

Birmingham City Council Equality Act 2010 Fact Sheet

DISABILITY EQUALITY

The Equality Act (2010) consolidates all previous equality legislation and extends some protections to groups that were not previously covered. Although there are similarities, there are also significant differences concerning the types of protection afforded the different protected groups. The protected characteristics include: **age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.**

This Fact Sheet discusses the provisions with regard to the characteristic, **DISABILITY**. It forms part of a series of fact sheets that highlight the relevant points pertaining to the Act for each of the nine protected characteristics. More detailed guidance and information about the provisions can be found in the Equality Act 2010 Statutory Code of Practice Employment and the [Equality Act 2010 Statutory Code of Practice](#) Services, public functions and associations.

The Equality Act replaced the Disability Discrimination Act 1995 and 2005 (DDA). It introduced new provisions on direct discrimination, discrimination arising from disability, harassment and indirect discrimination.

WHAT IS THE PROTECTED CHARACTERISTIC OF DISABILITY?

The Act defines Disability by reference to a person's disability. As explained in the Equality Act 2010 Explanatory Notes:

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.

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.

How long is long term - To satisfy the definition in the Act, the disability must:

- Have lasted at least 12 months, or
- Be likely to last at least 12 months, or
- Be likely to last for the rest of the person's lifetime (if less than 12 months)

The Act also covers people whose condition may involve periods of remission. Although the impairment may no longer have an adverse effect, it will still be deemed to have that effect if it is "likely to recur".

What are normal day to day activities - The phrase “normal day-to-day activities” means those activities that are “normal” for most people in their everyday lives, such as walking, driving, using a telephone, reading a book and forming social relationships.

What is substantial adverse impact - Substantial means more than minor or trivial. The factors that are taken into account when assessing whether the effect of impairment is substantial relate to such things as the time taken and the way in which an activity is carried out compared to a person who does not have impairment

Impairment covers, for example, long-term medical conditions such as asthma and diabetes, and fluctuating or progressive conditions such as rheumatoid arthritis or motor neurone disease. A mental impairment includes mental health conditions (such as bipolar disorder or depression), learning difficulties (such as dyslexia) and learning disabilities (such as autism and Down’s syndrome).

Who is disabled under the Act?

- People who have had a disability in the past; people with progressive conditions; people who have been able to control or correct their disability – for example by medical treatment or the use of aids; and anyone deemed to have a disability such as those who have been diagnosed with HIV infection, cancer and multiple sclerosis. For example, a woman who, four years ago, experienced a mental illness that had a substantial and long term adverse effect on her ability to carry out normal day-to-day activities, but who has experienced no reoccurrence of the condition, all have the right to protection against discrimination.
- Babies and children under the age of six who have impairment are also covered. This is significant for the purposes of associative discrimination so that the parent of a child with impairment will be protected even if the child’s condition does not yet have a substantial adverse effect on the child’s ability to carry out normal day-to-day activities, but may do in the future. Children aged six and older are subject to the normal requirements of the definition of disability

Exclusions from the definition of disability - Certain conditions are not to be regarded as impairments for the purposes of the Act. These include:

- Addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed)
- The condition known as seasonal allergic rhinitis (e.g. hay fever), except where it aggravates the effect of another condition
- Tendency to set fires; Tendency to steal; Tendency to physical or sexual abuse of other persons
- Wearing glasses and contact lenses
- Exhibitionism; Voyeurism

WHAT FORM OF PROTECTION DOES THE ACT PROVIDE?

Those who share the protected characteristic of Disability are protected from direct and indirect discrimination, harassment and victimisation, as described below. Such protection applies in a range of areas including **Employment; Access to goods, services and facilities; Education; and Buying and renting property.**

The protection also applies to private clubs and associations with 25 or more members.

Direct Disability discrimination is where someone is unfairly treated because of their disability. In order to determine whether someone is directly discriminated against a comparison has to be made with someone without that disability but whose abilities and circumstances are the same or not materially different.

Examples:

- Someone who is refused flexible working to look after their disabled child although it has been granted to other workers who do not have a disabled child
- Someone who is prevented from attending a training session because they are thought to have bi-polar disorder

The definition is wide enough to cover those who are also discriminated against because they are perceived to have a disability or because they are associated with someone who has a disability. This includes:

- Discrimination by **Perception** – e.g. where a person is discriminated against or harassed because he or she is mistakenly thought to share a protected characteristic such as disability.
- Discrimination by **Association** – e.g. where a person is discriminated against or harassed because he or she is associated with a person who has a protected characteristic such as disability.

An example of this could be where an employer discriminates against an employee because a close relative has a disability or if a mother of a disabled child was refused service because of this association.

Indirect discrimination is where a rule or practice applies to everyone, but puts a particular group of people at a disadvantage.

Example:

- A local authority produces an information leaflet about its services for local people. It does not produce an easy-to-read version of the leaflet in order to save money. This would make it more difficult for someone with a learning disability to access the services and could amount to indirect discrimination.

- A pupil with cerebral palsy who is a wheelchair user is told she will be unable to attend a school trip to a local theatre putting on a production of a play she is currently studying in English, because the building is not wheelchair accessible. The pupil and her parents are aware that the play is also on at a theatre in a neighbouring city which is accessible but the school does not investigate this option. This is likely to be direct discrimination because of a disability

Harassment is unwanted conduct which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person. The definition of harassment also applies to those subjected to unwanted conduct because of another person's disability.

Examples:

- A disabled person attends a day centre for adults with learning difficulties. Some staff makes fun of him by mimicking him.
- An employee who is subjected to offensive comments about her disabled daughters.

Victimisation is where someone who has made a complaint of discrimination or harassment or supported someone else's complaint is victimised as a consequence. This applies where the person providing the support to someone taking out a complaint does not have to be disabled themselves.

Example: A customer has arranged to be a witness and to give evidence in a court case against a service provider and in response the service provider threatens not to serve that customer in future if they go ahead with giving evidence¹

Discrimination arising from disability - This occurs when a disabled person is treated less favourably "because of something arising in consequence of" the disabled person's disability i.e. something connected to their disability and the unfavourable treatment cannot be justified.

This is different from direct discrimination in that a person is not being treated unfavourably because of the disability itself but because of something connected to it. Treatment can be justified and will be lawful if it can be shown that it is intended to meet a legitimate objective in a fair, balanced and reasonable way.

Also discrimination arising from disability is not unlawful if an employer or service provider can show that they did not know, or could not be reasonably expected to know, that the person has a disability.

Example: Sarah seeks admission to a crèche for her son who has a disability which means that he does not have full bowel control. The crèche says that they cannot admit her son because he is not toilet trained and the children at the crèche are required to be. The refusal to admit Sarah's son is not because of his disability itself; but he is experiencing detrimental treatment as a consequence of his incontinence, which is something, arising from his disability. Sarah could challenge this exclusion on her son's behalf by making a claim in the county court. The exclusion would be unlawful discrimination arising from disability unless the crèche could demonstrate to the court that it did not know that the boy was disabled, or could demonstrate that its action was justified.

Duty to make Adjustments

Service Providers - have a legal requirement to make reasonable changes to the way things are done (such as changing a policy), to the built environment (such as making changes to the structure of a building to improve access) and to provide auxiliary aids and services (such as providing information in an accessible format, an induction loop for customers with hearing aids, special computer software or additional staff support when using a service).

Where a service is delivered from a building that cannot be made accessible through reasonable adjustments, it may be a reasonable adjustment to provide the service at a different venue, including a home visit.

Employment - When an employer knows or reasonably ought to know of the disabled person's disability they are under a duty to make a reasonable adjustment.

The duty arises when a physical feature of the premises or not providing an auxiliary aid places a disabled person at a substantial disadvantage in comparison to those who are not disabled.

The duty on the employer is to take such steps as it is reasonable to have to take to avoid the disadvantage. What is reasonable may depend on whether the step would remove the disadvantage, the cost and whether there was any financial assistance available, for instance from Access to Work. An employer cannot require a disabled worker to pay for the cost of any reasonable adjustment.

Examples of reasonable adjustments include:

- Altering working hours
- Allowing time off for rehabilitation or treatment
- Allocating some of the disabled person's duties to someone else
- Transferring the disabled person to a vacancy or another place of work
- Giving or arranging training for the disabled person or others
- Providing a reader or interpreter

An employer who fails to comply with the duty to make a reasonable adjustment will be discriminating against a disabled worker.

Examples of failure to make reasonable adjustments:

- A deaf pupil who lip-reads is at a substantial disadvantage because teachers continue speaking while facing away from him to write on the board
- A pupil with dyslexia is told she cannot have her teacher's lesson notes, and that she should take notes during lessons 'like everyone else'.

What health related enquiries can employers make?

An employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful applicants.

However, this is not a blanket ban and an employer can ask questions about or whether a person has a disability before offering a job to an applicant if it will help them to:

- Make a reasonable adjustment to the selection process
- Decide whether an applicant can carry out a function that is essential to the job
- Monitor diversity among applicants
- Take positive action to help the disabled
- Ensure that the candidate actually has a disability if the job genuinely requires the jobholder to have a particular disability

Redundancy and retirement - A person cannot be chosen for redundancy just because they are disabled. The selection process for redundancy must be fair and balanced for all employees. An employer cannot force a person to retire if they become disabled.

ARE THERE ANY EXCEPTIONS?

There are circumstances where disability discrimination is lawful. The Government Equality Office has published a guide that sets out the circumstances in which it remains lawful to use disability as a reason for treating people differently "by **exception, positive action and objective justification**"².

The Order specifies particular types of disability based actions, measures and practices that are considered “to be justifiable, beneficial or needed for good public policy reason”:

Indirect Discrimination can be justified if you can show that you acted reasonably in Managing your business, i.e. that it is ‘a proportionate means of achieving a legitimate aim’. A *legitimate aim* might be any lawful decision you make in running your business or organization, but if there is a discriminatory effect, the sole aim of reducing costs is likely to be unlawful.

Being proportionate really means being fair and reasonable, including showing that you’ve looked at ‘less discriminatory’ alternatives to any decision you make.

Positive Action - As part of complying with the general equality duty, relevant bodies could consider whether taking positive action is open to them and, if so, whether it would be appropriate to take that action.

When is positive action lawful? - It will be lawful for a relevant body to take positive action where it reasonably thinks that people who share a protected characteristic:

- a) Experience a disadvantage connected to that characteristic; or
- b) Have needs that are different from the needs of persons who do not share that characteristic; or
- c) Have disproportionately low participation in an activity compared to those who do not share that protected characteristic

What action is lawful? -Where the conditions above apply, the relevant body may take any action which is proportionate to meet the aims stated in the Act. Those aims are:

- a) Enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage
- b) Meeting those needs, or
- c) Enabling or encouraging persons who share the protected characteristic to participate in that activity

Example: In recruitment and selection if two candidates are equally qualified, a candidate with a disability can be appointed if disabled people are under represented in the workforce.

Positive action is not the same as positive discrimination, which is unlawful.

DO PUBLIC BODIES HAVE A DUTY TO PROMOTE DISABILITY EQUALITY?

The Equality Act includes a public sector Equality Duty (also known as the General Duty), which requires public bodies, when exercising their functions, to have due regard to the need to eliminate discrimination, advance equality of opportunity for people of different groups, and foster good relations between people who share the protected characteristic and those who do not.

Service Delivery - Local authorities need to be proactive in tackling discrimination and inequalities and in identifying and responding to the needs of people who share the protected characteristic of disability when designing and delivering services.

Accessibility - Any organisation providing services to the public need to make the appropriate arrangement to ensure all service outlets and the services themselves are fully accessible. Factors to be considered in meeting accessibility needs:

- Location / Means of escape / Lighting / parking
- Entrance and movement inside e.g. ramps, width of doors, signage that is large and provides visual information, lifts, handrails
- Induction loops systems that have been tested / Sign language interpreters
- Seating arrangements/Facilities for guide dogs/Accessible toilets / Catering

Treating disabled people more favourably than people who are not disabled - S.149(4) of the Act states that the steps involved in meeting the needs of disabled persons include steps to take account of disabled persons' disabilities. This emphasises the fact that equality of opportunity for disabled people cannot be achieved simply by treating disabled and non-disabled people alike. The Act contains a number of provisions allowing steps to be taken to take account of disabled persons' disabilities. They make it lawful to treat a disabled person more favourably than a non-disabled person. A disabled person can also be treated more favourably than disabled people with other impairments by relying on the positive action provisions outlined earlier.³ In order to comply with the general equality duty, relevant bodies should consider meeting the needs of disabled people by treating them more favourably than others.

Education - It is against the law for a school or other education provider to treat disabled students unfavourably. This includes:

- 'direct discrimination' e.g. refusing admission to a student because of disability
- 'indirect discrimination' – e.g. only providing application forms in one format that may not be accessible
- 'discrimination arising from a disability' e.g. a disabled pupil is prevent from going outside at break time because it takes too long to get there
- 'harassment' – e.g. a teacher shouts at a disabled student for not paying attention when the student's disability stops them from easily concentrating
- victimisation – e.g. suspending a disabled student because they've complained about harassment

³ For more details see the Commission's Code of Practice on Services, Public Functions and Associations at para 10.27.
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Resources and Contacts:

1. Equality Act 2010 Statutory Code of Practice Employment
http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employmentcode.pdf
2. Equality Act 2010 Statutory Code of Practice Services, public functions and associations
http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicecode.pdf
3. Government Equality Office - <http://homeoffice.gov.uk/equalities/>
4. EHRC (Equality & Human Rights Commission), the statutory body with responsibility to enforce and promote equality across the protected characteristics www.equalityhumanrights.com
5. Equality Act 2010: Guidance: Office for Disability Issues HM Government
6. Summary of the law on: Disability Discrimination – www.thompsons.law.co.uk
7. <https://www.gov.uk/rights-disabled> person-print
8. <https://www.acas.uk/index.aspx> article 1859
9. Equality Advisory Support Service (<https://www.gov.uk/equality-advisory-support-service>)
10. <https://www.gov.uk/rights-disabled-person/print>
11. Disability Rights UK (<http://www.disabilityalliance.org/>)
12. Advice now (<http://www.advicenow.org.uk/>)
13. Citizens Advice (<http://www.citizensadvice.org.uk/>)