasonable adjustments or actually constitute reasonable adjustments themselves:

- Planning in advance, anticipating the requirements of disabled students and reviewing the reasonable adjustments in place.
- Offering a variety of opportunities for students to disclose throughout their time as a student including at the pre-entry and admissions stage so that reasonable adjustments can be made.
- Conducting access audits on premises.
- Asking disabled students for their views on reasonable adjustments.
- Consulting local and national disability groups.
- Drawing disabled students' attention to relevant reasonable adjustments.
- Properly maintaining auxiliary aids and having contingency plans in place in case of the failure of the auxiliary aid.
- Training employees to appreciate how to respond to requests for reasonable adjustments.
- Encouraging employees to develop additional skills for working with disabled students (for example, communicating with hearing impaired people).
- Ensuring that employees are aware of the duty to make reasonable adjustments and understand how to communicate with disabled students so that reasonable adjustments can be identified and made.
- Effectively communicating and acting with one another where students attend more than one education institution, for example, pupils/students shared between schools and FE colleges.

Example: A 15 year old Deaf pupil is undertaking a Young Apprenticeship. This means that he spends one day a week at the local college and four days a week at school. The duty to make reasonable adjustments falls on both organisations. A system is agreed for the school and college to exchange relevant information about any issues that arise involving his disability, including problems and what has been found to work well. Information is presented in accessible formats and staff are briefed in the best way to communicate. The pupil also has a BSL interpreter funded by the Local Authority.

Chapter 8

Harassment

Introduction

8.1

This chapter explains the Act's general test for harassment. It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment, and less favourable treatment for rejecting or submitting to harassment.

s26

As explained in Chapter 1, the terms 'education provider' and 'student' and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

8.2

Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the student to show that another student was (or would have been) treated more favourably. For an explanation of direct discrimination please see Chapter 4.

What does the Act say?

8.3

The Act prohibits three types of harassment. These are:

- harassment related to a 'relevant protected characteristic'
- sexual harassment, and
- less favourable treatment of a student because they submit to or reject sexual harassment or harassment related to sex or gender reassignment.

s26(1)

s26(2)

s26(3)

8.4

In the case of sexual harassment of a minor, there is of course a range of other legislation, including that covering criminal acts, which will come into play. Such legislation is beyond the scope of this Technical Guidance.

8.5

The 'relevant protected characteristics' for this chapter of the Technical Guidance are:

- Age
- Disability
- Gender reassignment
- Race
- Religion or belief
- Sex
- Sexual orientation.

8.6

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

Harassment related to a protected characteristic

8.7

s26(1)(a) and (b) This type of harassment occurs when an education provider engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or effect of:

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

Example: During a film studies tutorial, the tutor speaks at great length to an Asian student about the Bollywood film festival she plans to attend this weekend. They have never discussed this genre of films before and it is not something the student has any knowledge about or particular interest in. While the student may find this a bit patronising and stereotypical, it is unlikely to amount to harassment under the Act.

8.8

Unwanted conduct covers a very wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a student's surroundings or other physical behaviour.

8.9

The word unwanted means essentially the same as ‘unwelcome’ or ‘uninvited’. ‘Unwanted’ does not mean that express objection must be made to the conduct before it is deemed to be ‘unwanted’. A serious one-off incident can amount to harassment.

Example: A HE tutor in theology makes aggressive and offensive remarks about the increased legal rights of gay and lesbian people under the law, stating that in any civilised society gay people should not be able to adopt, as their lifestyle is not conducive to raising children. These comments appear to have been directed at a lesbian student in the group who finds this behaviour offensive, hostile and intimidating. This conduct related to sexual orientation could amount to harassment under the Act.

‘Related to’

8.10

Unwanted conduct ‘related to’ a protected characteristic has a broad meaning and includes the following situations:

a. where the student has a protected characteristic

Example: A trainee primary school teacher with a severe facial disfigurement is told by her course tutor that she should not expect to work with very young children ‘looking like that’ because she might ‘upset’ the children. The tutor questions the student’s choice of career and makes remarks about new treatments and make-up to cover the ‘problem’, in front of others. The student is very offended and hurt by this behaviour. This is likely to be direct discrimination and harassment related to disability.

Example: A tutor on a performing arts course repeatedly makes sneering comments about people who have physical impairments but still feel they can become actors. A student in the class who uses a prosthetic leg finds this behaviour deeply offensive. This is likely to amount to harassment related to disability.

8.11

Protection from harassment also applies where a person is generally abusive to students but, in relation to a particular student, the form of the unwanted conduct is determined by that student's relevant protected characteristic.

Example: A lecturer in construction has a robust style which results in him being rude to his students. He makes jokes about women students getting their hands dirty on site, and stereotyping their abilities as better suited to childcare and not manual trades. Although the comments are not directed at any particular student, a female student who hears these remarks and is humiliated and offended by them, may have a claim of harassment related to sex.

b. where there is any connection with a protected characteristic**8.12**

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

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

Example: At a careers event for students and parents at an FE college, a student attends with her parents who are both Deaf. They communicate using BSL and the student notices two support staff staring and silently mimicking them. The student is very upset by the conduct of these staff which prevents her from fully participating in the event as it creates a degrading and offensive environment for her as well as her parents. The student could bring a claim of harassment related to disability.

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

Example: A female student goes to the college canteen to meet a friend. While waiting to be served, she hears the staff making insulting comments about her appearance, implying that she is a male to female transsexual. Despite the fact this is not true, she feels humiliated, offended and upset by their remarks and leaves before her friend arrives. While the remarks were not made directly to her, she is confident the staff were aware that she could hear what they were saying. This may be harassment related to perceived gender reassignment.

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

Example: A student born in the Czech Republic who is on a plumbing course is faced with continual taunts from his tutor about Polish plumbers and derogatory comments about Polish people. The tutor knows the student is from the Czech Republic, and he regards his comments as just a joke. The student has told him to stop, and is considering asking to move classes to avoid being insulted and verbally abused for a characteristic he does not possess. This may be racial harassment.

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

Example: A lecturer racially abuses a black student. As a result of the racial abuse, a white student is offended and could bring a claim of racial harassment.

- The unwanted conduct is related to the protected characteristic, but is not due to the protected characteristic and occurs for some other reason.

8.13

In all of the circumstances listed above there is a connection with the protected characteristic so the student could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 8.7.

Sexual harassment

s26(2) **8.14** Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraphs 8.7 which is of a sexual nature.

8.15 Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

Example: A tutor asks a student to stay behind after a class to discuss her coursework. During the discussion the tutor shows her a graphic sexual image on his laptop and makes lewd sexual jokes. The student finds his behaviour very offensive and disturbing. This conduct is likely to be sexual harassment.

Less favourable treatment for rejecting or submitting to unwanted conduct

s26(3) **8.16** The third type of harassment occurs when a student is treated less favourably by an education provider because the student has submitted to, or rejected, unwanted conduct of a sexual nature or unwanted conduct which is related to sex or gender reassignment and the unwanted conduct creates for them any of the circumstances defined in paragraph 8.7.

Under this type of harassment, the initial unwanted conduct may be committed by the education provider who treats the student less favourably, or by another person.

Example: After a female student rejects sexual advances and unwanted touching by a male lecturer, the lecturer marks down her coursework, a key element of assessment for progressing onto the final year of the course. The student had, until the incident, achieved high marks for all aspects of assessment and had expected to progress easily to her final year. This could amount to less favourable treatment as a result of her rejecting the sexual advances of her lecturer and is likely to be unlawful sexual harassment.

‘Purpose or effect’

8.17

For all three types of harassment, if the purpose of subjecting the student to unwanted conduct is to create any of the circumstances defined in paragraph 8.7, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of that conduct on the student.

s26(4)

s26(4)(a)

8.18

Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the effect of creating any of the circumstances defined in paragraph 8.7.

s26(4)(b)

8.19

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

a) the perception of the student;

that is, did they regard it as violating their dignity or of creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the student regards the treatment.

s26(4)(b)

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 student experiencing the conduct, for example, their health, including mental health, mental capacity, cultural norms or previous experience of harassment, and
- the relationship between the education provider and the student experiencing the conduct.

c) whether it is reasonable for the conduct to have that effect; this is an objective test.

Courts are unlikely to find that the unwanted conduct has the effect of, for example, creating a humiliating or offensive environment for a student if the court considers the student to be over sensitive and that another student subjected to the same conduct would not have been offended.

8.20

It may also be relevant in cases of alleged harassment whether the alleged perpetrator was exercising any of her/his Convention rights protected under the Human Rights Act 1998. For example, the right to freedom of thought, conscience and religion or freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case. This will be of particular relevance in relation to academic freedom, when controversial ideas are being explored and debated in an educational context.

s109(4)

Example: If a politics lecturer presented views held by members of far right groups in a seminar in order to explain a position that some people hold, then it is likely that this would not be harassment even if some of the students were offended or found the topic uncomfortable.

Statutory defence

Liability of employers and principals

8.21

Employers can avoid liability for harassment carried out by their employees if they take all reasonable steps to prevent harassment occurring.

Education providers as principals are also liable for such acts committed by their agents while acting under the education provider's authority. It does not matter whether the education provider knows about or approves of the acts of their employee or agents. See paragraphs 3.25–3.27 for further details.

Content of the Curriculum

8.22

Nothing in the Act applies to the content of the curriculum in higher or further education. This means that education bodies are free to expose students to a full range of materials, ideas and arguments whether or not they might be regarded as offensive by some people. A harassment claim cannot be brought based on anything which is included in the curriculum.

Chapter 9

Victimisation

Introduction

9.1

This chapter explains what the Act says about victimisation.

As explained in Chapter 1, the terms ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

What the Act says

9.2

The Act prohibits victimisation. It is victimisation for an education provider to subject a student to a detriment because the student has done a ‘protected act’ (see paragraphs 9.4 and 9.5) or because the education provider believes that the student has done or may do a protected act in the future.

s27(1)

Example: A mature student applies for a place on a sports science course at his community college, but is told that his age will make it difficult for him to reach the necessary fitness required. He makes a complaint to the college as he believes this is less favourable treatment because of age. A few weeks later he applies to attend a series of evening lectures at the college. He is told there are no spaces available. He finds out that a friend applied to attend the same lectures a few days after he did and got a place. This is likely to be unlawful victimisation if it was because of his previous age discrimination complaint.

9.3

An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to a ‘protected act’ (see paragraphs 9.4 and 9.5). Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation. Only individuals (not organisations) are protected from victimisation.

In the above example, if another applicant complains to the college regarding the unfair discrimination against the mature student and the college then refuses to admit the second applicant, this would also be victimisation and the age of that applicant would be irrelevant.

What is a 'protected act'?

9.4

s27(2)(a), A protected act is any of the following:

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

9.5

s27(2)(c) Protected acts can occur in any field covered by the Act and in relation to any
and (d) part of the Act. An education provider must therefore not victimise a person who has done a protected act in the field of employment, for example. This includes protected acts relating to marriage and civil partnership, even though these are not protected characteristics for the purposes of education.

Example: The mother of a young person with learning disabilities made a complaint to a local further education college that her daughter was only being given access to a course in basic skills, when she was interested in a course in catering and hospitality. Although she did not refer explicitly to the Act, she asserted that her daughter had been treated less favourably and referred to a protected characteristic (disability). That is sufficient for her complaint to be a protected act, and for her to make a claim for victimisation when she subsequently suffers a detriment because of her complaint. On applying for a place on a course at the college herself she is rejected with no explanation despite meeting the entry requirements and there being places available on the course. She believes that she has been victimised because of her complaint on behalf of her daughter. Her daughter may have a separate claim of disability discrimination.

Example: In the above case, if the mother's complaint had not referred to her daughter's disability (for example, if she had complained that the facilities were poor or that the catering arrangements were not adequate), that would not be a protected act, because the detriment complained of would not be because of a protected characteristic.

What is a 'detriment'?

9.6

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

9.7

In the context of further and higher education detriment might include:

- being excluded
- being given lower marks
- disciplinary action
- being denied opportunities, and
- failing to receive an appropriate response to a request for reasonable adjustments.

9.8

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

Example: A female engineering student is interviewed in relation to a complaint of racial harassment made by a fellow student against their tutor. She witnessed the incident and provides evidence to support the complaint. After providing the evidence, she finds out that her tutor has not put her forward for a prestigious design award, despite her project being recognised for excellence by the engineering faculty and having been told previously it would be submitted. If the reason for not being put forward was her involvement with the complaint, this would constitute victimisation.

9.9

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

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

9.10

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

9.11

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

Example: In his first year, a final year student with a hearing impairment was not provided with routine access to a palantypist for lectures. He made several complaints to the university and was eventually provided with palantypist support. The student applies for a postgraduate course at the university and at interview is questioned about the complaint and whether he expects he will need any other 'special help'. The student is unsuccessful in gaining a place on the course. This may be victimisation if he was able to show a link between him not gaining a place on the course and the questions about his complaint asked during the interview.

9.12

s27(3) An individual cannot claim victimisation where they have acted in bad faith such as maliciously giving false evidence or information or making a false allegation. Any such actions would not amount to a protected act.

Example: A black man applies for a place at a performing arts college to study dance. He attends an interview and audition as part of the selection process. He is told he has been unsuccessful in gaining a place as he doesn't have enough experience. The college suggest he might want to consider applying again next year. He writes a letter of complaint to the college principal stating he was discriminated against because of race. He makes allegations in the letter that staff interviewing him made racist comments toward him and he threatens to go public with his complaint. The complaint is investigated and the allegations are found to be completely false. He applies again the following year and is turned down as a result of the malicious and fabricated allegations he had made against college staff. This would not be unlawful victimisation.

9.13

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

Example: A man signs up for a drama workshop at his local further education college. He auditions for the part of leading man in a play but is told that he is too old, as it is written for a man in his twenties and he is middle-aged. He decides to pursue a legal action as he believes he has been the victim of age discrimination. He loses the case, as the college is able to justify the apparent age discrimination on the grounds that the part was designed for a younger man and choosing a younger actor to play it was a proportionate means of achieving a legitimate aim. He was not aware that direct age discrimination could be justified in this way, and accepts that he was wrong to bring the claim. A few months later, he is refused a place on another course at the college despite there being places available. He believes that he was victimised because of his previous complaint of age discrimination. Although he lost his case in the county court, he would be able to bring a claim of victimisation because the complaint was made in good faith.

Chapter 10

Further and higher education institutions

Introduction

10.1

This chapter explains in depth what is unlawful under the Act for further and higher education institutions under section 91 of the Act. Exceptions to these provisions are explained further in Chapter 14.

In this chapter the term ‘further or higher education institution’ is used to describe all those education providers covered by this chapter. The term ‘student’ is used to refer to all who are protected in the areas covered in this chapter including applicants, current and former students and disabled people not studying at the institution but seeking conferment of qualifications.

Education providers covered by this chapter

10.2

This chapter covers the obligations that the Act imposes on the following further and higher education institutions:

- s91, s94(4) **a. Universities in Scotland, England and Wales.**
This includes a university college and a college, school or hall of a university. All universities have obligations under this section of the Act irrespective of how they are funded.
- and s94(5) **b. Other Institutions in the higher education sector in England and Wales.**
These are defined in section 91 of the Further and Higher Education Act 1992 and include:
- i) universities receiving financial support from the higher education funding councils
 - ii) institutions run by higher education corporations, and

iii) institutions which have been designated as being eligible to receive funding from the higher education funding councils HEFCE in England and HEFCW in Wales.

c. Institutions in the further education sector in England and Wales.

s94(5)

These are defined in section 91 of the Further and Higher Education Act 1992 and include:

- i) Institutions run by further education corporations
- ii) Institutions which have been designated as being in the further education sector (under section 28 of the Further and Higher Education Act 1992)
- iii) Sixth form colleges.

d. Colleges of further education in Scotland.

s94(8)

A college of further education is defined in section 36 of the Further and Higher Education (Scotland) Act 1992 (1992 Act) as an educational establishment which provides further education.

e. Designated institutions in Scotland.

s94(9)

These are institutions providing higher education which have been designated under section 44 of the 1992 Act.

Who is the responsible body?

10.3

Those responsible for a further or higher institution's obligations under the Act vary depending on the type of institution. For any institution, the body that has responsibility is called the 'responsible body'.

s91(12)

The table below shows who is the responsible body for different types of further and higher education institutions:

Type of institution	Responsible body
University	The governing body
Higher education institution	The governing body
Further education institution	The governing body
Further education college under the management of a board of management	The board of management
Further education college without a board of management	Any board of governors of the college or any person responsible for the management of the college, whether or not formally constituted as a governing body or board of governors

What does discrimination mean in this chapter?

10.4

Any reference to 'discrimination' in this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise:

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

What is unlawful in relation to further or higher education institutions?

10.5

s91(1), (2), (6) and (7) The Act says that it is unlawful for a further or higher education institution to discriminate against or victimise a student:

- in the arrangements it makes for deciding who is offered admission as a student
- as to the terms on which it offers to admit the person as a student

- by not admitting the person as a student
- in the way it provides education for the student
- in the way it affords the student access to a benefit, facility or service
- by not providing education for the student
- by not affording the student access to a benefit, facility or service
- by excluding the student, and
- by subjecting the student to any other detriment.

10.6

The Act says that it is also unlawful for a further or higher education institution to discriminate (see Chapters 4 to 7) against or victimise (see Chapter 9) a disabled person who is not a student at the institution:

- in the arrangements it makes for deciding upon whom to confer a qualification
- as to the terms on which it is prepared to confer a qualification on the person
- by not conferring a qualification on the person, and
- by withdrawing a qualification from the person or varying the terms on which the person holds it.

s91(3)
and (8)

Harassment

10.7

The Act says that it is unlawful for a further or higher education institution to harass:

- a student
- a person who has applied for admission as a student, and
- a disabled person who holds or has applied for a qualification conferred by the institution.

s91(5)

Harassment is explained in Chapter 8.

Public Sector Equality Duty

10.8

Many further and higher education institutions will also have additional obligations under Part 11 of the Act. These responsibilities are set out in the Public Sector Equality Duty, which require a public authority to have due regard to the following matters when exercising its functions:

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

Some further and higher education institutions will also be required to meet specific Public Sector Equality Duties. These duties are different in England, Scotland and Wales. Guidance on the Public Sector Equality Duties is available on the Commission's website.

Other prohibited conduct

10.9

Chapter 3 sets out other prohibited conduct, such as aiding an act of discrimination, which applies to further or higher education institutions.

Admissions

Arrangements for deciding who is offered admission

10.10

The meaning of 'arrangements' – that is arrangements for determining who is offered admission – is wide. Such arrangements are not confined to those which a further or higher education institution makes in deciding who should be offered a place on a specific course, but also include arrangements for deciding who should be offered places more generally and how courses are designed. So participation in any pre-course activities such as taster sessions could be 'an arrangement' if its completion is a necessary step along the road to obtaining a place on the course. Arrangements include, for example:

- course design (but not curriculum content – see 10.27)
- application of course requirements
- marketing the course
- open days
- campus tours
- summer schools
- taster courses and days
- mentoring schemes with local schools
- recruitment fairs and activities
- application processes including application forms, interviews and tests, and

- informal admissions processes.

Marketing the course

10.11

All forms of advertisements, including emails, direct mail, notice boards and websites, as well as advertising to the general public in newspapers and on the radio, TV or internet are covered by the Act. An advertisement which suggests that a further or higher education institution might discriminate could amount to direct discrimination.

Example: On a website advertising college courses, the construction course is described as suitable only for ‘strong young’ applicants. This is likely to be unlawful direct age discrimination.

10.12

The Act allows further and higher education institutions to advertise that they welcome applications from all groups especially people who are under-represented in the institution. The positive action provisions of the Act allow institutions, in certain circumstances, to run courses for people with specific protected characteristics. As long as the requirements relating to positive action are met, these measures will not constitute unlawful discrimination. The positive action provisions of the Act are explained in detail in Chapter 13.

10.13

Further and higher education institutions can lawfully advertise courses as open to disabled people only or on more favourable terms as it is not unlawful to treat disabled people more favourably than non-disabled people because of or in connection with their disability.

Example: A further education introductory course in painting and decorating is advertised as being open to disabled applicants only. The college aims to encourage more people with a disability onto their courses in manual trades. This would not be unlawful discrimination.

Application process

10.14

Further and higher education institutions are responsible for ensuring that the application process for entry to any of their courses is non-

discriminatory. The application process may vary depending on the type of the institution and the type of course being applied for and may involve written applications, interviews, tests and other selection methods. Whatever methods are used the education institution must ensure that applicants are not discriminated against and reasonable adjustments are made for disabled applicants.

Example: A college has introduced a new online application procedure that is integrated into the management information system. In order to ensure that discrimination does not occur, the college has ensured that the online form can be used with assistive technology, that staff are available in-house to assist potential students and that a paper copy is also available for applicants with no access to a computer. This will assist disabled applicants.

Example: As part of the application process for a catering course, applicants are asked to prepare a meal with ingredients supplied by the college. The college provides only non-halal meat which means that a Muslim applicant is unable to carry out the test and therefore unable to obtain a place on the course. This would be indirect religion or belief discrimination unless it can be justified.

Professional and vocational courses

10.15

Some courses which lead to professional or trade qualifications are validated by professional qualifications bodies which impose particular entrance requirements. Further and higher education institutions have duties to ensure that any entry requirements that they apply on behalf of the qualification body are not discriminatory. Qualifications bodies also have duties under Part 5 of the Act which are summarised in Appendix 2.

Example: The Nursing and Midwifery Council requires applicants for nursing and midwifery courses to be of ‘good health and good character’. An applicant applies for a midwifery course at a university and declares on the application form that she has a history of epilepsy which is now well-managed. The university rejects her application on the grounds that she is not of ‘good health’ without investigating with her whether or not her condition is managed and what reasonable adjustments she might require. This is likely to be unlawful disability discrimination by the university unless it can be objectively justified.

Admission terms

10.16

Terms of admission should not discriminate against a person with a protected characteristic, unless permitted under the Act or another enactment (see Chapter 14). A further or higher education institution should not offer admission to a person with a protected characteristic on terms which are less favourable than those which are or would be offered to someone without the protected characteristic.

Example: A university medical school with a limited number of places and a high number of applicants, decides that people over the age of 30 will not be considered because of the high costs of medical training and the need to maximise the return from the investment in terms of length of time working as a doctor once qualified. This is likely to be direct age discrimination and would be unlawful unless it can be objectively justified. In addition, because it is likely to impact disproportionately on potential women students who may be seeking to train after having children, this term of admission is also likely to be indirect sex discrimination and would be unlawful unless it can be objectively justified.

Course requirements

10.17

Obviously the Act does not prohibit further and higher education institutions from having and applying course requirements. These must be lawful. Requirements for entry onto a course or admission to an institution can lead to discrimination. A requirement that leads to direct discrimination would always be unlawful, except in relation to age where it can be justified if it is a proportionate means of achieving a legitimate aim.

Example: The terms of admission for a full-time masters degree in business administration stipulates that students on the course must be at least 21 years old. This requirement was introduced to exclude younger students who acquired business administration qualifications through shorter courses rather than through the preferred three-year degree course. An applicant who has the necessary qualifications applies to the course, but is rejected because, as he took his undergraduate degree a year early, he will be 20 at the start of the course. Such a stipulation is unlikely to be a proportionate means of achieving a legitimate aim so this is likely to be unlawful direct age discrimination.

10.18

Requirements and criteria which are capable of being tested objectively and are applied to all applicants are less likely to lead to discrimination.

Example: A man over 60 applies for a place on an NVQ level 2 football coaching course. As part of the admissions process all applicants have to undergo a fitness test related to the requirements of the role of coach. The man is unable to meet the standard required and is refused a place on the course. This is unlikely to be unlawful age discrimination.

10.19

Requirements that are not a proportionate means of achieving a legitimate aim may lead to unlawful discrimination. Stating that a certain personal, medical or health-related characteristic is necessary or preferable can lead to discrimination if the characteristic is not necessary for the course (or reasonable adjustments could be made where a disabled applicant is otherwise unable to comply with the requirement).

Example: A university offering a postgraduate certificate in education course (PGCE) specifies that it requires a high level of fluency in spoken English for entrance onto its courses and mentions a particular test of language fluency that it will accept. An applicant from West Africa takes the test and does not pass. As teaching in the UK does require a good level of fluency in the English language, this is a proportionate means of achieving a legitimate aim, and is not indirect race discrimination.

Example: A university offering an undergraduate degree in biology applies the same requirement as the PGCE course. This is unlikely to be a proportionate means of achieving a legitimate aim as it is not necessary to have the same standard of spoken English to be able to take the biology course. It may however be proportionate to require a certain standard of English and that any applicants who do not have English as their first language undertake an appropriate test before being offered a place.

10.20

Applying blanket policies without taking into account individual circumstances (and without considering reasonable adjustments for disabled applicants) may result in discrimination.

Example: A college states that anyone with an infectious disease cannot take part in a practical cookery course. The college refuses to admit someone with HIV onto the course, believing him to be a health and safety risk. This action is likely to amount to unlawful direct disability discrimination.

10.21

The way in which a person's ability to meet the course requirements and criteria is assessed can also lead to unlawful discrimination.

Example: A college requires applicants for a course to demonstrate that they have a high level of maths ability. They assess this by considering the applicants' grade at their GCSE maths, only accepting those applicants with a grade B or above, and not accepting equivalent qualifications from other countries. This method of assessing a person's maths ability could mean that those with less traditional qualifications or with qualifications from outside the UK would be refused a place. This could lead to indirect race discrimination.

10.22

Where there are exceptions in the Act that apply in relation to a specific form of employment, and if the training is specifically related to that employment, then it is appropriate to apply these requirements as they would be applied to an applicant for the job. The Code of Practice on Employment explains these provisions in greater detail and is available on the Commission's website.

Disabled applicants

10.23

Further and higher education institutions have a duty to make reasonable adjustments for disabled applicants. This would include making reasonable adjustments to the course requirements unless they are a competence standard. Competence standards are explained in more detail in paragraphs 7.33–7.38.

Example: A college sets applicants for a higher level language course a short oral exercise. A person with a speech impairment is given additional time to complete the exercise. This is a reasonable adjustment for the university to make.

Example: A university requires applicants for a degree in music performance to demonstrate their ability to play a musical instrument to Grade 8 or equivalent standard. A disabled applicant asks the university to make a reasonable adjustment of not requiring him to undertake this part of the assessment. As this is a competence standard, the university would not be required to make any adjustment.

Not admitting the person as a student

10.24

It is unlawful for a further or higher education institution to reject an applicant because of a protected characteristic, other than age where discrimination can be justified if it is a proportionate means of achieving a legitimate aim. If a person is refused a place on a course because they cannot comply with a condition of admission this could amount to indirect discrimination and also, in the case of a disabled applicant, discrimination arising from disability, unless this is a proportionate means of achieving a legitimate aim. A further or higher education institution must also consider its duty to make reasonable adjustments for disabled applicants before rejecting a disabled applicant.

Example: A person applies for a course in health and fitness at a further education college and aspires to become a personal trainer. He is told he will be unable to meet the admissions requirement which specifies a 'good level of physical fitness' because he is a wheelchair user. The applicant disputes this stating he is involved in athletics and plays wheelchair basketball which requires a high level of physical fitness. The application of this rule would be unlawful disability discrimination unless it could be shown to be a proportionate means of achieving a legitimate aim.

Example: A female student is refused entry onto an advanced course in landscape design because she could not meet the entry requirement of experience within the last 12 months of working in the sector. The student has this experience but most recently has been out of employment due to having a child, therefore her experience in this field is not recent. This may be unlawful indirect discrimination because of sex.

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

10.25

The duties in relation to the provision of education and access to a benefit, facility or service cover all of the services, facilities and benefits, both educational and non-educational, that an institution provides or offers to provide to students. Such services will vary from one institution to another and may vary over time. They will include the following, for example:

- teaching, including classes, lectures, seminars, practical sessions, tutorials, field trips and outings
- all types of learning experience including short courses, distance learning, informal/optional study skills sessions, research degrees and independent learning opportunities such as e-learning or independent group work
- learning facilities such as seminar rooms, lecture theatres, laboratories, studios, darkrooms, research facilities
- learning equipment and materials such as laboratory equipment, computer facilities, handouts
- libraries, learning centres and information centres and their resources
- information and communication technology and resources
- arranging of study abroad or work placements and placement-finding services

- scholarships and bursaries
- examinations and assessment
- the conferment of qualifications
- graduation and certificate ceremonies
- leisure, recreation, entertainment and sports facilities, including changing facilities
- student services, including financial advice, welfare services, health services, chaplaincies and prayer areas, counselling services and childcare facilities
- careers advice, training, facilities and services including job references, job shops and employment-finding services
- residential accommodation and accommodation-finding services
- catering facilities and shops
- car parking
- the physical environment, and
- disciplinary procedures.

Example: A bus service operates between different sites of a university. Although this is not an educational service, it is a service which is provided by the university for its students and therefore it would be covered by the further and higher education provisions of the Act.

10.26

A further or higher education institution must not discriminate in the way it provides education or access to any benefit, facility or service, or by not providing education or access to any benefit, facility or service. It would be unlawful for a further or higher education institution to refuse to provide education or access to any benefit, facility or service to a student because of a protected characteristic, but it is also unlawful to arrange the provision of education or access to any benefit, facility or service in such a way that students with particular protected characteristics are unable to access them.

Example: A university arranges personal tutorials on Saturday mornings only. A student who is an Orthodox Jew complains that this would mean him breaking one of his religious principles, of doing no work on the Sabbath. Unless this could be shown to be a proportionate means of achieving a legitimate aim, it would be unlawful indirect religion or belief discrimination.

Example: Two transsexual students make a complaint that they are unable to use the university swimming pool because of a lack of private shower and changing facilities. There are no unisex cubicles for changing and showering, and the male and female changing rooms and showers are communal spaces with no locked cubicles. This practice disadvantages transsexual students more than other students and therefore may be unlawful indirect gender reassignment discrimination unless it could be shown to be justified as a proportionate means of achieving aims.

Content of the curriculum

10.27

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

Example: A college science department teaches evolution, which would not be discrimination because of religion or belief against a student whose religious beliefs include creationism.

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

Example: In the above example, while teaching *The Merchant of Venice*, a lecturer says that Jewish people are unethical moneylenders who only have themselves to blame for the resentment they experience. This could amount to unlawful racial or religious discrimination or harassment because the comments would be related to how the education is delivered, not the content of the curriculum.

Exclusions

10.28

The Act says that a further or higher education institution must not discriminate against a student by excluding them. This means that discipline or exclusion policies or procedures which discriminate will be unlawful.

10.29

When drawing up disciplinary procedures, further and higher education institutions should consider whether any proposed criteria would adversely impact a student because of their protected characteristic and whether the application of them would be a proportionate means of achieving a legitimate aim.

Example: A university which requires an 80 per cent attendance rate and penalises students with a lower attendance rate, disregards absences due to disability-related sickness, religious holidays, pregnancy or, in some circumstances, caring responsibilities.

Subjecting a student to any other detriment

10.30

The Act says that a further or higher education institution must not discriminate by subjecting a student to 'any other detriment'. Detriment is not defined by the Act but is a very broad term, taking many forms. It means some disadvantage, and can include denial of an opportunity or choice, or anything which a reasonable student would consider altered their position for the worse. The detriment need not be physical, economic or disciplinary for example, but the fact that the student has an unjustified sense of grievance alone would not be enough.

Example: A college receives an offer of a number of work placements from a local charity for students on a youth work course. The charity is affiliated with the local Catholic church and the college decides not to offer a placement to a gay student as they believe the charity may not 'be comfortable' working with the student due to his sexual orientation. This denial of opportunity to undertake a work experience placement could be a detriment under the Act and result in unlawful direct discrimination because of sexual orientation.

10.31

Even if a further or higher education institution thinks that it is acting in the best interests of a student that may still amount to a detriment.

Example: A college rejects a female student's application for a bricklaying course as they claim it would be too physically demanding for a woman. This is likely to be unlawful direct sex discrimination.

Disabled students and reasonable adjustments

10.32

The Act makes it unlawful for a further or higher education institution to fail to comply with a duty to make reasonable adjustments.

Sch13

10.33

This duty is anticipatory. This means that further and higher education institutions are required to consider and take action in relation to barriers that impede disabled people generally prior to an individual disabled person seeking to become a student.

10.34

A further or higher education institution will be acting unlawfully if it fails to comply with a duty to make reasonable adjustments in relation to:

- deciding who is offered admission as a student
- the provision of education
- access to a benefit, facility or service
- deciding on whom a qualification is conferred, and
- a qualification that the institution confers.

10.35

The reasonable adjustment requirements of disabled students are wide-ranging and include changes to provisions, criteria or practices, the provision of auxiliary aids and services and making adjustments to physical features.

Reasonable adjustments are explained in detail in Chapter 7.

Conferring qualifications on disabled people

10.36

In addition to the duties to applicants and students, the Act places obligations on further and higher education institutions in relation to

s91(3)

conferring qualifications on disabled people. These are disabled people who are not students at the institution.

Example: A disabled student is studying marketing at a business college but her qualification is awarded by a neighbouring university. The university has duties under the Act towards her in relation to the awarding of her qualification, even though she is not a student at the university. This would include the duty to make reasonable adjustments such as writing to her in an accessible format, if that is what she requires.

10.37

A qualification is not defined in the Act and so is likely to cover any qualification which the institution confers including any authorisation, qualification, approval or certification.

10.38

s94(11A) Conferring is defined in the Act as including renewing or extending the conferment of a qualification and authenticating a qualification conferred by another person.

10.39

People with protected characteristics other than disability are likely to be covered by other Parts of the Act in relation to the conferment of qualifications. If the qualification being conferred is a professional or trade qualification then they are likely to be covered by Part 5 of the Act. If not, they are likely to be covered by Part 3 as recipients of a service.

Good practice to avoid discrimination

10.40

As set out above, the Act prohibits certain forms of behaviour. In some situations, the Act also requires active steps to be taken. Complying with the reasonable adjustment duty requires further and higher education institutions to undertake measures to meet disabled students' needs in order to avoid substantial disadvantage. More generally, further and higher education institutions need to consider taking active steps to ensure that discrimination is not occurring in the education or services that they provide. In addition, the Public Sector Equality Duty requires further and higher education institutions to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.

- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

Guidance on the Public Sector Equality Duty is available on the Commission's website.

10.41

As explained in Chapter 3, a further or higher education institution will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.

10.42

Further and higher education institutions are more likely to be able to comply with their duties under the Act, including the Public Sector Equality Duty, and to prevent their employees from discriminating against students if they take the following steps:

- establish a policy to ensure equality in access to and enjoyment of education, services, facilities and by potential students from all groups in society
- communicate the policy to all staff, ensuring that they know that it is unlawful to discriminate when they are providing education or access to any benefit, facility or service
- train all staff, including those not directly involved in the provision of further or higher education, to understand the policy, the meaning of equality in this context and their legal obligations
- monitor the implementation and effectiveness of the policy
- address acts of discrimination by staff as part of disciplinary rules and procedures
- ensure that performance management systems address equality and non-discrimination
- maintain an easy to use, well-publicised complaints procedure
- review practices to ensure that they do not unjustifiably disadvantage particular groups, and
- consult students, staff and organisations representing groups who share protected characteristics about the quality and equality of the education, benefits, facilities and service and how they could be made more inclusive.

Positive action

10.43

In addition, further and higher education institutions may wish to consider adopting positive action measures, to seek to ensure that all sections of the community are able to benefit from the education, facilities, benefits and services they provide and to minimise any disadvantage experienced. The Act defines the circumstances in which a further or higher education institution may take positive action to overcome disadvantage, to meet different needs or to increase the participation of people in a particular equality group in an activity where they are under-represented.

Chapter 13 explains this more fully. Those further and higher education institutions which are subject to the Public Sector Equality Duty (see paragraphs 10.45 and 10.46 below) may be more likely to comply with the duty by using positive action measures.

Treating disabled people more favourably

10.44

It is important to note that it is never unlawful discrimination to treat a disabled student more favourably than a non-disabled student because of their disability or in connection with their disability. A non-disabled student cannot bring a claim of disability discrimination because he is being treated less favourably than a disabled person. This means that a further or higher education institution can, if it wishes, lawfully restrict courses, benefits, facilities or services to disabled people only, or offer to provide them to disabled people on more favourable terms.

Interaction with the public sector duty

10.45

Almost all further and higher education institutions are either public authorities or bodies which exercise a public function, and as such they are also subject to the Public Sector Equality Duty in Part 11 of the Act. This proactive duty is designed to enable institutions to identify and tackle subtle, and sometimes unknown, systemic inequalities arising from the way they act and to improve education outcomes for those with protected characteristics. The general equality duty requires a public authority – or a person carrying out a public function – to have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.

- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

10.46

Those public authorities and other organisations that are subject to the Public Sector Equality Duty may find it easier to meet the requirements of the duty if they act in the way set out in the good practice and positive action sections of this chapter. Complying with the Public Sector Equality Duty will also assist in meeting the further and higher education provisions in the Act.

Guidance on the Public Sector Equality Duty is available on the Commission's website.

Exceptions for further and higher education institutions

10.47

There are a number of specific exceptions which relate to further and higher education institutions. Chapter 14 explains these exceptions in more detail.

Chapter 11

Local authority duties

Introduction

11.1

This chapter explains in depth what is unlawful under the further and higher education provisions of the Act for local authorities (in England and Wales) and education authorities (in Scotland) under sections 92 and 93 of the Act.

In this chapter the terms ‘authority’ and ‘authorities’ are used to describe local authorities in England and Wales and education authorities in Scotland. The term ‘facilities’ is used to refer to recreational and training facilities.

11.2

Local authorities in England and Wales and education authorities in Scotland have various duties under the Act depending on the activity they are carrying out – they have duties under Part 5 as employers, duties under Part 3 as service providers and as bodies exercising public functions, duties under Part 6 as education providers and duties under Part 11 in relation to the Public Sector Equality Duty.

11.3

s92 and 93 Local authorities carry out many functions under the Education Acts which might appear to be ‘education’ but in the context of the Equality Act would be considered ‘public functions’ and are therefore covered by Part 3 of the Act. For example the provision of school transport and the maintaining of statements of special educational needs. However, in some circumstances the functions of a local authority in relation to education are covered by the further and higher education provisions in Part 6 of the Act. These vary between England, Scotland and Wales and are covered in this chapter.

Education covered by this chapter

England and Wales

11.4

In relation to the further and higher education provisions of the Act local authorities in England and in Wales have duties in the following circumstances:

- Securing a course of further education.
- Securing a course of higher education.
- Securing recreational and training facilities.

Scotland

11.5

In relation to the further and higher education provisions of the Act education authorities in Scotland have duties in the following circumstances:

- Securing a course of further education.
- Providing recreational or training facilities.

Relationship with other further and higher education duties

11.6

In practice most further and higher education will be provided by further and higher education institutions whose duties under the Equality Act are explained in Chapter 10. The duties placed on authorities by the Equality Act in relation to these activities are residual duties which seldom apply in practice.

What does discrimination mean in this chapter?

11.7

Any reference to 'discrimination' in this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise:

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

What is unlawful in relation to authorities?

11.8

The Act says that it is unlawful for an authority to discriminate against or victimise a person:

- in the arrangements it makes for deciding who is enrolled on a course or provided with the facilities
- as to the terms on which it offers to enrol a person on the course or to provide the facilities to the person
- by not accepting the person's application for enrolment or for the provision of the facilities, and
- in the services it provides or offers to provide in relation to the course or facilities.

Harassment

11.9

The Act says that it is unlawful for an authority to harass a person:

- who seeks enrolment on a course, or to have the facilities provided
- is enrolled on a course, or provided with the facilities, and
- is a user of services provided by the authority in relation to the course, or in relation to the facilities.

Harassment is explained in Chapter 8.

Who is protected?

11.10

Anyone who seeks enrolment onto a course of further or higher education secured by an authority or seeks to use the recreational and training facilities provided by it is covered, as well as anyone who is enrolled on the course or uses the facilities.

In relation to recreational and training facilities the protected characteristic of age does not apply to people who are under 18.

Securing a course of further or higher education

11.11

It is unlawful for a local authority securing further and higher education, or an education authority securing further education, to discriminate against, harass or victimise a person in relation to deciding who to enrol, or in the way

it provides any service relating to the course when the person has been enrolled. The authority also has a duty to make reasonable adjustments when offering such facilities and services to disabled people.

Course, in relation to further education, includes each component part of a course if there is no requirement imposed on persons registered for a component part of the course to register for another component part of the course.

Enrolment includes registration for a component part of a course.

Services means services of any description which are provided wholly or mainly for persons enrolled on a course.

Securing further education (England)

11.12

In England local authorities have a **duty** (under s15ZA of the Education Act 1996 as amended by the Apprenticeships, Skills, Children and Learning Act 2009) to ensure that there is sufficient and suitable education and training for people in their area who are either over compulsory school age and under 19, or aged between 19 and 24 with learning difficulties. This duty is a wide-ranging one and includes:

- Full-time and part-time training.
- Vocational, social, physical and recreational training.
- Apprenticeship training.

Local authorities also have a power (under s15B of the Education Act 1996 as amended) to 'secure the provision for their area of full-time or part-time education suitable to the requirements of persons who have attained the age of 19'. This includes the power to secure the provision of training, including vocational, social, physical and recreational training and organised leisure time occupation. This would include the provision of adult and community education.

Example: A local authority runs a 6 week computer course at a local library. A local resident with a hearing impairment applies to go on the course and informs them that she requires an induction loop. The local authority states that she will be unable to attend the course as the library does not have a loop installed. Unless it can be justified why a loop could not reasonably be provided, this would be a failure to make a reasonable adjustment and therefore likely to be unlawful.

Securing a course of further education (Wales)

11.13

In Wales it is the responsibility of the Welsh government to provide further education. However, local authorities have a power (under s15A of the Education Act 1996 as amended) to secure full-time or part-time education suitable to the requirements of persons who are over compulsory school age and under 19. This power includes the provision of:

- Full-time and part-time education.
- Training including vocational, social, physical and recreational.
- Organised leisure time occupation.

Example: The local authority runs a six week course for 16-18 year old school leavers to assist them in finding paid work. This includes components to develop communication and interpersonal skills. A field trip to the Brecon Beacons is scheduled for students to undertake outdoor activities including rock climbing and canoeing to demonstrate the importance of team working. A participant on the course with physical disabilities is denied the opportunity to attend the trip because his disability will prevent him from undertaking the planned activities. No alternatives or modifications to the activities are considered to allow him to take part. This is likely to be a failure to make reasonable adjustments.

Securing further education (Scotland)

11.14

Education authorities may at their discretion, provide further education if they wish under section 1(2A) of the Education (Scotland) Act 1980. This could include facilities for vocational and industrial training.

Example: An education authority (for example, a local council) sets up and runs a catering programme. All participants must be clean shaven. This policy may be unlawful indirect discrimination because of race because it excludes Sikh men, unless the requirement can be objectively justified.

Securing higher education (England and Wales)

11.15

Local authorities have a power (under s120 of the Education Reform Act 1988 as amended) to secure the provision of higher education.

Recreational and training facilities

11.16

It is unlawful for local authorities providing any recreational or training facilities to discriminate against, harass or victimise a person in deciding who should be provided with any facilities and the terms on which the facilities are provided. It also imposes on them the duty to make reasonable adjustments when offering such facilities and services to disabled people.

s93

What are recreational and training facilities?

England

11.17

Recreational and training facilities in England are those provided under sections 507A or 507B of the Education Act 1996:

- All local authority recreational, social and physical training facilities for children who have not attained the age of 13. These facilities include camps, holiday classes, playing fields, play centres, playgrounds, gymnasiums and swimming baths not attached to schools.
- Local authority educational and recreational leisure-time activities for the improvement of the wellbeing, personal and social development of children aged 13-19 and for young people aged 20-24 who have a learning difficulty.

Example: A local authority which puts on a summer camp for children from local schools refuses an application from a child simply because that child is disabled. This would be direct disability discrimination under the further and higher education provisions of the Act.

Example: A local authority offers a youth club for young people aged 11 to 17. This would not be unlawful age discrimination as age is not a protected characteristic for the purposes of the recreational and training facilities provision for people under 18.

Wales

11.18

Recreational and training facilities in Wales are those provided under section 508 of the Education Act 1996:

- All local authority facilities for recreation and social and physical training, for children in primary and secondary schools and as part of the facilities for further education services. Such facilities could include camps, holiday classes, playing fields, play centres, playgrounds, gymnasiums and swimming baths not attached to schools.

Example: Places on an outdoor activities programme involving questions and map reading are decided on the basis of a reading test. This is likely to be indirect discrimination on the grounds of disability for a young person with dyslexia, unless this requirement can be justified as a proportionate means of achieving a legitimate aim.

Scotland

11.19

The term 'recreational or training facilities' is not defined in the Act in relation to Scotland. Under s1(3) of the Education (Scotland) Act 1980 education authorities must secure for pupils at schools in their area the provision of adequate facilities for social, cultural and recreational activities and for physical education and training. Education authorities may secure such provision for persons in their area other than pupils at schools. Any activities carried out by education authorities under s1(3) of the Education (Scotland) Act 1980 would be covered by this section of the Equality Act, but the provisions of the Equality Act are not restricted to only such activities.

Example: An education authority establishes, maintains and manages a swimming pool for pupils in attendance at local schools and others in the community. The rules of membership state that only one-piece swimsuits or trunks may be worn by swimmers. This may be indirect discrimination because of religion or belief because it prevents female Muslims who wish to wear a 'burqini' from using the pool.

Avoiding discrimination

11.20

As set out above, the Act prohibits certain forms of behaviour. In some situations, the Act also requires active steps to be taken. Complying with the reasonable adjustments duty requires authorities to undertake measures to meet disabled users' needs to avoid substantial disadvantage. More generally, authorities need to consider taking active steps to, or, under the Public Sector Equality Duty, to have due regard to the need to, ensure that discrimination is not occurring in the education or facilities they provide or secure.

11.21

As explained in Chapter 3, an authority will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.

11.22

Authorities are more likely to be able to comply with their duties under the Act and prevent their employees from discriminating against students or users if they take the following steps:

- establish a policy to ensure equality in access to and enjoyment of education and recreational and training facilities by potential students or users from all groups in society
- communicate the policy to all staff, ensuring that they know that it is unlawful to discriminate when they are providing education or recreational or training facilities
- train all staff, including those not directly involved in the provision of further or higher education or recreational or training facilities, to understand the policy, the meaning of equality in this context and their legal obligations
- monitor the implementation and effectiveness of the policy
- address acts of discrimination by staff as part of disciplinary rules and procedures

- ensure that performance management systems address equality and non-discrimination
- maintain an easy to use, well-publicised complaints procedure
- review practices to ensure that they do not unjustifiably disadvantage particular groups, and
- consult students, users, staff and organisations representing groups who share protected characteristics about the quality and equality of the further and higher education and recreational and training facilities and how they could be made more inclusive.

In relation to the duty to make reasonable adjustments for disabled people the following actions will help authorities to meet their obligations under the Act:

- Review regularly whether education and facilities are accessible to disabled people.
- Carry out and act on the results of an access audit carried out by a suitably qualified person.
- Provide regular training to staff which is relevant to the adjustments to be made.
- Review regularly the effectiveness of reasonable adjustments and acting on the findings of those reviews.

Positive action

11.24

In addition, authorities may wish to consider adopting positive action measures, to seek to ensure that all sections of the community are able to benefit from the education and facilities they provide and to minimise any disadvantage experienced. The Act defines the circumstances in which an authority may take positive action to overcome disadvantage, to meet different needs or to increase the participation of people in a particular equality group in an activity where they are under-represented.

Chapter 13 explains this more fully. Those who are subject to the Public Sector Equality Duty (see below) may be more likely to comply with the duty by using positive action measures.

Treating disabled people more favourably

11.25

It is important to note that it is never unlawful discrimination to treat a disabled person more favourably than a non-disabled person because of their disability or in connection with their disability. A non-disabled person cannot bring a claim of disability discrimination based on more favourable treatment of a disabled person. This means that an authority can, if it wishes, lawfully restrict education and facilities to disabled people only or offer them on more favourable terms to disabled people.

Interaction with the public sector duty

11.26

As public authorities, local authorities and education authorities are also subject to the Public Sector Equality Duty in Part 11 of the Act. The general equality duty requires a public authority – or a person carrying out a public function – to have due regard to the need to:

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

Local authorities and education authorities may find it easier to meet the requirements of the duty if they act in the way set out in this chapter. Complying with the general equality duty will also assist in meeting the obligations under the further and higher education provisions.

Guidance on the Public Sector Equality Duty is available on the Commission's website.

Exceptions for authorities

11.27

There are a number of exceptions for authorities which relate to the further and higher education provisions of the Act. These are explained in detail in Chapter 14.

Chapter 12

Schools providing further education

Introduction

12.1

This chapter explains in depth what is unlawful under the further and higher education provisions of the Act for maintained schools in England and Wales providing courses of further education under section 92 of the Act.

In this chapter the term ‘student’ is used to refer to all who are protected in the areas covered in this chapter including applicants and former students.

12.2

Maintained schools in England and Wales providing further education to people other than pupils, as set out in section 80 of the School Standards and Framework Act 1998, have obligations under the Act as further education providers. This is in addition to their duties under the Act towards pupils.

12.3

It is the governing body of the school that is the responsible body. As explained in Chapter 3, the responsible body will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.

What education is covered by this chapter?

12.4

This chapter deals with the following types of further education which a maintained school provides to people other than pupils:

- part-time further education to people who are over compulsory school age, or
- full-time further education to people aged 19 and over.

The types of education covered would include, for example, literacy and language classes for parents.

What does discrimination mean in this chapter?

12.5

Any reference to ‘discrimination’ in this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise:

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

Reasonable adjustments

12.6

Maintained schools providing further education and education authorities securing such education are not required to make reasonable adjustments to physical features. The duty on schools to provide auxiliary aids came into force in September 2012. Their reasonable adjustments duty to students is thus in line with their duty to their pupils.

What is unlawful in relation to schools providing further education?

12.7

The Act says that it is unlawful for a school providing FE to discriminate against or victimise a student:

- in the arrangements it makes for deciding who is enrolled on a course
- as to the terms on which it offers to enrol a person on the course
- by not accepting the person’s application for enrolment onto the course, and
- in the services it provides or offers to provide in relation to the course.

Harassment

12.8

The Act says that it is unlawful for a school providing FE to harass a person:

- who seeks enrolment on a course
- is enrolled on a course, and
- is a user of services provided by the school in relation to the course.

Harassment is explained in Chapter 8.

Who is protected?

12.9

Anyone who seeks enrolment onto a course of further education provided by a maintained school or secured by an education authority as well as anyone who is enrolled on the course.

Chapter 13

Positive action

Introduction

13.1

This chapter explains the positive action provisions in the Act and the implications for education providers.

s158

As explained in Chapter 1, the term ‘education provider’ and ‘student’ (which includes prospective students) and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

What is positive action?

13.2

Students who share a protected characteristic may be socially or economically disadvantaged as a result of this protected characteristic, or may be affected by the consequences of past or present discrimination or disadvantage. Certain groups of students may experience institutional or systemic discrimination or be prevented from pursuing educational opportunities as a result of a protected characteristic – for example:

- Low participation of women in certain courses resulting in future economic disadvantage.
- Low academic achievement of Gypsy and Traveller young people limiting work opportunities.
- Low representation of disabled students on apprenticeships.

13.3

The Act contains provisions which enable education providers to take proportionate action to achieve fuller and more effective equality outcomes for members of groups that share a protected characteristic that are socially or economically disadvantaged or excluded, or who otherwise face the consequences of past or present discrimination or disadvantage, even though these actions involve discrimination against members of other groups which might otherwise be unlawful. These are known as the ‘positive action’ provisions.

What the Act says

13.4

The Act says that where an education provider reasonably thinks that people who share a protected characteristic:

- s158(1) a. experience a disadvantage connected to that characteristic, or
- s158(2) b. have needs that are different from the needs of those who do not share that characteristic, or
- c. have disproportionately low participation in an activity compared to those who do not share that protected characteristic then the education provider may take any action which is proportionate to meet the aims stated in the Act ('the stated aims').

13.5

The 'stated aims' are:

- enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage (referred to in this chapter as action to remedy disadvantage)
- meeting those needs (referred to in this chapter as action to meet needs), or
- enabling or encouraging persons who share the protected characteristic to participate in that activity (referred to in this chapter as action to encourage participation in activities).

Voluntary nature of positive action

13.6

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

The relationship of positive action with the Public Sector Equality Duty is discussed below at 13.24.

13.7

Positive action is not the same as positive discrimination, which is unlawful (except as already described for disabled people). It may be helpful to consider the Act's positive action provisions within the continuum of actions

to improve education, benefits, facilities and services for people who share a protected characteristic.

- First, action taken to eradicate discriminatory policies or practices will normally be lawful. So will action to benefit those from one particular protected group, which does not involve less favourable treatment of those from another protected group. For education providers this may include steps to improve awareness of and access to education, adjusting education benefits, facilities or services to meet the particular needs of a protected group, or training staff to recognise such needs. Such actions would not be classed as ‘positive action’ and do not rely on the positive action exception.
- Second, there are actions that fall within the framework of the Act’s positive action provisions. These actions are only lawful if they meet the statutory conditions for positive action measures and do not exceed the limitations set out in the Act.
- Third, there are actions – often referred to as ‘positive discrimination’ – which involve giving preferential treatment to members of a disadvantaged or under-represented group who share a protected characteristic. The aim may be to address inequality, but when these actions do not meet the statutory requirements for positive action they will be unlawful unless a statutory exception applies. (Exceptions are discussed in Chapter 14.)

13.8

When an education provider identifies a group’s particular needs in relation to education and decides to take action to address these, its actions are very likely to involve a combination of general good practice and some steps which would be unlawful but for the positive action provisions of the Act.

Example: In monitoring the students attending ESOL classes, an FE college finds that there is a disproportionately low take-up of these classes by the growing local Somali community, particularly women. The college decides to advertise classes in languages spoken by the Somali community, puts posters up in local shops and cafés frequented by the local Somali community and arranges for health care workers visiting homes to give course leaflets to Somali families. This is good practice which does not involve discrimination against anybody.

The college finds that taking the actions described above leads to an increase in the numbers of members of the Somali community attending ESOL classes. However, the numbers of Somali women attending the courses remain extremely low. In order to understand the reasons for the low take-up, the college arranges a consultation event to speak to Somali women. They discover that one of the major barriers to their participation in ESOL classes is that men attend the classes, which prevents many women from attending for cultural reasons. The college therefore makes the decision to run some women-only ESOL classes. This is a proportionate way of achieving the FE college's aim of enabling greater participation by Somali women and has the result of increasing the number both of Somali women and of women from the local Bangladeshi community in the classes. It would be a lawful positive action measure.

Example: Following the consultation described above, the college decides to restrict all ESOL classes to Somali women, therefore preventing all other people in the community from accessing ESOL classes. While these steps could increase participation by Somali women, they deny all such opportunities to others who would benefit from ESOL classes. This is unlikely to be a proportionate way of achieving the college's aim and is therefore unlikely to be lawful.

Example: A local college offers access courses for Roma students because of evidence that many Roma young people miss out on education at school level and would be unable to pursue further or higher education courses without additional learning opportunities. This would be a proportionate means of achieving the aim of enabling students who share a protected characteristic to overcome disadvantage connected with that characteristic and would therefore be lawful positive action.

Example: A college offers a course open only to people over 60 who would like to return to the workplace after a period of absence from employment following redundancy or retirement. The college has identified that older people face different employment barriers compared to others who also may have faced a period of unemployment, and have different needs to secure entry to work. These include a lack of IT skills and concerns about employer perceptions of older workers. In order to address these barriers the course includes modules on interview skills, personal development, and IT. This would be lawful positive action.

Example: A university is aware that relatively few men take up teaching in primary schools, and that the number of men that take its course in primary teaching is disproportionately low compared to women. The university decides to tackle this, and sets a target of increasing male participation on the course by 25%. As part of its action plan to achieve this target, it holds a ‘Men into Primary’ evening, staffed by men, both students and staff, to combat the apparent belief that primary teaching is more suited to women. The event is advertised in the local press. In addition, as a matter of good practice, interview panels for places are constituted with male and female lecturers equally represented, and panel members are trained to recognise and avoid the tendency to stereotype. The different parts of the initiative are likely to be proportionate means of achieving the university’s aim of attracting more men on to primary teaching courses and would therefore be lawful positive action.

What does ‘reasonably think’ mean?

13.9

In order to take positive action, an education provider must reasonably think that one of the relevant conditions applies – that is, disadvantage, different need or disproportionately low participation. This means that there will need to be some indication or evidence to demonstrate that one of those conditions applies. It does not, however, have to be sophisticated statistical data or research. It may simply involve looking at the profiles of students and/or making inquiries of other education providers in the area. Further and Higher Education institutions have a wealth of data (for example data they are required to collect, analyse and submit to funding bodies) that can be used as a basis for action, as well as relevant external research. A decision to take positive action could be based on qualitative evidence such as consultations or focus group work with students 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 education providers.

Example: A university carries out routine monitoring of its students by various protected characteristics but has not yet implemented monitoring procedures for gender reassignment. The university decides to set up some focus groups with students from the university's lesbian, gay, bisexual and transsexual student network to find out what issues these students may be facing on campus. Some trans students report problems in relation to their accommodation in halls of residence. This includes the lack of a private bathroom and toilet facilities and incidents of harassment from other students. As a result of this feedback, the university reasonably thinks that transgender students have needs that are different from the needs of other students and takes various actions which are a proportionate means of meeting these different needs. These include making it a priority to offer trans students an ensuite room. This is likely to be lawful positive action. In addition the university provides the diversity officer with special training on gender reassignment and informs trans students that they can go to the diversity officer for advice and to report any problems arising on campus. This would be good practice.

Action to remedy disadvantage

What is a disadvantage for these purposes?

13.10

s158(2) 'Disadvantage' is not defined in the Act. It may, for example, include lack of opportunity or choice, rejection, barriers to accessing provision or exclusion (see paragraphs 5.9–5.14). Disadvantage may be obvious from statistical sources, such as national data – but in other cases may be shown by qualitative evidence, by impact assessment, or from the results of monitoring that has been carried out.

What action might be taken to enable or encourage people to overcome or minimise the disadvantage?

13.11

s158(2) (a) The Act enables action to be taken to enable or encourage students who share a protected characteristic and who experience a disadvantage connected to

that characteristic, to overcome or minimise the disadvantage. The Act does not limit the action that could be taken, provided it satisfies the statutory conditions and is a proportionate means of achieving that aim (more detail on this is given below).

Example: A university carries out outreach activities with local inner city schools to encourage applications from ethnic minority students who are under-represented at the university. The outreach activities include talks by students from ethnic minority backgrounds at school assemblies, providing mentors from similar backgrounds, and offering taster days at the university for ethnic minority pupils and parents only.

Example: A college runs a male-only introductory course in childcare to encourage more men into the sector. Male-only courses have been found to break down some of the barriers in relation to men entering the childcare profession including the perceived social stigma and lack of support some men report on predominantly female courses.

Action to meet needs

What are 'different' or 'particular' needs?

13.12

A group of students who share a particular protected characteristic have 'different needs' if, because of that characteristic, they have needs that are different from the needs of others. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered 'different'. Needs may also be different if, when compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

For example, many women may need re-skilling courses to get back into work after having children but there is evidence that Muslim women may need different courses to deal with religious and cultural issues concerning mixed-sex classes.

Example: A further education college is aware that older people in the local community are facing particular issues with regard to re-training and getting back into the workforce following a period of unemployment. They have a largely young student population and recognise that the needs of mature learners are not being met. The college decides to run targeted recruitment activities and re-training courses to encourage more mature learners to study at their institution, with priority in allocating places given to older students. As a matter of good practice they ensure that images in their marketing materials reflect a diversity of ages.

What action might be taken to meet those needs?

13.13

- s158(2) (b) The Act does not limit the action that education providers can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving the aim of meeting genuinely different needs (more detail on what ‘proportionate’ means can be found in paragraphs 13.17–13.20).

Example: A university identifies disproportionately low numbers of Pakistani and Bangladeshi women studying at their institution and, for those who are, poor employment outcomes on finishing their degree. They are also aware of research which indicates a number of obstacles to access to higher education and graduate level employment. The university decides to introduce a programme of action including:

- ensuring local provision of courses that South Asian women wish to study
- providing some courses and discussion groups for South Asian female students only, to overcome reticence in participating and to enable them to share their common experience
- providing some financial and practical assistance to South Asian women students to enable them to continue on the course
- maintaining and building links with local communities and careers services for South Asian students and graduates
- working with local communities to increase awareness about the value of a wider range of degree courses
- developing role models and a critical mass of students to create a sense of belonging within their institution, and
- ensuring equal opportunities policies are put into practice to challenge discriminatory behaviour from staff and students.

All these actions are examples of good practice in support of the aim of increasing the numbers of Pakistani and Bangladeshi women studying at the university and their subsequent employment opportunities. Only the second and third actions, which involve benefits and facilities provided to South Asian women only, would need to rely on the positive action provisions of the Act to make the action lawful.

Action to encourage participation in activities

What activities does this apply to?

13.14

This provision applies to any education, benefit, facility or service made by the education provider where the participation of students who share a protected characteristic is disproportionately low. It covers not just access to the activity but also experiences of undertaking the activity and completion of it. It includes activities undertaken or organised or facilitated by an education provider and it might include study abroad or careers events for example. It

may also involve addressing low take-up of particular courses by a particular student group, such as low numbers of women on gas-fitting, engineering or vehicle maintenance courses or low numbers of men on childcare and primary school teaching courses.

Example: A college collects and analyses data on student attainment and completion rates and finds that ethnic minority pupils in local schools, particularly from Black Caribbean backgrounds, are less likely to apply for courses in the college and have disproportionately higher drop-out rates than white students. To try and find out the reasons for this, the college runs consultation events with Black Caribbean students and potential students and discovers that they face a range of barriers to undertaking or completing college courses including their own lack of confidence to apply, college tutors' low expectations of them and difficulties in gaining work placements needed to complete their qualification because of negative attitudes among employers. The college decides to implement a range of measures to address these barriers to the students' participation in the college's educational provision, including offering mentoring and advice to Black Caribbean pupils in local schools, encouraging applications from black and minority ethnic people when recruiting teaching staff and dedicating resources to work with employers to overcome prejudices to help these students secure work placements.

What does disproportionately low mean?

13.15

The Act says that action can only be taken where the education provider reasonably thinks that participation in an activity by students sharing a protected characteristic is 'disproportionately low'. This means that the education provider will need to have some reliable indication or evidence that participation is low compared with that of other groups or compared with the level of participation that could reasonably be expected given certain relevant factors such as the type of course and in some circumstances its locality. The education provider may base its opinion on empirical evidence including national or local statistical data or, where this is not available, from qualitative evidence or information derived from consultation, surveys or a review of the comparative take up by different groups.

Example: A sixth form college analyses its data on student participation on vocational courses and finds that there are disproportionately low numbers of students from Asian backgrounds on these courses compared with numbers of Asian students in the college overall and in the wider community. The college decides to take action, including working with feeder schools to promote vocational options to Asian students, and running careers events for Asian students and parents on the benefits of taking the vocational course route with involvement from local employers and universities.

What action could be taken?

13.16

The Act permits action to be taken to enable or encourage students who share a protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit the action that could be taken.

Example: An FE college organises two regular events – a ‘young women into engineering’ awareness day and an interactive construction day for people from an ethnic minority background. The engineering day starts with the college picking up the girls from school to visit a local employer where they are encouraged to try out equipment. This is followed by a tour of the college to meet apprentices undertaking their training at the college and a presentation by successful women in engineering on their own careers and the opportunities and prospects available. The construction day follows a similar format but instead of visiting an employer, the pupils are given hands-on taster sessions at the college run by local craftspeople and tutors. Confining these activities to girls and to ethnic minority pupils is not unlawful discrimination against boys or majority ethnic pupils.

Example: A university's faculty of modern foreign languages is committed to promoting links with schools to address the low numbers of male students on foreign language courses. Each year, the faculty supports the local Education Business Partnership in the organisation of two half-day 'Languages for Lads' taster events involving only male pupils from local schools. The pupils enjoy an interactive quiz on language learning and interview experienced business people who actively use one or more languages on a daily basis in their work. This gives the pupils a flavour of exciting job opportunities requiring language competence. They sample languages such as Portuguese, Italian, Russian, Mandarin and Japanese and are given a tour of the campus by male student role models. Provided the low level of male participation has been demonstrated this will not be unlawful discrimination against female pupils.

What does 'proportionate' mean?

13.17

To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' described in 13.5.

13.18

'Proportionate' refers to the weight to be given to competing relevant factors. These factors will vary depending on the basis for positive action – whether it is to overcome the disadvantage, meet different needs or address the under-representation of a particular student group. Other relevant factors will include the objective of the action taken, or to be taken, including the cost of the action.

13.19

The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

13.20

Education providers need to consider:

- Is the action an appropriate way to achieve the stated aim?
- If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as

effectively by other actions that are less likely to result in less favourable treatment of others?

Paragraphs 5.30–5.34 provide a more detailed explanation of proportionality.

Example: A university is aware of low numbers of female students on physics courses. The university is considering two options to meet its aim of increasing women’s participation on physics courses. The university runs an award for final year physics students with a cash prize and overseas trip and a placement with a prestigious employer. One option is to make this award open to female students only. A second option is to set up a scholarship for female first year students, run a summer school for female school pupils and recruit more female mentors.

The first option is unlikely to be a proportionate means of achieving greater participation by female students; it would discriminate against male students and would not meet the appropriate and necessary test since on its own it is unlikely to bring in more female students but would merely benefit female students already studying physics at the university.

The second option is more likely to be a proportionate way to meet their aim. Like the first it would involve less favourable treatment of men both in terms of access to the scholarship and summer school; however, this action could meet the appropriate and necessary test since it is likely to be effective in attracting women to study physics at the university and the less favourable treatment of men who are over-represented would be balanced by the fact that other forms of support are available to both male and female students.

Time-limited positive action

13.21

If positive action continues indefinitely, without any review, it may become no longer proportionate, especially if the action taken does effectively remedy the situation which had existed as a pre-condition for the positive action. This would make it unlawful to continue to implement the action.

Therefore, when undertaking measures under the positive action provisions, it would be advisable for education providers to indicate that they intend to take the action only so long as the relevant conditions apply, rather than

indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.

Example: A local college recognises that members of the local Sikh community are under-represented among its students, and identifies a number of reasons for this including low awareness of the opportunities offered by the college and some feeling in the community that the college does not really welcome people of their culture and religion. The college engages in a programme of good practice and positive action measures to attract and accommodate the needs of Sikh students. A review after some years demonstrates that there is now high awareness and a positive attitude to the college in the local community and that Sikh students are participating in the same proportions as their representation in the community. While good practice measures remain appropriate, positive action favouring members of this group may no longer be appropriate or justified.

Positive action and disability

13.22

s13(3) It is not unlawful direct disability discrimination to treat a disabled person more favourably than a non-disabled person. This means that an education provider can, if they wish, restrict courses, benefits, facilities and services to disabled students, or offer them on more favourable terms, and this will be lawful (see paragraph 4.33).

13.23

However, the positive action provisions may still be appropriate to achieve equality of opportunity between disabled people with different impairments. This means that an education provider can implement positive action measures to overcome disadvantage, meet different needs or increase participation of people with a particular impairment but not those with other impairments.

Example: A college has carried out a student satisfaction survey of additional social activities offered in addition to courses and finds that Deaf students are less likely to participate in these activities and can feel excluded when they do take part. As part of the reasonable adjustments duty, the college improves accessibility for the existing activities such as providing a BSL interpreter and ensuring that venues used for the activities have hearing loops installed. The college also offers Deaf students the opportunity to attend a camp set up specifically to give Deaf students the opportunity to meet and socialise with other Deaf students. The trip is only open to Deaf students and not for students with other disabilities. This would be lawful under the positive action provisions.

Positive action and the Public Sector Equality Duty

13.24

Education providers which are public authorities subject to the Public Sector Equality Duty may want to consider using positive action to help them comply with the Duty.

s149(1)
and (3)

Example: When setting its objectives under the Public Sector Equality Duty, a university collects and analyses data and identifies that:

- a larger proportion of male entrants to Honours degrees withdrew or transferred elsewhere before reaching the end of their studies, compared with female entrants, and
- of the remainder who went on to complete degrees, a lower proportion of men obtained first or upper second class.

The university identifies a need to establish to what extent these differences are related to gender or whether they could arise from factors such as age and qualifications at entry, school background, or ethnicity. It considers the possibility of further qualitative research on male student aspirations and approach to university life. The university then carries out a range of positive action activities, including targeted learning, study skills support and mentoring to raise the attainment of male students.

Example: After an initial screening, a sixth form college's bullying and harassment policy shows a high relevance for lesbian, gay, bisexual and transsexual students and it is prioritised for an equality impact assessment. The policy as it stands does not address the issue of homophobic bullying. Focus groups with lesbian, gay, bisexual and transsexual students, run as part of the consultation process for the EIA, uncovers that homophobic bullying is a significant problem for these students which may be contributing to drop-out and lower grades. The college takes action, including changing the bullying policy and communicating the change, training staff so they are better able to identify and address any incidents of homophobic bullying, and running activities for Lesbian Gay Bisexual Trans History Month. It also sets up a mentoring and support programme for lesbian, gay, bisexual and transsexual students. These steps contribute to the aims of advancing equality, eliminating discrimination and harassment and promoting good relations under the Public Sector Equality Duty and some of them also act as a positive action measure for these students.

Implementing positive action

13.25

In order to identify possible causes of disadvantage, different needs and under-representation and to develop appropriate positive action measures, education providers may benefit from the involvement of members of relevant student groups. In a similar way, involving student groups targeted for positive action in the monitoring and evaluation of measures can support the university in achieving its aims in using the positive action provisions of the Act.

Example: A number of homophobic incidents at a university have been widely reported. The university recognises that it needs to take steps to improve its ethos and culture so that all students feel welcome on campus. Evidence provided by the student's union shows that this is currently not the case and that lesbian, gay, bisexual and transsexual (LGBT) students are not applying to the university. The institution decides to introduce a package of measures targeted directly at LGBT people. The university arranges to speak to members of the LGBT student network to gain their views on making the institution the 'university of choice' for LGBT students. The network makes several suggestions for improving the university's image and ways of attracting more LGBT students. These include changes to their marketing materials to include more diverse images and a positive message from the vice-chancellor, sponsoring LGBT events, appointing a LGBT officer, having a LGBT Champion on the university board, and running a joint campaign with the network to mark LGBT History Month.

13.26

To ensure a sound basis for positive action measures and avoid unlawful discrimination education providers might consider drawing up an action plan which sets out:

- evidence of the disadvantage, particular needs and/or disproportionately low levels of participation, as appropriate, and an analysis of the causes
- specific outcomes which the education provider is aiming to achieve
- identification of possible steps
- assessment of the proportionality of possible steps
- the steps the education provider decides to take to achieve those aims, and
- measurable indicators of progress towards those aims, set against a timetable.

Education providers are advised to keep some form of written record containing this information.

13.27

To ensure that there is understanding and support for their positive action and to allay any potential resistance or resentment, it is good practice for education providers to explain to staff and students why positive action is being taken and that it is lawful. It would support effective implementation and the achievement of the positive action objective if this explanation includes the basis on which they are proposing particular time-limited steps.

Example: A college analyses its destination data for students on construction courses and discovers that female students find it harder to gain a job after completing the course. They speak to recently graduated students and find that two of the major barriers are a lack of contacts and stereotypical attitudes of some employers. The college decides to set up a specialist support programme for female construction students to help them overcome these barriers. The programme includes job search techniques, individual tutor support, careers guidance, and sessions with local Construction Skills advisers and employers. Prior to the introduction of the programme, the college runs information sessions on the support programme to explain the reasons behind setting it up. They also arrange for women working in the construction field to talk about their experiences in the industry. The male students get an insight into why the college is running these specialist programmes which helps to guard against any resentment. The male students are also involved in the programme as they are asked to volunteer to take part in mock interviews and assist with finding work placements if they have contacts in the industry.

Chapter 14

Exceptions

Introduction

14.1

The Act contains a number of exceptions which permit discrimination in the provision of further and higher education which the Act otherwise prohibits.

The basic presumption under the Act is that discrimination is unlawful unless any exception applies and any exception to the prohibition of discrimination should generally be interpreted restrictively.

This chapter gives an overview of the exceptions to the further and higher education provisions of the Act. It explains exceptions that apply generally to all education providers with duties under the further and higher education provisions, as well as exceptions that may apply only to certain types of education provider and to certain activities.

In this chapter, the term ‘education provider’ and ‘student’ and terms which flow from these are used generically to refer to all those who have duties or who are protected in the areas covered by this Technical Guidance.

14.2

Where an exception permits discrimination because of one protected characteristic, education providers must ensure that they do not discriminate because of any of the other protected characteristics.

14.3

The exceptions discussed in this chapter should be distinguished from positive action which is discussed in Chapter 13. Unlike the exceptions described below, positive action measures should be time-limited and discontinued once their aim is achieved.

References to ‘discrimination’

14.4

s17 Many of the exceptions in the Act refer to ‘discrimination’ as it applies to one or more protected characteristics, for example, ‘religion or belief discrimination.’ Apart from pregnancy and maternity discrimination, which is defined separately, the Act defines discrimination for all of the protected characteristics as including:

- direct discrimination, and
- indirect discrimination.

s25 In addition ‘disability discrimination’ also includes:

- discrimination arising from disability, and
- failure to make a reasonable adjustment.

These forms of discrimination are discussed above in Chapters 4, 5, 6, and 7.

General exceptions

Statutory authority

14.5

s191 and Sch22.1 It is not a breach of the Act as it applies to further and higher education to do anything that is required under another statute. However, it is only in cases where a statutory requirement is specific, leaving an education provider with no choice other than to act in a particular way, that the provisions of the Act may be overridden. This exception is thus of narrow application, and it is likely to permit discrimination only in rare circumstances.

This provision applies to the following protected characteristics (and mirrors the provisions in previous equality legislation):

- Age
- Disability
- Religion or belief
- Sex
- Sexual orientation.

What is a statutory requirement?

14.6

Anything that is required under:

- an Act of Parliament
- an Act of the Scottish Parliament
- an Act or Measure of the National Assembly for Wales
- subordinate legislation of such Acts and Measures (such as regulations)
- a Measure of the General Synod of the Church of England.

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
- the National Assembly for Wales
- the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh government.

Example: A university must lawfully refuse to sell alcohol to someone under the age of 18.

Example: A wheelchair user wants to access a university building but cannot get into the building as there is a steep flight of steps at the entrance with no ramp or lift. He asks the university why these have not been installed. The university replies that because the building is a listed building it is not required to make any changes to it. As this exception only applies when an education provider has no option but to act in a certain way, and in this case the university could seek consent to make the building more accessible, it would not be able to rely on this exception to make its actions lawful.

(See Appendix 4 for more information on legal considerations in making changes to premises.)

Sch22.1(2), s56(6) **14.7** This exception does not apply to vocational training. In the case of HE and FE institutions, vocational training means any form of education which prepares people for a qualification for a particular profession, trade or employment or equips them with the training and skills required for such a profession, trade or employment. This would include in HE, for example, courses providing medical training for doctors and teacher-training courses and in FE, vocational courses such as those providing specific training for plumbing, construction or, hairdressing work.

Protection of women

Sch22.2 **14.8** The Act allows an education provider to treat women differently if it is required to do so to comply with laws protecting women who are pregnant or who have recently given birth or against risks specific to women.

This exception only covers vocational training.

Example: A pregnant woman undertaking a course to become a radiologist is prevented from undertaking procedures where there is a risk of accidental high doses of radiation which is known to cause birth defects. This would not be unlawful sex or pregnancy and maternity discrimination.

Nationality discrimination authorised by statute or the executive

Sch23.1 **14.9** The Act provides that:

- direct or indirect nationality discrimination, or
- indirect discrimination, where the provision, criterion or practice refers to residency requirements (such as a place of residence or length of time a person has been present or resident in or outside the UK or an area within it),

is lawful in relation to the further and higher education provisions if it is done to comply with another law, Ministerial arrangements or Ministerial conditions.

For example, the Education (Fees and Awards) Regulations 2007 – made under the Fees and Awards Act 1983 – permit Higher Education Institutions to charge higher fees to students who do not have a specified connection with the United Kingdom than to those who do have such a connection.

Content of the curriculum

14.10

Obligations on education providers do not apply to anything done in connection with the curriculum. This is explained in more detail in paragraph 10.27.

s94(2)

Communal accommodation

14.11

An education provider does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting students to communal accommodation, or providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied.

Sch23.3

14.12

‘Communal accommodation’ is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex. It can also include residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

Example: Where a hall of residence has only one communal bathroom, it would be lawful for an education provider to restrict the hall to only male or only female students.

14.13

A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation.

14.14

Restricting communal accommodation for one sex is permitted only if accommodation is managed as fairly as possible for both women and men.

Example: It would not be lawful for an education provider with both male and female students to designate all its accommodation as female accommodation only. It would be lawful for it to designate some accommodation as male only and some as female only.

14.15

In excluding a student from communal accommodation because of sex or gender reassignment, the education provider must take account of:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
- the relative frequency of demand or need for the accommodation by persons of each sex.

14.16

The Act permits an education provider to exclude a student who is proposing to undergo, is undergoing or who has undergone gender reassignment from communal accommodation. However, an education provider could only exclude such a student from communal accommodation where the exclusion is a proportionate means of achieving a legitimate aim. This is likely to be the case only in exceptional circumstances.

National security

14.17

s192 An education provider does not breach the Act by doing anything it is proportionate to do for the purpose of safeguarding national security. This exception would only apply to education providers 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.

Charities

14.18

s193 and 194 An education provider which is a charity will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charitable instrument that establishes or governs the charity and is either:

- 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 Royal National Institute for the Blind (RNIB) to run a college, as an education provider, for visually impaired students and not for other disabled students.

14.19

This exception does not apply if the group of people who are to receive benefits under the charitable instrument is defined by colour. If the charitable instrument enables benefits to be provided to a group of persons defined by colour then it has effect as if it enabled benefits to be provided:

- to other groups of persons if the group defined by colour is ignored, or
- to all persons generally, if the group of people to receive benefits is defined only by colour.

If an education provider has a charitable instrument enabling the provision of benefits to black students it would thus actually enable the benefits to be provided to all students. If the instrument seeks to confine benefits to disabled white female students, then it will be regarded as providing them to disabled female students generally. However if the instrument provides benefits to a group defined by nationality or ethnicity (for example, Polish or African-Caribbean students) then that will be legitimate provided it meets the tests set out in paragraph 14.18 above.

14.20

A charity's 'charitable instrument' is its governing document or, in Scotland, its constitution or founding document. It sets out the charity's purposes, how its income can be spent and generally how the charity will operate.

Depending on the legal structure of the charity this may be in the form of a constitution or rules, a trust deed or a memorandum and articles of association. It could be a charter or Act of Parliament or other document or combination of two or more documents.

14.21

Whether restricting the benefits of a charity to people who share a particular protected characteristic meets either of the Act's two tests in paragraph 14.18 is ultimately a matter for the courts to decide.

s194(2)

14.22

The exception in the Equality Act applies only to benefits which it is the purpose of the charity to provide. It is that charitable purpose which has to be for the public benefit and which provides part of the justification for limiting the beneficiaries. The ‘public benefit test’, that all charities must pass to gain charitable status, may therefore assist, but will not guarantee, that any such restriction meets either of the tests specified in the Act. The Charity Commission for England and Wales and the Scottish Charity Regulator will consider the likely impact of any restriction on beneficiaries in the charitable instrument and whether such restriction can be justified, in assessing whether the aims of a charity meet the ‘public benefit’ test.

Meeting the test for restricting benefits

Proportionate means of achieving a legitimate aim

14.23

As is discussed in Chapter 5, a legitimate aim is one which is legal, non-discriminatory in itself and represents a real, objective consideration. To assess whether an action is a proportionate means of achieving a particular aim involves balancing the advantages for the education provider in terms of achieving their desired aim against the disadvantage caused by the action to students with the relevant protected characteristics. In the case of an education provider with charitable status, the restriction would need to promote, or, in any event not inhibit, the achievement of one of its stated aims. To be proportionate, the impact of the restriction in furthering the aim in question should be balanced against any adverse impact on the charity’s ability to fulfil its other aims and to meet the ‘public benefit’ test.

In cases of dispute, ultimately whether an action is a proportionate means of achieving a legitimate aim will be determined by the courts.

Preventing or compensating for disadvantage linked to the protected characteristic

14.24

To show that restricting the provision of benefits to people who share a protected characteristic is for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic, the charity will need to demonstrate a reasonable connection between the past or current disadvantage experienced by this group and the benefits provided by the charity.

As discussed in paragraphs 5.9–5.14, disadvantage can include exclusion, rejection, lack of opportunity, lack of choice, or barriers to accessing services, education or employment. The disadvantage may be obvious and well-known, or may be known to the charity through its funded research or evidence from other sources. The benefits the charity provides should be capable of making a difference in terms of overcoming the disadvantage linked to the protected characteristic.

Example: A community college is set up under a charitable instrument which has the purpose of assisting African-Caribbean boys who traditionally have suffered disadvantage in terms of poor educational attainment. Depending on the provisions of its charitable instrument, the charity should be able to provide benefits to enable the group to overcome this disadvantage. This might include financial resources for educational projects, supplementary educational facilities, training for teaching staff on the particular learning needs of this group, mentoring schemes, extra learning experiences outside of school hours or development work with parents and community leaders.

14.25

There is no requirement that a charity must provide benefits to the most disadvantaged group or assess the relative disadvantage of different groups. The Act only requires that, if a charity provides benefits to a group of people with the same protected characteristic to the exclusion of others, it must be able to show that the purpose of restricting benefits in this way is to prevent or compensate for disadvantage experienced by members of the selected group or groups.

14.26

Charities whose aims include provision of benefits only to persons who share a particular protected characteristic should keep their aims under review to ensure that such restrictions remain lawful under the Act.

Example: If a charity has been established to provide benefits to single mothers, the trustees would need to consider whether this restriction would come within either of the two tests under the Act, and if not they may need to apply to the charity regulator to amend their aims, for example to replace ‘mothers’ with ‘parents’.

- s193(5) and (6) **14.27** If a charity has, continuously from a date before 18 May 2005, required members or prospective members to make a statement that asserts or implies membership or acceptance of a religion or belief, the Act allows it to continue to do so. If a charity restricts access by members to a benefit, facility or service to those who make such a statement this is treated as imposing such a requirement.

Example: A university offers bursaries to students from the Middle East, which are provided by a charitable trust. It is a criterion of acceptance of the bursary that students assert that they are followers of Islam. This bursary was set up in 2004, so the Act allows the bursary to continue to operate in the same way.

Activity to support a charity

- s193(7) **14.28** 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 women-only sponsored swim to raise money for a charity.

Training provided to non-European Economic Area (EEA) residents

- Sch 23, para 4 **14.29** The Act allows access to facilities for education or training or ancillary benefits to be provided only to people who are non-residents of an EEA state. An education provider can only rely on this exception if they believe that the person does not intend to use the skills gained in Great Britain. The purpose of this provision is to enable people from developing countries to acquire vital skills which may not be available in their country of residence. This exception mirrors the provision in previous equality legislation.

Exceptions which apply only to further and higher education institutions

Admission to single-sex institutions

- s91 Sch 12.1(1) **14.30** The Act permits single-sex institutions to admit students of only one sex without this being unlawful sex discrimination.

14.31

A single-sex institution is an institution which:

- admits students of one sex only, or
- admits students of the opposite sex but their admission to the institution is exceptional or their numbers are comparatively small and their admission is confined to particular courses or classes.

Sch12.1

Example: A groundskeeper at a women-only college lives with his family in a cottage on the college premises. The groundskeeper's son is permitted to attend the college. It is still regarded as a single sex institution.

14.32

Where an institution admits students of the opposite sex as described it is permitted to confine those students to particular courses or classes, but not to discriminate against them in other respects.

Sch12.1

Example: A male-only sixth form college has places available on A level courses in Economics and Russian and agrees to admit a small number of female students from the local area to these courses as their schools do not offer these options. It is not discriminating unlawfully by refusing to admit female students on to other courses.

14.33

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 college would be acting unlawfully if it did not allow the female students access to the college canteen or library.

Single-sex institutions turning co-educational**14.34**

If a single-sex institution decides to alter its admissions arrangements so that it will cease to be a single-sex institution, it may apply to the Equality and Human Rights Commission for a transitional exemption order.

Sch12.3

14.35

A transitional exemption order authorises an institution, for the period specified in the order, to discriminate in relation to sex in the arrangements it makes for deciding who is offered admission as a student and to refuse to admit a person as a student because of their sex.

14.36

An institution is not acting unlawfully in relation to sex discrimination if in accordance with a transitional exemption order, or pending the determination of an application for a transitional exemption order, it does not admit a person as a student because of the person's sex.

Occupational requirements**14.37**

Sch12.2(4) A further or higher education institution can restrict access to courses which prepare people for a particular job or profession, where that job or profession is lawfully restricted to people of a particular race, disability, sex, religion, sexual orientation or age or who are not transgendered. This only covers those occupational requirements covered in Schedule 9 to the Act which relates to the work provisions of the Act.

Example: A Catholic theological college can refuse to admit a woman to a training course which was designed only to prepare candidates for the Catholic priesthood. However, a Church of England college could not confine training for the priesthood to men since women may also become Anglican priests.

Institutions with a religious ethos**14.38**

Sch12.2(5) An institution with a religious ethos is one which has been designated as such by a Minister of the Crown. This exception only covers a small number of institutions in England and Wales which are all Catholic sixth form colleges.
SI 2010/1915 The list of designated institutions is set out in regulations.

14.39

The Act permits institutions which are designated as having a religious ethos to have admissions arrangements that give preference to people of their own religion or belief, where they do so to preserve the institution's religious ethos.

Example: A Catholic sixth form college may give priority to Catholic students when choosing between applicants for admission. However, it must still not discriminate against students, such as refusing to admit a student because she is a lesbian.

14.40

This exception does not cover courses of vocational training and so it would not be lawful for such an institution to give preference on faith grounds for admission to any course of vocational training. Vocational training means any form of education which prepares people for a qualification for a particular profession, trade or employment or equips them with the training and skills required for such a profession, trade or employment. (See 14.7 above.)

Benefits dependent on marital status

14.41

The Act does not prevent a further or higher education institution from restricting access to certain benefits, facilities or services to married persons and civil partners and not providing them to other persons. This would not constitute unlawful sexual orientation discrimination against people who for reasons connected to their sexual orientation are less likely to be in a legally recognised relationship.

Sch12.6

Example: A university provides larger rooms in halls of residence for students who are married or in a civil partnership and wish to live in halls with their partner. The provision of these larger rooms only to students who are married or in a civil partnership would not be unlawful sexual orientation discrimination.

Childcare

14.42

The Act's provision in relation to age discrimination does not prevent a further or higher education institution from providing, making arrangements for, or facilitating the provision of, childcare which is restricted to children of a certain age.

Sch12.7

Example: A further education college provides crèche facilities for students' children aged up to the age of four. This would not be discrimination against the parents of children of different ages.

Competitive sport

14.43

s195 The Act includes two types of exceptions that may apply in relation to a competitive sport, game or other competitive activity.

Competitive sport – sex and gender reassignment

14.44

s195(1)-(4) For sporting competitions where physical strength, stamina or physique are significant factors in determining success or failure, the Act permits separate events to be organised for men and women.

14.45

If the physical strength, stamina or physique of the average person of one sex would put them at a disadvantage compared to the average person of the other sex as competitors in a sport, game or other competitive activity, it is not unlawful for those arranging the event to restrict participation to persons of one sex.

14.46

s195(4) In considering whether separate events should be organised, the age and stage of development of the people competing in the activity should be taken into account.

Competitive sport – nationality, birthplace etc

14.47

s195(5) and (6) In selecting one or more persons to represent a country, place or area or a related association in a sport, game or other competitive activity, or in complying with eligibility rules for participation in that activity, it is lawful to do anything which is because of a person's nationality or place of birth or how long that person has lived in a particular area or place.

Chapter 15

Enforcement

Introduction

15.1

This chapter gives an overview of enforcement by the civil courts in England, Wales and Scotland in relation to the further and higher education provisions in Part 6 of the Act.

S113-119
and
S136-141

This chapter is not intended to be a procedural guide to presenting a claim to the civil courts. In this chapter ‘civil courts’ means the county courts of England and Wales and the sheriff court in Scotland unless the contrary is indicated.

In this chapter, the term ‘education provider’ and terms which flow from this are used generically to refer to all those who have duties in the areas covered by this Technical Guidance.

In addition in this chapter, a person who brings proceedings is known as the claimant in England and Wales and the pursuer in Scotland; a person against whom proceedings are brought is known as the defendant in England and Wales and the defender in Scotland. The use of these terms in this chapter also includes the parties’ legal representatives.

15.2

Students who believe that their education provider has committed an unlawful act against them may bring civil proceedings. In England and Wales a student who is under 18 or who does not have mental capacity will have to make their claim through a litigation friend who is an adult appointed to conduct the claim on their behalf. Students in Scotland who are over 16 are able to bring a claim in their own name. Students in Scotland who are under 16 can bring a claim in their own name if they have a general understanding of what it means to do so; it is presumed that those over 12 have sufficient understanding. If a student does not have capacity to bring their own claim: for those under 16, a parent or another person with parental responsibilities can conduct the claim on their behalf; for those over 16, a court appointed guardian could raise proceedings.

What unlawful acts can be remedied by the civil courts under the Act?

15.3

The unlawful acts that the civil courts can remedy include:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- pregnancy and maternity discrimination
- failure to make reasonable adjustments for disabled persons
- harassment, and
- victimisation.

15.4

These provisions are explained in Chapters 4, 5, 6, 7, 8 and 9. Also, claims brought against those who cause, induce or aid these unlawful acts may be brought in the civil courts. These terms are explained in Chapter 3. For brevity these will all be referred to as ‘unlawful acts’.

15.5

s114(1) A student who believes that an education provider has carried out an unlawful act against them may bring civil proceedings in the civil courts.

15.6

s138 If a student thinks they may have a claim against an education provider, before they start proceedings it may be helpful to question the education provider (see obtaining information paragraphs 15.28–15.32).

15.7

Before starting proceedings, a student should also ensure that the relevant provisions of the civil courts’ rules are observed.

Conciliation

15.8

Where a student thinks that an education provider has acted unlawfully towards them, before taking the complaint further it may be appropriate to see whether it can be resolved directly with the education provider, for example by using a complaints procedure. However, if that does not succeed in dealing with the problem, then it may be sensible to see whether the dispute can be resolved without recourse to the courts.

15.9

Students in FE in England (not those at sixth form colleges) can refer complaints to the Skills Funding Agency if they are not satisfied with the provider's internal complaints procedure. The Skills Funding Agency helps to facilitate resolution but does not decide on the merits of the case. Cases can be referred to the Parliamentary Ombudsman who can assess if procedures have been followed correctly but similarly, will not assess the merits of the case. Findings on the lawfulness or otherwise of alleged act(s) of discrimination are ultimately for the courts to determine.

s118(2)
and (3)

15.10

Higher Education Institutions in England should have internal complaints procedures in place. Students at universities or higher education institutions in England and Wales can make a complaint to the Office of the Independent Adjudicator ('OIA') if they have exhausted their institution's internal complaints procedure. There are several issues that the OIA cannot hear complaints about, such as questions of academic judgement, but it can consider complaints of discrimination within its remit. It should be noted though that findings on the lawfulness or otherwise of alleged act(s) of discrimination are ultimately for the courts to determine. If a complaint is made to the OIA within six months of the alleged unlawful act then the time limit for making a claim is extended by three months, to nine months (see paragraphs 15.17–15.19 below).

15.11

Students at universities or higher education institutions in Scotland can make a complaint to the Scottish Public Services Ombudsman ('SPSO') if (usually) they have exhausted their institution's internal complaints procedure.

Civil courts**15.12**

If a dispute cannot be resolved by conciliation or agreement, and the person brings proceedings, the matter will have to be decided by a court.

15.13

The Act allows the civil courts to hear cases concerning discrimination and other unlawful acts, in the provision of further and higher education.

s114(1)(c)

Assessors in cases under the Act

- s114(6) and (7) and s63(1) of the County Courts Act 1984 and the power under rule 44.3 of Schedule 1 to the Sheriff Court (Scotland) Act 1907
- 15.14** In cases about unlawful acts a judge (in England and Wales) or sheriff (in Scotland) will usually have to appoint an ‘assessor’ to assist him or her. These are persons of skill and experience in discrimination issues who help to evaluate the evidence. The Act says that unless the judge or sheriff is satisfied that there are good reasons for not doing so they must appoint an assessor.
- 15.15** It would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings. A party to proceedings can object in writing to the court about the appointment of an assessor.
- The remedies which the civil courts can grant are dealt with in paragraph 15.39 below.

Time limits

- s118
- 15.16** Court action must be started within six months (minus a day) of the unlawful act.
- 15.17** If the proceedings are not brought within that period the court still has discretion to hear the proceedings, if it thinks it is just and equitable to do so.
- s118(4)
- 15.18** If the dispute has been referred to the OIA, the period within which the claim must be brought is nine months, or such longer period as the court thinks just and equitable.

When does the period for bringing a claim start?

- 15.19** The Act says that the period starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred or the date on which the claimant or pursuer becomes aware that an unlawful act occurred, for example the date when a student was refused admission on an unlawful basis.

15.20

Sometimes, however, the unlawful act is the education provider's failure to do something. The Act says that a failure to do a thing occurs when the education provider decided not to do it. In the absence of evidence to the contrary, an education provider is treated as deciding not to do a thing:

- a. when it performs an act that is inconsistent with doing the thing, or
- b. if it does not carry out an inconsistent act, on the expiry of the period in which it might reasonably have been expected to do the thing.

s118(6)
and (7)**15.21**

In addition, the Act recognises that where conduct extends over a period it should be treated as being done at the end of that period for the purposes of calculating when the act of discrimination occurred.

s118(6)(a)

15.22

If an education provider has a policy, rule or practice, in accordance with which decisions are taken from time to time, this might constitute an 'act extended over a period'. So if an education provider maintains an unlawful policy which results in a student being discriminated against on a continuing basis or on many occasions, the period for bringing a claim starts when the last act of discrimination occurred, or when the policy, rule or practice is removed.

15.23

For these purposes, a continuing state of affairs may constitute an act extended over a period. This means that even if the individual acts relied upon are done by different persons and are done at different places, they may be treated as a single act extending over a period. However, a single unlawful act which has continuing consequences will not extend the time period.

What happens if the claim is presented outside the correct time limit?**15.24**

Where the claim is brought outside these time limits, the courts have discretion whether to hear the case if satisfied that it would be just and equitable to do so.

s118(1)(b)

15.25

In exercising their discretion, the courts will consider the prejudice which each party would suffer as the result of the decision to extend the time limit. This means that the court will consider what impact hearing the case out of

time would have on the defendant or defender and on the claimant or pursuer.

15.26

When a court considers whether to exercise its 'just and equitable' discretion, it will have regard to all the circumstances of the case including in particular:

- the length of and reasons for the delay
- the extent to which the cogency of the evidence is likely to be affected
- the extent to which the defendant or defender had cooperated with any requests for information
- the promptness with which the claimant or pursuer acted once they knew of the facts giving rise to the claim, and
- the steps taken by that person to obtain appropriate professional advice once they knew of the possibility of taking action.

The procedure for obtaining information

15.27

s138 Before starting proceedings, it may be helpful to the person considering bringing proceedings to obtain information from the education provider, to help them decide if they have a valid claim or not. Any student who thinks that they were the subject of an unlawful act may request information relevant to their claim from the education provider they think is responsible. This is known as the procedure for obtaining information and it is additional to other means of obtaining information under the courts' rules.

15.28

There are standard forms for asking and answering questions as well as guidance which explains how the process works. However, the standard forms do not have to be used to present questions or answers.

15.29

The questions procedure is a way for students to obtain information when they believe they have been subjected to conduct which is unlawful under the Act but do not have sufficient evidence to be sure. It should also assist the education provider in their decision about how to proceed with the complaint.

Example: A male applicant was turned down for a course in childcare studies even though he had excellent grades and relevant experience. He suspects that he was turned down because of his sex. He could request information using the questions form from the course provider about its decision which could support his belief that he was unlawfully discriminated against.

15.30

The questions and answers are admissible in evidence in court proceedings.

s138(3)

15.31

The recipient of the questions is not obliged to answer the questions.

s138(4),

However if the recipient chooses not to answer the questions within eight weeks (starting on the day they are received), or if they give an equivocal or evasive answer, then the civil court may draw an inference from that, which could be an inference of discrimination. A court cannot however draw an inference from a failure to answer questions if the answers might prejudice a criminal matter or in other circumstances as specified in the legislation.

s138(5)

Burden of proof

15.32

A claimant or pursuer alleging that they have experienced an unlawful act must prove facts from which a court could decide that such an act has occurred.

s136

15.33

A court will usually hear all of the evidence from the claimant or pursuer and the defendant or defender before deciding whether the burden of proof has shifted to the defendant.

15.34

If a claimant or pursuer has proved facts from which a court could conclude that there has been an unlawful act, then the burden of proof shifts to the defendant or defender. To successfully defend a claim, the defendant or defender will have to prove, on the balance of probabilities, that it did not act unlawfully. If the defendant or defender's explanation is inadequate or unsatisfactory, the court must find that the act was unlawful.

Example: A postgraduate student has been asked by his department to come along to careers fairs to talk about life at the university ever since his first year as an undergraduate at the same university. He enjoys doing this and it is good for his CV. In October he told his supervisor that he was gay. Shortly afterwards, he was told by the head of his department that he would not be needed at any of the careers fairs that year. The student can show that other postgraduate students have been asked to speak at careers fairs this year. If the student takes a claim to the civil courts, the head of department on behalf of the education provider must provide an explanation of the lack of invitation to the student in question which shows that his sexuality did not inform any part of the decision-making if the education provider is to avoid a finding of direct sexual orientation discrimination.

15.35

Where the basic facts are not in dispute, a court may simply consider whether the defendant or defender is able to prove, on the balance of probabilities that it did not commit the unlawful act.

15.36

The above rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence.

Settling complaints without recourse to the court

15.37

Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the civil courts. An agreement of this nature can include any terms the parties agree to and can cover compensation, future actions by the defendant or defender, costs and other lawful matters.

Remedies

15.38

- s119(2) In England and Wales the county court has the power to award all the remedies which the High Court can grant in proceedings in tort or in a claim for judicial review.
- s119(3) Likewise, in Scotland, the sheriff court has the power to make any order which could be made by the Court of Session in proceedings for reparation or on a petition for judicial review.

These remedies include:

- a declaration of the rights and responsibilities of the parties to the claim
- an injunction (England and Wales) or interdict (Scotland) to prevent the person defending the claim from repeating the unlawful act in the future
- quashing orders by which the court can set aside an administrative decision or action of a public authority
- damages to compensate for any loss suffered by the person bringing the claim
- interest on damages, and
- costs (in England and Wales) or expenses (in Scotland) if appropriate.

15.39

Special rules apply where it is alleged that an injunction or interdict might prejudice a criminal case (see paragraph 15.47).

Damages

15.40

Damages may include compensation for injured feelings (whether or not the award includes compensation on any other basis). s119(4)

15.41

An award of damages can include any loss the claimant or pursuer has suffered. In England and Wales the award can include aggravated damages which may be awarded when the person committing the unlawful act has behaved in a high-handed, malicious, insulting or oppressive manner in doing so. These damages are additional compensation for injured feelings.

15.42

In England and Wales where a public authority (including most education providers), acts unlawfully under the Act, the courts may, very occasionally, award 'exemplary' damages. At the court's discretion, these may be awarded for oppressive, arbitrary or unconstitutional action by servants of the government.

15.43

'Exemplary damages' may also be awarded where the education provider's conduct has been calculated by it to make a profit for itself. Exemplary damages may well exceed the compensation to the claimant. Exemplary damages are not available in Scotland as a separate head of claim.

Damages for complaints of indirect discrimination

s119(5) and (6) **15.44** Where the court makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer, it must not award damages unless it first considers whether to dispose of the case by providing a different remedy, such as a declaration or injunction or interdict. If the court considers that another remedy is not appropriate in the circumstances, it may make an award of damages.

15.45 Indirect discrimination will be intentional where the defendant (or defender) knew that certain consequences would follow from their actions and they wanted those consequences to follow. A motive, for example, to improve its position in the league tables, does not mean that the act of indirect discrimination is unintentional.

Effect on criminal matters

15.46 The court must not grant an interim injunction or interdict unless satisfied that no criminal matter would be prejudiced by doing so.

Use of judicial review

15.47 If the complaint under the Act is about the lawfulness of a decision, an action or a failure to act of a public authority or a person carrying out a public function, the person complaining may bring proceedings for judicial review.

15.48 A claim for judicial review will be appropriate where the person bringing it wants to quash (remove) an administrative decision of the public authority.

15.49 In England and Wales a person who brings a claim for judicial review must obtain permission from the High Court. An application for permission must be made promptly and in any event not later than three months after the grounds for judicial review first arose. The court will expect any appeal mechanisms against the decision to have been exhausted before granting permission for judicial review, which is a remedy of last resort.

15.50

In Scotland the person bringing a judicial review petition does not need to seek permission. While there is no formal time limit, the petition must be raised without undue delay.

National security**15.51**

The Act includes the possibility of special rules being applied to proceedings for the purpose of safeguarding national security (see Chapter 14).

s117

15.52

The rules of the courts may allow the courts to exclude from all or part of the proceedings the claimant or pursuer, where the court considers it expedient in the interests of national security. Their representative may be excluded, and the court may also exclude the assessor in the case.

15.53

The claimant, pursuer or representative who has been excluded may make a statement to the court before the exclusive part of the proceedings starts. The court may take steps to keep secret all or part of the reasons for its decision.

15.54

The Attorney General or the Advocate General for Scotland may appoint a person to represent the interests of a claimant or pursuer in these proceedings. However, that representative is not responsible to the person whose interests they are appointed to represent.

Equality and Human Rights Commission**15.55**

In addition to the rights given to an individual under the Act, the Commission has a power to apply to the court if it thinks that a person is likely to commit an unlawful act, seeking an injunction (in England and Wales) or an interdict (in Scotland) to prohibit them from committing that act.

Equality
Act 2006
s24**15.56**

The Commission has power to take action even if no identifiable individual has been (or may be) affected by the unlawful act. It can take action in respect of arrangements which would, if they were ever applied to an individual, amount to an unlawful act, for example, to deal with the publication of an advertisement which suggests that an education provider would discriminate.

Equality
Act 2006
s24A

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 person at a disadvantage.

15.57

Equality Act 2006 s34, s20-22 and Sch2
If the Commission suspects that an education provider has committed an unlawful act, it can conduct an investigation. If it finds that the education provider has done so, it can serve a notice requiring it to prepare an action plan to avoid repetition or continuation of that act or recommend that it takes action for that purpose.

15.58

Equality Act 2006 s23
The Commission may also, if it suspects that an education provider is committing an unlawful act, enter into a binding agreement with the education provider to avoid such contraventions.

15.59

Equality Act 2006 s28
The Commission also has a power to assist a student who is taking enforcement action against an education provider.

Appendix 1

General Qualification Bodies

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

s97(2)
s97(4)
s97(5)

General qualification bodies

2. A general qualifications body is an authority or body which can confer a relevant qualification.

A body is not a general qualifications body, in so far as it is:

- the responsible body of a school (as described in Chapter 3 of this Technical Guidance)
- the governing body of a further or higher education institution (as described in Chapter 3)
- a body in England or Wales that exercises functions under the Education Acts, such as a local authority
- a body in Scotland that exercises functions under the Education (Scotland) Act 1980, such as an education authority.

Regulations may prescribe other bodies which are not general qualifications bodies.

Relevant qualification

3. A relevant qualification is an authorisation, qualification, approval or certification of such a description as is prescribed in regulations. These are the types of qualifications which pupils at school and students in FE may be studying for such as:
 - 14-19 Diploma Principal Learning
 - Advance Extension Awards
 - Cambridge International Certificate
 - Cambridge pre-University qualification
 - Certificates in Adult Literacy and Numeracy
 - Entry level certificates in GCSE subjects

s97(3)

- Extended projects
- Foundation projects
- Free Standing Maths Qualifications
- Functional Skills qualifications
- CE Advanced level (A and AS levels)
- GCSEs
- GNVQs
- Higher projects
- The International Baccalaureate
- Key Skills
- The Welsh Baccalaureate Qualification Core Certificate
- The National Qualifications in Scotland.

A qualification which is not prescribed by regulations as being a relevant qualification may be a 'professional or trade' qualification. A description of what constitutes a professional or trade qualification and the duties of professional or trade qualifications bodies are set out in Appendix B.

Conferring qualifications

- s97(6) 4. The Act says that conferring a relevant qualification includes renewing or extending the conferment of a relevant qualification and authenticating a relevant qualification conferred by another person.

Discrimination

5. The different forms of discrimination relevant to the general qualifications bodies provisions of the Act are:
- direct discrimination
 - indirect discrimination
 - discrimination arising from disability
 - pregnancy and maternity discrimination, and
 - failure to provide a reasonable adjustment.

Any reference to 'discrimination' in the following paragraphs of this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise.

What is unlawful?

6. The Act makes it unlawful for a general qualifications body to discriminate against a person:

- in the arrangements it makes for deciding upon whom to confer a relevant qualification
- as to the terms on which it is prepared to confer a relevant qualification, and
- by not conferring a relevant qualification on that person.

It is also unlawful for a general qualifications body to discriminate against a person on whom it has conferred a relevant qualification by:

- withdrawing the qualification
- varying the terms on which the qualification is held, and
- subjecting the person to any other detriment.

The Act also makes it unlawful for a general qualifications body to harass or victimise a person who applies for or holds a relevant qualification.

These provisions are explained in Chapters 8 and 9 respectively.

The role of the regulator

7. A general qualifications body does not have to make reasonable adjustments to provisions, criteria or practices which the appropriate regulator specifies are not subject to the reasonable adjustments duty. s96(7)
8. A general qualifications body is not required to make reasonable adjustments which the appropriate regulator specifies should not be made.
9. The regulator must consult with such persons as it thinks appropriate before it specifies that a provision, criterion or practice is not subject to the reasonable adjustments duty or that an adjustment should not be made.
10. The regulator must have regard to:
 - the need to minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities

- the need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of a person upon whom it is conferred, and
 - the need to maintain public confidence in the qualification.
11. The appropriate regulator for a general qualifications body that confers qualifications in England is Ofqual.

The appropriate regulator for a general qualifications body that confers qualifications in Wales is the Welsh Ministers.

The appropriate regulator for a general qualifications body that confers qualifications in Scotland is the Scottish Qualifications Authority.

Overlap with other duties

12. There will be situations where other people or bodies also have duties under the Act towards people who apply for or hold a relevant qualification. The education providers covered in this Technical Guidance may have duties to such people and these duties are explained in more detail in Chapters 10, 11 and 12.

Example: A student at a further education college is on an A level maths course. The further education college has duties towards him while he is on the course and the general qualifications body has duties in relation to the conferment of the A level. So if he requires a reasonable adjustment of large font papers the college would be responsible for providing course documents and handouts in large font and the general qualifications body would be responsible for providing exam and assessment papers in large font.

Appendix 2

An overview of qualifications bodies' duties

1. This appendix gives an overview of how Part 5 of the Act applies to Qualification Bodies.

s53

Qualification bodies

2. A qualifications body is an authority or body which can confer a 'professional or trade' qualification.

s54(2)

Examples of qualifications bodies include:

- the General Medical Council
- the Nursing and Midwifery Council
- the Driving Standards Agency
- City and Guilds
- the Institute of the Motor Industry
- the Guild of Cleaners and Launderers, and
- the Law Society.

3. A body is not a qualifications body, in so far as it is:

- the responsible body of a school (as described in Chapter 3 of this Technical Guidance)
- the governing body of a further or higher education provider (as described in Chapter 3)
- a body in England and Wales that exercises functions under the Education Acts, such as a local authority
- a body in Scotland that exercises functions under the Education (Scotland) Act 1980, such as an education authority, and
- a body that can confer a qualification to which s96 applies (as described in Appendix 1), namely a 'general qualification body'.

'Professional or trade' qualification

- s54(3) 4. A 'professional or trade' qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

A qualification which is prescribed by regulations as being a relevant qualification that is conferred by a general qualifications body is not a 'professional or trade' qualification. A description of what constitutes a general qualifications body and of its duties is set out in Appendix 1.

Conferring qualifications

- s54(5) 5. The Act says that conferring a 'professional or trade' qualification includes renewing or extending the conferment of a 'professional or trade' qualification.

Discrimination

6. The different forms of discrimination relevant to the qualification bodies provisions of the Act are:
- direct discrimination
 - indirect discrimination
 - discrimination arising from disability
 - pregnancy and maternity discrimination, and
 - failure to provide a reasonable adjustment.

Any reference to 'discrimination' in the following paragraphs of this chapter is a reference to all of these forms of discrimination unless specifically indicated otherwise.

What is unlawful?

- s53 7. The Act makes it unlawful for a qualifications body to discriminate against a person:
- in the arrangements it makes for deciding upon whom to confer a qualification
 - as to the terms on which it is prepared to confer a qualification, and
 - by not conferring a qualification on that person.

It is also unlawful for a qualifications body to discriminate against a person on whom it has conferred a qualification by:

- withdrawing the qualification
- varying the terms on which the qualification is held, and
- subjecting the person to any other detriment.

The Act also makes it unlawful for a qualifications body to harass or victimise a person who applies for or holds a qualification.

These provisions are explained in Chapters 8 and 9 respectively.

Competence standards

8. The application of a competence standard is not a provision, criterion or practice for the purposes of the reasonable adjustments duty and therefore a qualifications body does not have to make reasonable adjustments to the application of a competence standard. s53(6)
Sch8.15.2

The application of a competence standard to a disabled person is not disability discrimination unless it constitutes indirect discrimination. s53(7)

Overlap with other duties

9. There will be situations where other people or bodies also have duties under the Act towards people who apply for or hold a qualification. The education providers covered in this Technical Guidance may have duties to such people and these duties are explained in more detail in Chapters 10, 11 and 12.

Appendix 3

The meaning of disability

1. This Appendix is included to aid understanding about who is covered by the Act.

When is a person disabled?

2. A person has a disability if he has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.
3. However special rules apply to people with some conditions such as progressive conditions and some people are automatically deemed disabled for the purposes of the Act (see below).

What about people who have recovered from a disability?

4. People who have had a disability within the definition are protected from discrimination even if they have since recovered (though those with past disabilities are not covered in relation to Part 12 (transport) and section 190 (improvements to let dwelling houses)).

What does 'impairment' cover?

5. It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

6. The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including dyslexia and other impairments often referred to generically as learning disabilities.

What if a person has no medical diagnosis?

7. There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment not the cause.

What is a 'substantial' adverse effect?

8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.
9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; because of a loss of energy and motivation.
10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how he or she carries out those activities. For example: where an impairment causes pain or fatigue in performing normal day-to-day activities the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

What is a 'long-term' effect?

11. A long-term effect of an impairment is one:
 - which has lasted at least 12 months; or
 - where the total period for which it lasts is likely to be at least 12 months; or
 - which is likely to last for the rest of the life of the person affected.
12. Effects which are not long term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

13. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

What are ‘normal day-to-day activities’?

14. They are activities which are carried out by most men or most women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.
15. Day-to-day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. They also encompass the activities which are relevant to working life.

What about treatment?

16. Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment).

In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).

Does this include people who wear spectacles?

17. No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

18. People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the long-term requirement.

Are there any other people who are automatically treated as disabled under the Act?

19. Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act.

In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist, are automatically treated under the Act as being disabled. In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act.

What about people who know their condition is going to get worse over time?

20. Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition.

Appendix 4

Making reasonable adjustments to premises – legal considerations

Leases, binding obligations and reasonable adjustments

Introduction

- s20(9) 1. In Chapter 7 it was explained that one of the situations in which a duty to make reasonable adjustments may arise is where a physical feature of premises occupied by an education provider places a disabled student at a substantial disadvantage compared with students who are not disabled. In such circumstances the education provider must consider whether any reasonable steps can be taken to overcome that disadvantage. Making physical alterations to premises may be a reasonable step for an education provider to have to take. This appendix addresses the issues of how leases and other legal obligations affect the duty to make reasonable adjustments to premises.

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

- Sch21 2. The education provider may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant, or in Scotland a feu disposition) under which they cannot alter the premises without someone else's consent.
- Sch21, para 2 3. In these circumstances, the Act provides that it is always reasonable for the education provider to have to request that consent, but that it is never reasonable for the education provider to have to make an alteration before having obtained that consent.

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

4. Special provisions apply where an education provider occupies premises under a lease or tenancy agreement, the terms of which prevent it from making an alteration to the premises.
5. In such circumstances, if the alteration is one which the education provider proposes to make in order to comply with a duty to make reasonable adjustments, the Act enables the lease to be read as if it provided:
 - for the education provider to make a written application to the landlord for that consent
 - for the landlord not to withhold the consent unreasonably
 - for the landlord to be able to give consent subject to reasonable conditions, and
 - for the education provider to make the alteration with the written consent of the landlord.
6. If the education provider fails to make a written application to the landlord for consent to the alteration, the education provider will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the education provider to have made the alteration.
7. Whether withholding consent will be reasonable or not will depend on the specific circumstances. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the landlord's interest in the premises, the landlord is likely to be acting reasonably in withholding consent. The landlord is also likely to be acting reasonably if it withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).
8. A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the landlord's interests and so it would generally be unreasonable to withhold consent for them.

Sch21,
para 3

- Sch21,
para 4
9. If the education provider has written to the landlord for consent to make an alteration and the landlord has refused consent or has attached conditions to its consent, the education provider or a disabled student who has an interest in the proposed alteration may refer the matter to a county or sheriff court. The court will decide whether the landlord's refusal or any of the conditions are unreasonable. If it decides that they are, it may make an appropriate declaration or authorise the education provider to make the alteration under a court order (which may impose conditions on the education provider).
- Sch21,
para 5
10. In any legal proceedings on a claim involving a failure to make a reasonable adjustment, the disabled student concerned or the education provider may ask the court to direct that the landlord be made a party to the proceedings. The court will grant that request if it is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the court has determined the claim.
11. Where the landlord has been made a party to the proceedings, the court may determine whether the landlord has refused to consent to the alteration, or has consented subject to a condition, and in each case whether the refusal or condition was unreasonable.
12. If the court finds that the refusal or condition was unreasonable it can:
- make an appropriate declaration
 - make an order authorising the education provider to make a specified alteration (subject to any conditions it may specify), or
 - order the landlord to pay compensation to the disabled student.
13. If the court orders the landlord to pay compensation, it cannot also order the education provider to do so.

What about the need to obtain statutory consent for some building changes?

14. An education provider might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning permission, Building Regulations approval or a building warrant in Scotland, listed building consent, scheduled monument consent and fire regulations approval. The Act does not override the need to obtain such consents.
15. Education providers should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.
16. Education providers should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to consider avoiding the physical feature.

