

Factsheet 79

Equality, discrimination and the Public Sector Equality Duty

August 2020

About this factsheet

The *Equality Act 2010* (*the Act*) came into force on 1 October 2010 and combines almost all previous anti-discrimination laws in a single piece of law. It expanded the scope of discrimination law to cover: Age, Disability, Gender Reassignment (or Transgender), Marriage and Civil Partnership, Pregnancy and Maternity, Race, Sex, Religion, and Sexual Orientation.

This factsheet explains basic information about discrimination and equality as covered by the Act. One of its most important aspects of the Act is the Public Sector Equality Duty – a duty for public bodies to consider and apply fairness and equality, especially in making decisions or policies.

The information in this factsheet is applicable across the whole UK and is correct at the time of publishing.

If you need more detailed advice or representation, you can contact a local service. Age UK Advice, Age Cymru Advice, or Age Scotland Helpline can give you contact details for services in your area.

Contact details for any organisation mentioned in this factsheet can be found in the *Useful organisations* section.

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1 What is the Equality Act?

The *Equality Act 2010* ('the Act') aims to protect you from discrimination. This means discrimination or unfair treatment on the basis of certain personal characteristics, including age, is against the law in almost all cases. The Act applies to discrimination based on:

- Age
- Disability
- Gender reassignment
- Marriage or civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

These are called '*protected characteristics*' under the Act.

1.1 How does the law protect me from age discrimination?

You are protected from different things under the Act:

Direct discrimination

This happens if you are treated less favourably directly because of a protected characteristic. For example, your local gym refuses to give you a membership because of your age.

Indirect discrimination

This happens if goods or services have rules affecting everyone who receives them, but because of a protected characteristic such as age, the rules have a worse effect on you than other people. For example, an optician says you can pay for glasses in instalments if you work. This disadvantages people who have retired.

Harassment

This is if you experience behaviour that makes you feel intimidated, humiliated, or degraded, or that creates a hostile environment. For example, a nurse makes offensive jokes about your age or religion whilst you are in hospital.

Victimisation

This is if you are treated unfairly as a result of making a complaint about discrimination, or giving evidence when someone else makes a complaint.

Public Sector Equality Duty

Public bodies such as local authorities, hospital trusts, and police authorities must prevent discrimination. This is called the Public Sector Equality Duty. They must consider the needs of people with protected characteristics, including older people, when planning or carrying out their public duties or services. For example, if a local bus service is to be cancelled but it is used a lot by older people to get to local health services, this should be considered when a decision is made.

1.2 In what situations does the Equality Act apply?

The Equality Act covers a range of different types of places and organisations. The law applies to places providing goods or services, as well as employment. These include:

Consumer services such as:

- Shops
- Hotels
- Leisure facilities

Health services such as:

- Your GP surgery
- Hospitals
- Dentists

Public services such as the NHS cannot provide inferior services or refuse to provide services purely because of your age, unless there is a good and sufficient reason. For example, you should not be refused treatment because of a '*stereotypical*' view of your age. Instead, the NHS must look at each case individually to decide what treatment options should be offered.

However, age ranges selected for cancer screening or a vaccination programme are examples of where there may be objective justification for different treatment due to age.

Employment includes:

- Your treatment in the workplace
- Applying for a job

Public services include:

- Local authority services
- Local transport
- Housing associations

Contact the Equality Advisory Support Service (EASS) helpline for more advice. Check the Law Centres Network to see whether there is a local Law Centre who may be able to advise you.

1.2.1 Exemptions

Specific exemptions to the Act allow discrimination on the basis of age, or other protected characteristics, in certain situations. Examples include:

- age-related holidays offered for over 50's or 18-30's only
- discounts in shops for people aged over 65
- social or leisure clubs catering for people of specific ages only.

These examples are lawful because age-related concessions and age-specific services can be exempt under the Act.

There is an exemption for financial services, including banks, building societies, and insurance companies. This means they can use age limits when deciding what services to offer. If using age to assess risk, for example refusing insurance to an older person, or charging more, they must ensure their decision is based on reliable and relevant information, which shows people over a certain age are at greater risk.

Age discrimination can be '*objectively justified*' if a good reason can be given. For example, a health screening programme targeting a particular age group may be objectively justifiable, if there is good evidence this group is more at risk of the disease being screened for.

1.3 What do I do if I have been discriminated against?

How you take action depends on who your complaint is against but as a general guide, you should first make notes about what has happened and collect any related evidence. Next, you can:

Step one: Find out about the complaints procedure for the organisation you want to complain about. For example:

- If it is your employer, speak to ACAS and you may then wish to talk to your manager, your union, or Human Resources.
- If it is a shop or hotel, contact the manager or customer services.
- If it is your GP surgery, ask to see a copy of their complaints procedure.

Step two: Send in details of your complaint to the organisation concerned about what happened, and when. Make it clear you are complaining about age (or other) discrimination. It can help to suggest solutions, for example, you want an apology, or the person responsible to be retrained. Try to keep your complaint polite and to the point.

Step three: If you are unhappy with their response, you may have to go to the next step of the complaints procedure (for example, contact the head office, the relevant Ombudsman, or an employment tribunal).

If you are unsure what to do next, seek further advice from EASS. If you are seeking legal advice, contact the Law Society for details of solicitors who specialise in public law, but remember, this may incur costs.

2 Public Sector Equality Duty

An important aim of the Act is to consolidate and update the Public Sector Equality Duty (PSED). This is a duty for public bodies to have due regard of the need to consider and apply fairness and equality in carrying out their functions, especially in making decisions or policies.

Note

Equality is used to describe the treatment of people in certain categories, who may have, or be seen to face, a disadvantage not faced by the rest of the population. The categories are described in the Act as '*protected characteristics*' because it seeks to protect people seen to be at a disadvantage from discrimination.

Discrimination refers to treatment of a person within a category which is less favourable than the treatment of others in another category, or the rest of the population in general. Anti-discrimination laws make discrimination unlawful against people in protected categories and to define those protected categories.

2.1 Why is it important?

No-one should be treated less favourably or experience discrimination because of their age, or disability, or other protected characteristics such as race, gender, or sexuality. Public bodies are bound by the law when they provide you with services and in your everyday dealings with them.

2.2 General duties

Section 149(1) of the Act defines what the PSED means in terms of general and specific duties.

The Act places a general duty on the public sector. In the exercise of its functions, a public authority must have due regard to the need to:

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

An aim of these duties is to encourage public bodies to consider how they can positively contribute to the advancement of equality and good relations. Equality considerations should be reflected in the design of policies, the delivery of services, including internal policies and reviews.

In government guidelines, further considerations for public bodies exercising the duty are highlighted:

- **Knowledge:** Persons in public bodies responsible for making policies or making decisions should be familiar with the requirements of the PSED.
- **Timeliness:** A public body making a decision or policy must consider the Equality Duty before making the decision or policy and not afterwards.
- **Real consideration:** A public body must properly and genuinely consider equality when making decisions or policy.

There are exceptions to the general duties, but these are narrow and relate to the discharge by public bodies of their functions in limited circumstances.

2.3 Specific duties

There are specific duties giving public bodies responsibilities to:

- prepare and publish objectives they believe necessary to achieve the general duties, in a format easily understandable to the public. These must be specific, measurable, and revisited every four years
- publish their compliance with the general duties
- publish evidence and analysis of the impact of compliance measures on protected persons (including employees) and evidence of engagement with persons with an interest in promoting this duty
- publish the information on compliance with the general duties, at regular intervals of, at most, 12 months from the previous.

3 Who does the duty apply to?

3.1 Public bodies

Public bodies are national and local Government bodies carrying out functions for the public and include:

- Government departments such as DWP, HM Revenue and Customs, etc
- Local authorities
- NHS bodies e.g. hospitals
- Transport and educational bodies
- The police
- Other bodies carrying out public functions on behalf of the above.

The list of bodies is not exhaustive – the complete list is in Schedule 19 of the Act. There is also provision for additional bodies specific to Wales (Part 2) and Scotland (Part 3). See www.legislation.gov.uk/ukpga/2010/15/schedule/19.

3.2 Private bodies carrying out public functions

A private organisation is considered to carry out a public function if the service provided is partially or fully funded by the government. For example, a private company running a local authority housing benefit service is carrying out a public function and is subject to the Duty.

A private body is exercising a public function if it is:

- publicly funded, e.g. a GP's surgery under the NHS, or care home commissioner by the local authority
- carrying out duties that the law says should be carried out by a public body (e.g. public utilities)
- carrying out duties in place of government and/or working closely with government in carrying out its duties (e.g. a private security company overseeing a detention centre).

4 The Public Sector Equality Duty and older people

The Public Sector Equality Duty (PSED) as it relates to older people is in addition to rights under other parts of the Equality Act, such as equality in employment, goods and services, etc noted in section 1.2. This means you can:

- require public bodies to have due consideration to age equality in making policies and decisions, and
- challenge a decision or policy of a public body, if it fails to consider the impact of the decision on older people (by not carrying out an Equality Impact Assessment (EIA) or not considering the results of an EIA).

Older people have a right to have their interest considered by a public body when decisions are made using the Act and supporting regulations, as well as other existing judicial and legal means.

5 How can I challenge discrimination?

5.1 Enforce the duty without going to court

If you believe a public body is in breach of the PSED, you must make a formal complaint using the public body's complaints or reporting procedure. All avenues to resolving the matter must be exhausted before court proceedings can be filed.

Courts have a duty to ensure all peaceful means of resolving problems are exhausted before litigation. Court proceedings involve considerable legal expense and complex legal processes and an unsuccessful party is often liable to pay the costs of the other side. It is important to pursue all means of resolving a claim to try to avoid the need to resort to litigation.

5.2 How to do this yourself

If a public body makes a policy or decision that has a negative effect on older people (or any other category you belong to), you should:

- Write to them using their complaints procedure asking if they have given due consideration to the impact of the decision on older people.
- When you receive a response, consider whether there has been proper consideration of the impact of the decision on older people. Seek advice from a Citizens Advice or a solicitor (who may charge you).
- If you are unhappy with the response or there is no response from the public body, refer your complaint with a covering letter to the EHRC (see next section).

Note

You have a right to compel the public body to comply with the duty, as long as it is seen to have failed to consider the interest of the protected category you belong to.

5.3 What the EHRC can do

The Equalities and Human Rights Commission (EHRC) is responsible for enforcing the provisions of the Act on behalf of anyone subject to the protected categories. They have power to monitor compliance with and enforce the Public Sector Equality Duty on behalf of Individuals or organisations.

The EHRC will assess your complaint and if it is seen to be substantial, it can take up the complaint under its own procedures.

Compliance notices: The EHRC assess the public body's compliance with the general and/or specific duties and issues a compliance notice if there has been a breach of either duty. It may enter into an agreement requiring the body to take certain steps to comply with the duty and not issue a compliance notice.

Judicial review: A person whose rights have been affected by a breach of duty can apply for judicial review to the High Court. An application for judicial review must meet certain requirements:

- the application must be made within three months of the date of the action complained of
- the person or organisation making the complaint must be directly affected by the action challenged or act for someone whose rights have been affected, e.g. someone with a Lasting Power of Attorney in England and Wales, or Continuing or Welfare Power of Attorney in Scotland
- the action challenged must be an exercise of a public duty.

If an application for judicial review is successful, the Court can make one or more orders, depending on the nature of the application:

- reverse an action taken by the public body
- prevent the public body from taking, or compel it to take the action, in breach of the public duty.

Any proceedings for enforcement of the PSED must be in public law. This means it must be through judicial review in the High Court. You cannot bring an action against a public body for breach of an individual contract, e.g. you cannot use the Duty to sue your council for failing to pay you for gardening services rendered.

The EHRC has specific powers to make an application for judicial review where a public body has breached the general or specific duties of the Duty. The EHRC can intervene in judicial review claims filed by individuals and organisations to help to clarify the law. In this context, its role is neutral.

It is possible for private individuals and organisations to take judicial review proceedings without legal representation. However, these proceedings are very complex and there can be significant costs attached to taking action. Always seek professional advice from a specialist adviser.

Note

Consider your claim very carefully and get advice on its potential for success. If there are other routes to challenge a decision, it is best to try these before thinking about applying for a judicial review.

The EHRC publishes guidance on the PSED which details how public bodies can comply. It is on their website at:
www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-guidance.

6 Equality impact assessment

Before the Act, public bodies had a legal responsibility to comply with Disability, Race, and Gender Equality duties in making policies or carrying out functions by carrying out an '*equality impact assessment*' (EIA).

An EIA assesses how policies and decisions of a public body are likely to affect, or have affected, people in protected categories, looking for ways to promote equality and remove negative aspects that may be discriminatory. It should be far-reaching and comprehensive, analysing the potential of the policy to give rise to discrimination.

Under the Act, public bodies no longer have a legal duty to carry out an EIA, but most continue to do so. This is likely to continue to be seen as good practice in compliance with the Public Sector Equality Duty. If a public body carries out an EIA, it must be done effectively and comprehensively. Due regard must be had to information contained if a decision is made or a policy devised to which the EIA applies.

Although public bodies no longer have a legal duty to carry out an EIA, an individual or organisation who believes a public body has not carried out an EIA before making a policy or decision can apply for judicial review of the policy or decision if it is likely to result in discrimination.

7 How the Public Sector duty has been applied

These legal decisions help show how public bodies should take action to comply with the PSED and provide guidance on the correct approach.

Case 1

(AA and others) v Sandwell Metropolitan Borough Council CO/633/2014

Sandwell Council introduced minimum residency requirements for anyone claiming Council Tax Reduction (CTR) in their area. Three women took the council to court on various grounds, including that the council had failed to comply with the PSED under section 149 of the Act.

The court found against the council, stating in their decision:

94. Section 149 was undoubtedly engaged: indeed, that was well-recognised by the Council, in the way in which it conducted an EIA at various stages before the residence requirement was tabled. However, there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013-14 CTR Scheme; and scant evidence that it did so prior to the 2014-15 Scheme.

I do not consider that the evidence that there is (e.g. with regard to feedback towards the end of 2013, from wherever it came) is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristics.

95. On the evidence, I cannot but find that the Council was in breach of its section 149 duty. That duty is important; and, had the Council been rigorous in satisfying its obligation to have due regard to the relevant characteristics, then, again, it may not have proceeded with the unlawful course that it followed.

The High Court struck down the policy in a highly critical judgment. Mr Justice Hickinbottom ruled the two year residency rule was unlawful on six separate grounds. The Council acted outside its statutory powers, the rule was irrational and discriminated on grounds of race and gender, and the Council failed to hold any consultation or comply with its equality duties.

Case 2

R (Rahman) v Birmingham City Council (2011) EWHC 944 (Admin)

Birmingham City Council decided to restrict care provision to those with critical needs. Local users challenged this on the ground that the Council had failed to consider race and disability equality impacts. The Court accepted this and decided the decision was unlawful.

Case 3

R (Chavda) v London Borough of Harrow (2008) 100 BMLR 27

The London Borough of Harrow decided to make cuts to its social care services, restricting them to people with critical needs. Their EIA showed it would affect disabled people particularly, but this was not brought to the attention of the councillors making the decision.

An application for judicial review was filed by users of the care services in the Borough. The Court decided that as the Council had not considered the disability equality duty and its decision was unlawful.

Case 4

Aaron Hunt v North Somerset Council [2012] EWHC 1928 (Admin)

The local authority was faced with significant cuts to funding. During a review, they identified there might be a need to consider making substantial financial savings in respect of providing youth services.

The authority decided to *'review youth service provision through promoting non-[council] funded positive activities, supporting transfer of responsibility to towns/parish councils and community groups or closing youth centres as a last resort ([ensuring] targeted youth support will continue for the most vulnerable)'*. Specific budget reductions were set.

The Claimant argued that in approving budget reductions, the authority had failed to comply with its duty to have regard to section 149. The judge disagreed and held the evidence showed council members did have due regard to the PSED when they reached their decision to approve the revenue budget.

The EIA identified the budget proposals which had a high impact on service-users; it dealt explicitly and in detail with the impact of the reduction in the youth-service budget; it referred explicitly to the impact on a number of the protected characteristics itemised in section 149. It set out information on which it based its conclusions and steps to be taken to minimise or mitigate that impact.

8 Human rights in the UK

Human rights in the UK are found in the *Human Rights Act 1998*, based on the *European Convention of Human Rights*. They include:

- the right to life
- the right not to be subjected to torture, inhuman or degrading treatment
- the right to liberty
- the right to a fair trial
- the right to respect for and freedom from interference with privacy and family life
- the right to marriage and family
- the right to freedom from discrimination.

These rights are important and affect everyone, including older people, in their daily life. If your human rights have been breached, you can apply for a judicial review of the decision, policy or action complained of.

8.1 Human rights impact assessment

Human rights impact assessments (HRIAs), like EIAs, analyse how a policy affects people's human rights. The difference is EIAs focus on protected categories of people, while HRIAs focus on how policies affect people generally, but with reference to specific rights. It is good practice for a public body to have an HRIA policy alongside an EIA.

Human rights procedures are not part of the Public Sector Equality Duty. Human rights are guaranteed as basic rights that people are entitled to. Equality ensures all categories of people are treated equally and given the same rights: so they often go together.

Useful organisations

Advisory, Conciliation and Arbitration Service (ACAS)

www.acas.org.uk

Telephone helpline 0300 123 1100 Mon-Fri 8am-8pm, Sat 9am-1pm

Independent organisation aiming to improve employment relations.

British Institute of Human Rights (BIHR)

www.bihar.org.uk/olderpeopleguide

Telephone 020 7882 5850

Produce a guide with Age UK called *Older People and Human rights – a guide for older people*, which can be downloaded from their website.

Citizens Advice

England or Wales go to www.citizensadvice.org.uk

Northern Ireland go to www.citizensadvice.co.uk

Scotland go to www.cas.org.uk

In England telephone 0344 411 1444

In Wales telephone 0344 477 2020

In Scotland telephone 0808 223 1133

National network of advice centres offering free, confidential, independent advice, face to face or by telephone.

Equality Advisory Support Service (EASS)

www.equalityadvisoryservice.com

Telephone helpline 0808 800 0082 Mon-Fri 9am-7pm, Sat 10am-2pm

Funded by the EHRC, the Helpline provides information and advice

Equality and Human Rights Commission (EHRC)

www.equalityhumanrights.com/en

Independent statutory body with the responsibility to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote the human rights of everyone in Britain.

Government Equalities Office (GEO)

www.gov.uk/government/organisations/government-equalities-office

Responsible for the government's overall strategy on equality issues

In **Wales**, see the '*Equality*' section of the **Welsh Government** website:

www.gov.wales/equality

Law Centres Network

www.lawcentres.org.uk

Telephone 020 3637 1330

Find if there is a Law Centre near you via the website. Law Centres Network does not give advice directly to the public.

Law Society

<http://solicitors.lawsociety.org.uk>

Telephone 020 7320 5757

Searchable database of regulated solicitors in England and Wales.

Law Society of Scotland

<https://www.lawscot.org.uk/>

Telephone 0131 226 7411

Liberty

www.liberty-human-rights.org.uk/

Telephone Advice Line 0845 123 2307

A non-profit-making organisation protecting and promoting civil liberties and human rights.

Local Government Association (LGA)

www.local.gov.uk/

Telephone 020 7664 3000

LGA supports improvement and innovation in local government through networks, online resources and support from councillors and peers.

In **Wales**, contact the **Welsh Local Government Association (WLGA)**

www.wlga.gov.uk

Telephone 029 2046 8600

In **Scotland**, contact **COSLA**

www.cosla.gov.uk/

Telephone 0131 474 9200

Older People's Commissioner for Wales

www.olderpeoplewales.com

Telephone 03442 640 670

An independent voice and champion for older people across Wales, standing up and speaking out on their behalf.

Ombudsman Association

www.ombudsmanassociation.org/index.php

Ombudsmen deal with complaints from the public about certain public bodies and private services. Their services are free of charge.

Scottish Human Rights Commission

www.scottishhumanrights.com/

Telephone 0131 244 3550

Independent public body, accountable to the Scottish Parliament. They have a general duty to promote awareness, understanding and respect for all human rights – economic, social, cultural, civil and political – to everyone, everywhere in Scotland, and to encourage best practice.

Age UK

Age UK provides advice and information for people in later life through our Age UK Advice line, publications and online. Call Age UK Advice to find out whether there is a local Age UK near you, and to order free copies of our information guides and factsheets.

Age UK Advice

www.ageuk.org.uk

0800 169 65 65

Lines are open seven days a week from 8.00am to 7.00pm

In Wales contact

Age Cymru Advice

www.agecymru.org.uk

0800 022 3444

In Northern Ireland contact

Age NI

www.ageni.org

0808 808 7575

In Scotland contact

Age Scotland

www.agescotland.org.uk

0800 124 4222

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The evidence sources used to create this factsheet are available on request. Contact resources@ageuk.org.uk

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