



FACT FILE 03/11

The Equality Act 2010 - Key Points for Schools

This guide was produced jointly by the Equality and Human Rights Commission (Wales) and Governors Wales.



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The Equality Act 2010 (the Act) brings together and **replaces** the previous anti-discrimination laws, such as the Disability Discrimination, Race Relations, and Equal Pay Acts with a single Act. The majority of the Act came into force on 1 October 2010. **This short fact file highlights some of the key provisions under the Act.**

Further Guidance:

The website of the Equality and Human Rights Commission contains [guidance](#) on the provisions of the Act that prohibit schools from discriminating against, harassing or victimising prospective pupils, current pupils and in some circumstances, former pupils.

Schools also have obligations under the Act as employers, bodies that carry out public functions and as service providers (For Foundation, Voluntary Aided schools, the governing body is the employer whilst in community and Voluntary Controlled schools, the LA is the employer but the governing body is responsible for staffing matters, etc.) The Commission's website also has [guidance](#) on those aspects of the Act.

Who the Act protects:

The Act generally covers anyone who has one or more of the following '**protected characteristics**':

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race – including ethnic or national origin, colour or nationality;
- religion or belief – including lack of belief;
- sex, and sexual orientation.

Protected characteristics in schools: The Act extends protection against discrimination related to gender reassignment and pregnancy and maternity to pupils in school. However, the Act makes an exception that discrimination on the grounds of *age* and *marriage and civil partnership* are *not* protected in schools.

What is new under the Act?

As the Equality Act 2010 seeks to harmonise and bring together the previous equality legislation, schools will already be doing much of what is required. For example, Schedule 10 of the Act covers Accessibility for Disabled Pupils. This retains the former provisions requiring local authorities to prepare written accessibility strategies and governing bodies of maintained schools to develop **written accessibility plans**, setting out how they will increase disabled pupils' access to the school curriculum, improve the physical environment and improve the provision of information.

The main *new* provisions in the Act are:

- New protected characteristics of gender reassignment, pregnancy and maternity, marriage and civil partnership;
- A new definition of *direct* discrimination;
- Changes to the definitions of *disability discrimination*;
- A new public sector *equality duty*;
- Amplification of *positive action*;
- *Pre-employment questions about disability* and health.

Direct discrimination:

Direct discrimination involves less favourable treatment 'because of' a protected characteristic. The new definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic or because the victim is wrongly thought to have it. Thus, discrimination by *association* and *perception* has been extended to expressly cover age, disability, gender reassignment and sex in addition to previous protection for race, sexual orientation and religion and belief.

There is generally no defence to *direct discrimination*. The exception to this is that it is possible to justify direct discrimination on the basis of age (only) where the treatment is a proportionate means of achieving a legitimate aim.

Disability discrimination:

The Act has introduced two changes around what amounts to discrimination on the basis of disability. There are now four types:

- *direct discrimination* – this existed previously;
- *failure to make a reasonable adjustment* – again this existed previously. It applies only in relation to disability (see further information below for how the duty applies to schools);
- *indirect discrimination* – this form of discrimination applies to disability (and gender reassignment) for the first time. Broadly, this means that it is unlawful to apply a policy or practice that puts those who share a protected characteristic at a particular disadvantage, unless it can be shown to be a proportionate means of achieving a legitimate aim;
- *discrimination arising from disability* – this is another new form of disability discrimination and replaces the previous concept of disability-related discrimination. This new discrimination is where a person is treated unfavourably because of something arising in consequence of his/her disability. It is a defence to show that the treatment is a proportionate means of achieving a legitimate aim. It is also a defence for an employer or service provider etc, if they can show that they did not know, and could not reasonably have been expected to know, that the person had the disability.

A new public sector equality duty:

The Act includes a new public sector equality duty (the 'general duty'), replacing previous separate duties relating to race, disability and gender equality. The general duty is supplemented by specific duties brought in by the Welsh Government, which set out certain steps that schools and other public authorities in Wales must take to help in their better performance of the general duty.

A separate fact file provides more detail, including what action is required of schools by April 2012.

Amplification of positive action:

The Act makes a general provision permitting (but of course not requiring) positive action where there is reason to think that people who share a protected characteristic:

- suffer disadvantage connected to the characteristic, or
- have needs that are different from those who do not share it, or
- where their participation in an activity is disproportionately low.

In such circumstances, the Act does not prohibit any action that is a proportionate means of achieving the aim of people who share the protected characteristic to overcome or minimise the disadvantage, meeting their needs or of enabling or encouraging their participation.

In the narrower context of employment, previous legislation permitted employers to take positive action in relation to under-represented groups with regard to targeting training and encouraging applications from these groups. The Equality Act 2010 extends permitted positive action to cover recruitment and promotion. When selecting candidates for promotion or recruitment it is open to an employer to take into consideration a person's protected characteristic, subject to certain conditions being met.

The conditions are:

- the more favourable treatment must be aimed at those individuals whose protected characteristic(s) means that they are disadvantaged or under-represented.
- In addition, such positive action is only permitted where:
 - (i) the individual in question is 'as qualified as' other candidates;
 - (ii) the employer does not have a policy of such positive action (i.e. only acts on a case-by-case basis); and
 - (iii) the more favourable treatment must also be objectively justified – i.e., a proportionate means of addressing disadvantage or under-representation of people with protected characteristics.

Pre-employment questions about disability and health:

The Act brings into sharper focus the previous position, so that it is now explicitly unlawful for an employer, recruitment agency or consultant to ask (in writing or orally) about the health of an applicant prior to offering work or short listing. So questions about numbers of days off taken would not be permitted. There are, however, several exceptions to this general prohibition. For example: asking for the purpose of making a reasonable adjustment to enable participation in the recruitment process; or to discover whether the applicant would be able to undertake a function intrinsic to the job. It is of course lawful to make a job offer conditional on a satisfactory health assessment.

What the Act requires of schools in particular

Part 6 of the Act states that the **responsible body** of a school must not discriminate against a pupil:

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;
- (f) by subjecting the pupil to any other detriment.

In addition to the provisions against discrimination, the Act also protects pupils from harassment or victimisation by a school.

A 'responsible body' is a local authority or governing body (or proprietor of an independent school). As an employer (see page 1), a school is legally responsible for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment or by people who take action on its behalf (agents).

A school's duty to its pupils goes beyond just the formal education, it provides and covers all school activities such as extra-curricular and leisure activities, after-school and homework clubs, sports activities and school trips, as well as school facilities such as libraries and IT facilities.

It does not matter whether a school knew about or approved of those acts. However, if it can show that it took all reasonable steps to prevent its employees or agents from acting unlawfully, it will not be held legally responsible.

An employee of a school is personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment, whether or not the employer is also liable. However, an employee cannot be personally liable in relation to disability discrimination in schools.

Schedule 11 of the Act sets out limited exceptions to some of the discrimination provisions around admissions, including in relation to single sex schools and schools of a religious character.

Reasonable adjustments by schools

As stated above, a school has a duty to make reasonable adjustments for disabled people.

The Act *extends the duty* to make reasonable adjustments to cover the provision by a school of auxiliary aids and services. However, the date by which this element of the duty is to come into force is yet to be confirmed.

The Act specifically identifies provision of information in an accessible format as a reasonable adjustment.

Special Education Needs (SEN) Provision

The duty to make reasonable adjustments sits alongside the duties of a school and of local authorities in relation to SEN under Part 4 of the Education Act 1996. In some cases, the support a disabled pupil may receive under the SEN framework may mean that they do not suffer a substantial disadvantage and so there is no need for additional reasonable adjustments to be made for them. In other cases disabled pupils may require reasonable adjustments in addition to the special educational provision they are receiving. There are also disabled pupils who do not have special educational needs, but still require reasonable adjustments to be made for them. The level of support a pupil is receiving under Part 4 of the Education Act 1996 is one of the factors to be taken into account when a school considers what it would be reasonable for it to have to do.

Refer also to the Fact File on the Public Sector Equality Duty for schools in Wales, which includes some examples of areas of potential discrimination in schools.

For further information, contact: wales@equalityhumanrights.com
or contact@governorswales.org.uk

This Fact File offers a summary of the main points on the Equality Act 2010 for schools and governing bodies. It should be used in conjunction with detailed advice and support produced by your LA and diocesan authority where appropriate, as well as the reference material already noted.

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